You Can't Own Ideas: Essays on Intellectual Property: A Skeletal E-book

by STEPHAN KINSELLA *on* MAY 2, 2023

Preface

This is a collection of my previously-published writings on the topic of intellectual property (IP), which cover the range of my thought on this topic, from 1995–2023. This is a skeletal e-book, containing links to the relevant material.[1]
The contents, arranged in "chapters," are listed below in the recommended reading order, with an initial preface. I have also printed to PDF all the chapters and combined them in one file here for those who prefer that format (PDF [TBD]).

My first major piece on this issue was *Against Intellectual Property* (*AIP*), first published 2001 (not included here). In the intervening 22 years, I've given many talks, responded to many objections and questions, and written other articles and blog posts on this issue, all linked at c4sif.org/aip. This collection draws on these pieces.
After some introductory and earlier pieces in "Part I. Beginnings" and "Part II. Summary Presentations," I include some lengthier articles in "Part III. Main Theory," beginning with "Law and Intellectual Property in a Stateless Society,"[2] a more recent and streamlined and somewhat updated version of the argument presented in *AIP*; and "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward." This latter piece contains an overview of the debate on IP in the 20+ years since *AIP* was published, and summarizes additional arguments and changes or supplements I would make to *AIP* if rewriting it now, or if writing a new book from scratch on this topic.[3] Together, these two chapters provide a good and fairly comprehensive overview of my current IP views and arguments. These chapters are based on those slated to appear in *Legal Foundations of a Free Society* (*LFFS*; Papinian Press, forthcoming late 2023). Several other chapters included here are also drawn from *LFFS*. In the PDF file linked above, I include the current drafts of those chapters as they will appear in *LFFS*, as they have been significantly updated from the original articles upon which those chapters are based. When *LFFS* is published, I will update the files linked here with the final, published versions from *LFFS*.
The remaining chapters include other articles, interviews, transcripts, and blog posts.

Contents

instead "The Case Against Intellectual Property" as it omits some material very few need to read, such as the examples in the Appendix and the lengthy bibliography.[13]

6. **Law and Intellectual Property in a Stateless Society** (2010).[14] This article, originally intended for a symposium issue of the *Griffith Law Review* but withdrawn because of a dispute with the editors, was originally published in my journal *Libertarian Papers* in 2013. It was the most comprehensive article I'd written on IP since *AIP*.[15]

   The structure of the article is similar to the more concise "Intellectual Property and Libertarianism" (ch. 4). The title is slightly misleading because the article was really about why IP is unjust, and had little to do with anarchy or stateless societies; the title and the slight emphasis on stateless societies in the text was intended to make the article fit the theme of the symposium issue it was intended for, which was "Law and Anarchy: Legal Order and the Idea of a Stateless Society." I've chosen to retain the original title.

   This chapter incorporates much of the material from *AIP* and includes some additional material that I had published the intervening decade or so. The following piece (ch. 7), contains additional arguments developed subsequently and complements this work and *AIP*.
7. ***Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward** (2023), first published in *LFFS* (other than an online working draft). This chapter provides a perspective on the IP debates amongst libertarians since *AIP* was first published in 2001, and provides an overview of newer arguments about IP that I've made in the twenty-plus years since the publication of *AIP*. It also discusses changes I would make to the original arguments presented in *AIP*. This chapter complements ch. 6 above, which itself was originally published about a decade after *AIP*.
8. **Goods, Scarce and Nonscarce**" (with Jeffrey A. Tucker; 2010)[16] This article emerged out of many discussions Tucker and I had about intellectual property and our respective writings on this topic.[17]
9. **Selling Does Not Imply Ownership, and Vice-Versa: A Dissection** (2022).[18] I delivered a speech with the same name as this chapter at the Property and Freedom Society's 16th Annual Meeting, in Bodrum, Turkey, in 2022.[19] This chapter helps to expand on and clarify some issues touched on in the previous chapters. It takes aim, in part, at some of Walter Block's views on voluntary slavery and body-alienability, a topic we've disagreed about for a long time.[20] Since Walter prefers to respond to published articles, I published the transcript of this speech as an article. The transcript was lightly edited for clarity and to add some references and links, but the colloquial and informal tone has largely been preserved, and some headings added. I published it on my old, mostly defunct site *The Libertarian Standard*, to which Walter responded in due course.[21] This chapter is a revised version of that article.[22]

Part IV. Elaborations and Applications

10. **Introduction to *Origitent*** (2018).[23] Libertarian sci-fi author J. Neil Schulman, an old friend, and I agreed on most political matters, except for IP, over which we'd had a decades-long disagreement.[24] Neil modified his theory over time, moving from "logorights" to "media-carried property," and eventually published *Origitent: Why Original Content is Property* in 2018, which included debates and discussions with IP abolitionists Wendy McElroy, Sam Konkin III, and me, and including my Introduction. I have updated my Introduction, and retained the somewhat breezy and informal style.
11. **Conversation with Schulman about Logorights and Media-Carried Property** (2018)[25] This chapter based on an edited transcript of a conversation between libertarian sci-fi author J. Neil Schulman and me,[26] which was included in his book *Origitent*, in addition to my introduction (ch. 10).
12. **Intellectual Freedom and Learning Versus Patent and Copyright** (2011).[27] In this chapter, I emphasize the importance of the accumulation of technological knowledge—Hayek's "fund of experience"—for human prosperity, and how the patent system impedes this. I summarize this also in ch. 7, Part IV.E.

Part V. History

13. **The Origins of Libertarian IP Abolitionism** (2011).[28] All hail Benjamin Tucker, Sam Konkin, and Wendy McElroy!
14. **The Four Historical Phases of IP Abolitionism** (2011).[29] Let's go ahead and get to phase five.
15. **Classical Liberals and Anarchists on Intellectual Property** (2015).[30] Rounding them up. The good, the bad, the ugly.[31]

Part VI. Empirics and Reform

16. **There's No Such Thing as a Free Patent** (2005)[32] In this article I pointed out that utilitarian justifications of IP have to take the costs of IP law into account, but they never do (and can't).[33]
17. **Radical Patent Reform Is *Not* on the Way** (2009).[34] Patent defenders like to argue that the system is under assault. It's their way of framing their Overton window and blocking any meaningful reform. I point out here that the patent system is in no danger of any significant reform (unfortunately). And that's how they like it.
18. **Reducing the Cost of IP Law** (2010).[35] People say IP abolition is impossible and they criticize me for not suggesting more moderate reforms that could improve the system. Here I offer some suggestions for reform, short of abolition. Of course, these reforms would all be opposed tooth and

nail by the IP parasites, so these suggestions are about as impractical as abolition, but hey, they asked.[36]

19. **The Overwhelming Empirical Case *Against* Patent and Copyright** (2012).[37] Not the official narrative.
20. **Legal Scholars: Thumbs Down on Patent and Copyright** (2012).[38] Even law professors manage to get a few things right, on occasion.
21. **The Patent, Copyright, Trademark, and Trade Secret Horror Files** (2010).[39] I started to collect various anecdotes of outrageous results due to IP law, but gave up updating it regularly since it would be duplicative and impossible to keep up with.

Part VII. Shorter Pieces

22. **Absurd Arguments for IP** (2010).[40] All arguments for IP are flawed or dishonest, but here are choice few especially ridiculous ones.
23. **Independent Institute on The 'Benefits' of Intellectual Property Protection** (2016)[41] With friends like these … Why are almost all libertarian groups weak on the IP issue, other than the Mises Institute?[42]
24. **"Oh yeah? How would like it if I copy and publish your book under my name?!": On IP Hypocrisy and Calling the Smartasses' Bluffs** (2013).[43] Calling their bluff.[44]
25. **Intellectual Property Rights as Negative Servitudes** (2011).[45] The real problem with patent and copyright law. Also discussed in ch. 7, Part IV.B.
26. **Intellectual Property and the Structure of Human Action** (2010).[46] Deeep. The *real* real problem with IP. Also discussed in ch. 7, Part IV.E.
27. **Rothbard on the Main Fallacy of our Time: Marx's Labor Theory of Value** (2016).[47] Sic 'em, Murray. See also "Locke's Big Mistake" (ch. 30).

Part VIII. Transcripts and Interviews

28. **On the Logic of Libertarianism and Why Intellectual Property Doesn't Exist** (2012).[48] This was an interview by Anthony Wile. I would not word the title this way—the problem with IP is not that it doesn't "exist" but rather that IP law is unjust. But I didn't choose the title, and have not changed it here. This has been revised for *LFFS*.
29. **A Libertarian's Case Against Intellectual Property** (2018).[49] This is a transcript (unedited) of a speech I delivered at the Federalist Society chapter at University of Berkeley-California. It was well-organized and there was a perceptive and interesting critical commentary by Professor Talha Syed.
30. **Locke's Big Mistake: How the Labor Theory of Property Ruined Political Theory** (2013).[50] Blame it all on Locke. And Rand. This is a lightly-edited transcript of a talk I delivered at the "Liberty in the Pines" conference

at Stephen F. Austin State University, in Nacogdoches, Texas.[51] This topic is also addressed in ch. 6, Part III.B and ch. 7, Part IV.C. See also "Rothbard on the Main Fallacy of our Time: Marx's Labor Theory of Value," ch. 27.

31. **Intellectual Nonsense: Fallacious Arguments for IP** (2012).[52] This is a transcript of a talk I delivered at ~~Libertopia~~ in 2012, and the followup Part 2 (**transcript**) which I recorded afterwards.[53]
32. **KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished** (2021).[54] This is a transcript of my debate with Richard Epstein on IP law at the Soho Forum in Manhattan on November 15, 2021, moderated by Gene Epstein. I defended the resolution "all patent and copyright law should be abolished" and Professor Epstein opposed it. Oxford debate rules applied which meant that whoever changed the most minds won. My side went from about 20 to 29 percentage points, gaining about 9; Richard went from about 44 to 55%, gaining about 11, so he won by 1.7 percentage points. Well, I tried.[55]
33. **KOL341 | ESEADE Lecture: Should We Release Patents on Vaccines?, including: An Overview of Libertarian Property Rights and the Case Against IP** (2021).[56] A transcript of speech delivered (remotely) at ~~3rd Adam Smith Forum~~, Moscow, Russia. As I noted in a previous post, this event was held Nov. 12, 2011 in Moscow. It was organized by the Center for the Philosophy of Freedom, the Libertarian Party of Russia, and others. The Chairman of the ASF Steering Committee was economist Pavel Usanov, head of the Hayek Institute for Economy and Law, and Andrey Shal'nev, head of the federal committee of the Libertarian Party of Russia, was its co-chairman. I was invited to speak but could not attend in person, so my 47-minute speech "Why Intellectual Property is not Genuine Property" was presented remotely, with Russian subtitles.

Part IX. Final Thoughts

35. ***Do Business Without Intellectual Property*** (Liberty.me, 2014). At the encouragement of Jeff Tucker when he was with Liberty.me, I put together this little booklet explaining how businessmen can avoid or reduce their dependence on IP in an IP-riddled world.
36. **The Death Throes of Pro-IP Libertarianism** (2010).[57] The revolution is still in progress. First we convert all the libertarians, and then the other 99.9%.[58]

Appendix: Further Reading

Below I provide some links to related resources; these will not be included in the omnibus PDF, which will only include the actual content of the above-noted hcapters.

- For critiques by IP by others from a libertarian or free market point of view, see Kinsella, ed., *The Anti-IP Reader: Free Market Critiques of Intellectual Property: A Skeletal E-book*, *StephanKinsella.com* (2023).
- Kinsella, Introduction to *Against Intellectual Property* (Laissez Faire Books, 2012) (files linked above)
- ——, "The Case Against IP: A Concise Guide," *C4SIF Blog* (Sep. 4, 2009)
- ——, "A Selection of my Best Articles and Speeches on IP," *C4SIF Blog* (Nov. 30, 2015)
- "Rethinking Intellectual Property: History, Theory, and Economics" (Mises Academy course, 2011).[59] If you want a deep dive, this six-lecture Mises Academy course is for you. See also the introduction to this course: "Rethinking IP," *Mises Daily* (Feb. 10, 2011).
- For other articles and blog posts, see the *AIP* Supplementary Material linked at www.c4sif.org/aip; the Resources page at www.c4sif.org/resources.

Endnotes

1. Thanks to Jeff Tucker for the title suggestion. [↩]
2. Stephan Kinsella, "Law and Intellectual Property in a Stateless Society," *Libertarian Papers* in 2013, 5, no. 1 (2013): 1–44. [↩]
3. Which I may do someday, in a book tentatively to be entitled *Copy This Book: The Case for Abolishing Intellectual Property*. [↩]
4. *IOS Journal* 5, no. 2 (June 1995): 12–13. [↩]
5. In another article for an engineering journal in 1995, I also tried to delicately introduce a note of IP skepticism without being too explicit about it, by noting that there is debate about the justifiability of the patent system. See Kinsella, "Patent Law Basics and Recent Developments," *The Bent of Tau Beta Pi* 86, no. 2 (Spring 1995): 14–17, p. 14. [↩]
6. *Pennsylvania Bar Association Intellectual Property Newsletter* 1 (Winter 1998): 3 (of which I was editor); republished in the Federalist Society's *Intellectual Property Practice Group Newsletter*, 3, no. 3 (Winter 2000). [↩]
7. See, e.g., my talks at Federalist Society sponsored events: KOL253 | Berkeley Law Federalist Society: A Libertarian's Case Against Intellectual PropertyKOL235 | Intellectual Property: A First Principles Debate (Federalist Society POLICYbrief); KOL079 | "Federalist Society IP Debate (Ohio State)" (2011); KOL253 | Berkeley Law Federalist Society: A Libertarian's Case Against Intellectual Property. See also my posts More defenses of IP by the Federalist Society (July 29, 2013); Anti-IP Material Needed in the IP Section of the Federalist Society's "Conservative & Libertarian Legal Scholarship: Annotated Bibliography" (Oct. 29,

2012); James Stern: Is Intellectual Property Actually Property? [Federalist Society No. 86 LECTURE] (Sep. 17, 2022). [↩]

8. *LewRockwell.com* (Sep. 4, 2000). [↩]
9. *Mises Daily* (Nov. 17, 2009). [↩]
10. Another summary piece, which I omit from this collection due to redundancy with this piece and the next chapter, is "How Intellectual Property Hampers the Free Market," *The Freeman* (June 2011), republished as "How to Slow Economic Progress," *Mises Daily* (June 1, 2011). [↩]
11. *Mises Daily* (Nov. 23, 2010). [↩]
12. "KOL054 | "Ideas are Free: The Case Against Intellectual Property: or, How Libertarians Went Wrong" (2010, Property and Freedom Society)" and "PFP064 | Stephan Kinsella, Ideas are Free: The Case Against Intellectual Property Rights (PFS 2010)." I discuss the conference in my post "Bodrum Days and Nights: The Fifth Annual Meeting of the Property and Freedom Society: A Partial Report." I also participated in a Q&A Discussion Panel featuring "Hoppe, van Dun, DiLorenzo, Kinsella, Daniels, Kealey": see "PFP066 | Hoppe, Kinsella, Kealey, Van Dun, Daniels, DiLorenzo, Discussion, Q&A (PFS 2010)." [↩]
13. Kinsella, "The Case Against Intellectual Property," in *Handbook of the Philosophical Foundations of Business Ethics* (Prof. Dr. Christoph Lütge, ed.; Springer, 2013) (chapter 68, in Part 18, "Property Rights: Material and Intellectual," Robert McGee, section ed.), as this piece was a slightly more recent and streamlined version of *AIP*. [↩]
14. Originally published in *Libertarian Papers* 5, no. 1 (2013): 1–44; an updated version of which is included in *LFFS*. [↩]
15. The publication history is detailed at Kinsella, "Kinsella, 'Law and Intellectual Property in a Stateless Society,'" *C4SIF Blog* (March 1, 2013). [↩]
16. Originally published in *Mises Daily* (Aug. 25, 2010); an updated version of which is included in *LFFS*. [↩]
17. For some of Tucker's writings related to IP, see, e.g., "Ideas, Free and Unfree," and other chapters in the "Can Ideas Be Owned?" section of ***It's a Jetsons World: Private Miracles & Public Crimes*** (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/its-jetsons-world-private-miracles-and-public-crimes) (chaps. 37–41); several chapters in the "Technology" section of ***Bourbon for Breakfast: Living Outside the Statist Quo*** (Auburn, Ala.: Mises Institute, 2010; https://mises.org/library/bourbon-breakfast); various chapters in ***Liberty.me: Freedom Is a Do-It-Yourself Project*** (Liberty.me, 2014; https://perma.cc/LWV2-UNJM); and various other articles, such as "Germany and Its Industrial Rise: Due to No Copyright," *Mises Economics Blog* (Aug. 18, 2010); and "Eternal Copyright," *C4SIF Blog* (Feb. 21, 2012). [↩]
18. Originally published in *The Libertarian Standard* (Oct. 25, 2022); an updated version of which is included in *LFFS*. [↩]

19. Kinsella, "KOL395 | Selling Does Not Imply Ownership, and Vice-Versa: A Dissection (PFS 2022)," *Kinsella on Liberty Podcast* (Sept. 17, 2022). [↩]
20. See Kinsella, "KOL004 | Interview with Walter Block on Voluntary Slavery and Inalienability," *Kinsella on Liberty Podcast* (Jan. 27, 2013). [↩]
21. Walter Block, "Rejoinder to Kinsella on ownership and the voluntary slave contract," *Management Education Science Technology Journal* (MESTE) 11, no. 1 (Jan. 2023; https://perma.cc/H3AL-WBQJ): 1-8. [↩]
22. Some of this material is also discussed in ch. 7, Part IV.G. [↩]
23. Stephan Kinsella, "Introduction," in J. Neil Schulman, *Origitent: Why Original Content is Property* (Steve Heller Publishing, 2018; https://perma.cc/2E6G-WWPE), an updated version of which is included in *LFFS*. For related and background material, see Kinsella, "On J. Neil Schulman's Logorights," *Mises Economics Blog* (July 2, 2009); *idem*, "KOL208 | Conversation with Schulman about Logorights and Media-Carried Property," *Kinsella on Liberty Podcast* (March 4, 2016). [↩]
24. See Kinsella, "On J. Neil Schulman's Logorights," *Mises Economics Blog* (July 2, 2009); *idem*, "KOL208 | Conversation with Schulman about Logorights and Media-Carried Property." Neil passed away in 2019. See Kinsella, "J. Neil Schulman, R.I.P.," *StephanKinsella.com* (Aug. 10, 2019). [↩]
25. In Schulman, *Origitent*; an updated version of which is included in *LFFS*. [↩]
26. See Kinsella, "KOL208 | Conversation with Schulman about Logorights and Media-Carried Property," which was transcribed by Rosemary Denshaw and edited for clarity for Schulman for his book. [↩]
27. *The Libertarian Standard*, Jan. 19, 2011; also published as "Intellectual Freedom and Learning Versus Patent and Copyright," *Economic Notes* No. 113 (Libertarian Alliance, Jan. 18, 2011). This article was based on this speech: "KOL062 | "Intellectual Freedom and Learning versus Patent and Copyright" (2010)." [↩]
28. *C4SIF Blog* (April 1, 2011). [↩]
29. *C4SIF Blog* (April 13, 2011). [↩]
30. *C4SIF Blog* (Oct. 6, 2015). [↩]
31. I call out various libertarian groups for their weak stances on IP in various posts, e.g. More defenses of IP by the Federalist Society (July 29, 2013); Anti-IP Material Needed in the IP Section of the Federalist Society's "Conservative & Libertarian Legal Scholarship: Annotated Bibliography" (Oct. 29, 2012); James Stern: Is Intellectual Property Actually Property? [Federalist Society No. 86 LECTURE] (Sep. 17, 2022); Independent Institute on The "Benefits" of Intellectual Property Protection (Feb 16, 2016) (ch. 22); Shughart's Defense of IP (Jan. 29, 2010); Disinvited From Cato (Aug. 7, 2016); Cato on IP (Jan. 30, 2023); Cato vs. Public Citizen on IP and the TPP (Jan. 20, 2014); Cato Tugs Stray Back Onto the Reservation; Epstein on reimportation (July 29, 2003). [↩]
32. *Mises Daily* (Mar. 7, 2005). [↩]

33. See also "The Forgotten Costs of the Patent System" (Dec. 6, 2010); "Costs of the Patent System Revisited" (Sep. 29, 2010); What are the Costs of the Patent System? (Sep. 27, 2007). See also ch. 18. [↩]
34. *Mises Daily* (Oct. 1, 2009). [↩]
35. *Mises Daily* (Jan. 10, 2010). [↩]
36. See also "The Forgotten Costs of the Patent System" (Dec. 6, 2010); "Costs of the Patent System Revisited" (Sep. 29, 2010); What are the Costs of the Patent System? (Sep. 27, 2007). [↩]
37. *C4SIF Blog* (Oct. 23, 2012). [↩]
38. *C4SIF Blog* (Oct. 23, 2012). [↩]
39. *StephanKinsella.com* (Feb. 3, 2010). [↩]
40. *C4SIF Blog* (Dec. 10, 2010). [↩]
41. *C4SIF Blog* (Feb 16, 2016). [↩]
42. See also references in the note to ch. 15. [↩]
43. *C4SIF Blog* (Jan. 3, 2013). [↩]
44. See also a similar stunt I pulled in "Russell Madden's 'The Death Throes of Pro-IP Libertarianism,'" (July 29, 2010). [↩]
45. *C4SIF Blog*, (June 23, 2011). [↩]
46. *StephanKinsella.com* (Jan. 6, 2010). [↩]
47. *StephanKinsella.com* (Dec. 26, 2016). [↩]
48. *The Daily Bell* (March 18, 2012). [↩]
49. *StephanKinsella.com* (Oct. 12, 2018). [↩]
50. *C4SIF Blog* (April 13, 2013). [↩]
51. KOL037 | Locke's Big Mistake: How the Labor Theory of Property Ruined Political Theory (March 28, 2013). [↩]
52. *StephanKinsella.com* (April 25, 2021). [↩]
53. KOL236 | Intellectual Nonsense: Fallacious Arguments for IP (Libertopia 2012) (Feb. 10, 2018) and KOL237 | Intellectual Nonsense: Fallacious Arguments for IP—Part 2 (Libertopia 2012) (Feb. 12, 2018). [↩]
54. *StephanKinsella.com* (Nov. 24, 2021). [↩]
55. See KOL369 | Soho Forum IP Debate Post-Mortem with Greg Morin. [↩]
56. *StephanKinsella.com* (June 5, 2021). This is a transcript of a webinar I did for an Argentinian audience for ESEADE May 26, 2021. The topic was formally "Should We Release Patents on Vaccines" ("¿Hay que liberar las patentes sobre las vacunas?"). In this talk, I briefly provide an overview of the nature of property rights and the principled case against IP, then apply it to vaccines, and took questions from the audience.
57. **Why Intellectual Property is not Genuine Property** (2011). ((*StephanKinsella.com* (Dec. 11, 2013). [↩]
58. *Mises Daily* (July 28, 2010). [↩]

59. See also “Classical Liberals and Anarchists on Intellectual Property,” ch. 15; “An Objectivist Recants on IP” (Dec. 4, 2009); “Yet another Randian recants on IP” (Feb. 1, 2012); “Letter from a UK Grad Student” (Feb. 10, 2012). [↩]
60. *Kinsella on Liberty Podcast* (Feb. 14, 2015). [↩]

The Roundtable

(Continued from Back Page)

who engage in it have been persuaded that it has power, and that it gives them, however indirectly, some degree of influence over the future course of events ("God willing," as they say). But the power of actually changing the course of events with your own hands has always been much more compelling, even among the religiously inclined.

What [we need] is some human and humane, non-magical alternative to the* action *of prayer.

What you need here is some human and humane, non-magical alternative to the *action* of prayer. I think that one of the things that atheists often overlook about prayer is that it actually does make a difference to the people who practice it, though not for the reasons that the religious assume. The reason, I think, is that it gives you something to *do* in times of crisis. It's a first step out of paralysis. The downside is that it places most or all of the responsibility for what happens next in the hands of another (nonexistent) party, but all of the literature I know suggests that taking some action is the best antidote to feelings of fear and depression.

Here is an opportunity to promote the virtue of benevolence at the same time that you're teaching a lesson about the value of human life and reason. There are lots of ways to do this. For example, there are many disaster relief organizations that are collecting money, food, clothing, and other things to help the families devastated by the bombing. Some of those are secular, and one thing to do is to get your daughter involved in one of these efforts.

Here is an action one can take that alleviates wrongfully inflicted pain and suffering. It feels good to do that—it feels right. It is a way of denying the validity of the injustice done by acting in ways that are diametrically opposed to it. It is a way of counterbalancing the evil the bombing represents, and by getting involved in it as a project in which others are involved, it gives tangible evidence that there are lots of people out there who are not seeking to achieve their ends by violence. And you could emphasize the difference between acting in this way and simply praying for someone else to take care of things (where was He when the bomb was being built in the first place?), even pointing out that the way that the truly religious in the community actually make a real, tangible difference is by helping in the same ways that you are helping. Their prayers are just a kind of incantation or ritual that serves as prelude to the really important action.

I think this kind of activity will help, but sooner or later it will occur to your daughter that this is *reactive* and after the fact. It doesn't address the problem of why I shouldn't be afraid that this will happen to me next week. That's a good question, and it has no easy answers, but if you can restore that sense of being in control, the answers that you do give will be much easier to listen to. Those answers have to do with the value and importance of building a society that is based on principles of reason rather than blind faith. Promoting a world in which those kinds of beliefs and values are fully shared is another kind of action that one can take to reduce the possibility of future actions like the bombing. But that's pretty abstract, and there are many, many ways to do that. So that's a much longer discussion that will continue, I suspect, over many years to come.

Finally, let me say that I think that it's highly likely that this is all going to turn out well in the end. The reason I feel so confident about that is that you are clearly thinking well and deeply about this yourself. It sounds as if you already have good communication with your daughter, and you are therefore providing a fine model of how reasonable, sane people deal with the unreasonable and insane. That's a fine recipe for eventual success.

—Kenneth Livingston, Ph.D.

Intellectual Property Rights

As an intellectual property law attorney with a great appreciation of Ayn Rand's philosophy and an interest in property rights theory, I was quite interested to read Murray I. Franck's article in the April 1995 *IOS Journal*, "Intellectual Property Rights: Are Intangibles True Property?"

Mr. Franck argues that "intangible" property such as "personality property" and patents, copyrights, and trademarks, is actually property deserving the protection of law. However, there seem to me to be several insurmountable problems in treating intangible entities such as reputations and inventions as "property."

First, the very reason we need property rights is that we do not live in the Garden of Eden, where everything is in infinite abundance. Rather, some things are by their nature *scarce*, which means that there can be conflicts between individuals over who gets to consume and control various scarce goods. Because of the possibility of such conflicts and the necessity of humans being able to use physical goods to survive in the world, we must have a system of property rights that solve such conflicts by allocating specific scarce goods to specific individuals. Thus I can own and farm Blackacre, and you can build a house on Greenacre, rather than us eternally warring over these tracts.

Here is an opportunity to promote the virtue of benevolence at the same time that you're teaching a lesson about the value of human life and reason.

However, intangibles such as *ideas* (e.g., a particular invention which may be patented under today's laws) are the exact opposite of a scarce good: person B may learn of and use A's idea without

diminishing A's possession and use of the idea. As Thomas Jefferson wrote, "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." (It is true that the economic *value* of A's idea may diminish if B is able to learn and use it without paying A for this, but property rights protect the integrity of one's property, not its value, since value is dependent on what others are willing to pay for it. For example, your house may be more valuable on the market if your neighbor has a nice rose garden, but you do not have a right to this value at all, and your neighbor has every right to tear down his rose garden even if it reduces the value of your property.) Thus, ideas do not deserve property protection because they are not scarce goods and are thus simply not property.

Another problem with intellectual property rights is that at least some of them seem to be inherently arbitrary and vague. This is in contrast to normal property rights to tangible or corporeal objects like land and furniture, which have objective, intersubjectively ascertainable boundaries that can be determined and respected by everybody. A patent protects an invention which is defined in the patent's "claims," but these claims are much more vague than are the boundaries of normal property.

There is often no objective answer as to whether an allegedly infringing invention is the "same" as that claimed in the patent.

Further, the scope of things that patent rights apply to seems both arbitrary and inherently vague and subjective. Patents, for example, protect "inventions" but not "abstract ideas." Thus I can get a patent on a new mousetrap, while, in a recent case (*In re Trovato*, 1994) the inventor of a new way to calculate a number representing the shortest path between two points, an extremely useful technique, was denied patent protection because this was "merely" a mathematical algorithm. Why the distinction? Are not both equally beneficial to mankind? Do not both "discoveries" require creative intellect? Patent law seems to arbitrarily protect some intellectual creations, but not others.

—N. Stephan Kinsella, West Chester, PA

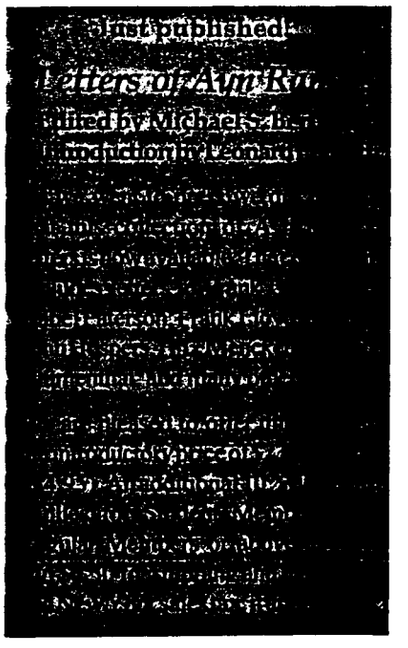
[I]deas do not deserve property protection because they are not scarce goods and are thus simply not property.

As a general thesis about property rights, I think Mr. Kinsella's point about scarcity misses the essence of the issue. Property rights are required because man needs to support his life by the use of his reason. The primary task in this regard is to create values that satisfy human needs, rather than relying on what we find in nature, as animals do. I therefore agree with Murray Franck's premise that the essential basis of property rights lies in the phenomenon of creating value.

Scarcity becomes a relevant issue when we consider the use of things in nature, such as land, as inputs to the process of creating value. As a general rule, I would say that two conditions are required in order to appropriate things in nature and make them one's property: 1) one must put them to some productive use, and 2) that productive use must require exclusive control over them, i.e., the right to exclude others.

Condition (2) holds only when the resource is scarce. But for things that one has created, such as a new product, one's act of creation is the source of the right, regardless of scarcity.

—David Kelley □



IOS Journal Submissions

The *IOS Journal* welcomes proposals from writers for essays, reviews (books, movies, training programs, CD-ROMs), and shorter comments (along the lines of Op-Ed pieces). The *Journal* especially encourages submissions to The Roundtable.

Those who are interested in writing for the *Journal* should compose a one-page letter stating the proposed topic, the essential argument or point of view, and the writer's qualifications (not necessarily formal) to address the topic. Samples of your writing also would be helpful. Letters can be sent to IOS (addressed to the editor); faxed to the editor (1-718-965-2708 or 1-516-324-1775); or e-mailed to the production editor (dcermele@delphi.com). The editors will reply to all queries.

{This final part of my letter-to-the-editor was cut from the published letter. — SK}

One final problem with intellectual property rights is that at least some of them require legislation to be created — i.e., they would never form in a common-law system. A patent, for example, is a monopolistic grant by government to exclude others from using or selling one's patented invention. It is doubtful that a rights-respecting court-based system would create or recognize such privileges. Bruno Leoni explained in *Freedom and the Law* why legislation should not be considered the primary way of making law. Legislators are incapable of escaping special-interest influence, and are also hopelessly ignorant of the complex patterns that naturally evolve in society, much as central economic planners cannot efficiently plan socialist societies, as Ludwig von Mises demonstrated in the 1920s.

Thus legislators' centrally-issued commands are usually inept and have unintended consequences. It is very unlikely that edicts issued by government employees will have anything to do with individual rights or with what property law ought to be. For this reason common-law type systems should be relied upon as the primary way of discovering legal principles, and legislation should be distrusted and relegated to a strictly secondary status. Intellectual property rights that depend on legislation for their existence are suspect on this ground alone.

Responsibility and Happiness

(Continued from Page 4)

seem arbitrary, irrational, even oppressive. After all, much of culture consists of rules, conventions, habits, and practices that are taken for granted; they are, quite literally, the common sense of the community, and people would be understandably baffled if they were asked to justify them rationally from first principles. When immigrants arrive in large numbers from cultures that stress different rules and even disregard those embodied in American culture, this reduces the status of American culture.... "

But even if we had no further immigration, we are already a multicultural society. Consensus about values and beliefs cannot be willed into existence, certainly not in a society as diverse as that of the United States. If we want to counter the subjectivism that lies behind the flight from responsibility, it is no longer an option to teach conformity. Our only option, culturally speaking, is to teach genuine cognitive responsibility.

The Difference It Makes

Here, then, is my answer to the question I posed at the outset, the question of what difference it makes in practice whether one adopts the conventional view of responsibility or the Objectivist view. The conventional view breeds a managerial outlook on life. People with this outlook expect someone else to set the rules and to reward them for following the rules. Such people do not regard themselves as full owners of their own lives and persons; they do not regard their own happiness as an end in itself; and they do not take cognitive responsibility for choosing their values and convictions.

The Objectivist view of responsibility, by contrast, says we should be entrepreneurs of our own lives, with a sense of self-ownership and commitment to happiness, exercising reason on our own initiative and dealing with others on the basis of trade, not status, tradition, or obedience.

I believe in the Objectivist conception of responsibility for philosophical reasons. I think it is the one that agrees with the facts about human nature and values. But I also think our society desperately needs this conception as a way to counter the flight from responsibility. □

The Roundtable

(Continued from Back Page)

porary. Naturally, if the symptoms do not abate, and they begin to interfere with daily functioning, professional assistance should be sought.

—Richard A. Warshak, Ph.D., Dallas, TX

Intellectual and Personality Property

I wish to thank Stephen Kinsella for his letter [*IOS Journal*, June 1995] highlighting several insightful challenges to the proposition that, although they are intangibles, intellectual and personality property are true property, entitled to legal recognition and protection. While my original lecture incorporated full answers to the issues Mr. Kinsella raises, space limitations permit only a summary response here.

1. Intellectual and personality property meet the criteria of all property, namely "creation and earning." Intellectual and personality property are not *government granted* monopolies any more than is government protection of one's movie theater against nonpaying trespassers. And, as is the case with all property, trespassers and infringers diminish the value of intellectual and personality property, a value placed upon it by consumers.

2. Mr. Kinsella is correct, of course, that no one can legitimately demand that the market deem his property to be of value or, if the market does so deem it, that conditions remain static in order to maintain that value. Intellectual property law is consistent with this position: it protects inventions that leapfrog existing patents, often rendering them worthless in the eyes of consumers.

3. The level of creativity required for intellectual property protection is quite high, so that not everything new or beneficial rises to the dignity of property. For example, the idea of the modern supermarket is not protected.

4. That there are problems in specifying exactly what qualifies as intellectual property protection does not mean that intellectual property is not property. Such problems are not more difficult than those involved in defining rights in the airwaves once seemed—or in defining what quantity of smoke from a neighbor's barbecue constitutes trespass or infringement of one's right to the quiet enjoyment of his own backyard. If any of these laws is discovered to reflect a technical error, the error can be corrected.

5. Just as the common law evolved to recognize "trespass by barbecue smoke," it would have evolved to recognize property in the airwaves and in intellectual creations. But even if it could be established somehow that the common law would *never* have recognized intellectual property rights, this would not be an argument against such rights. The common law often requires legislation to correct it (for example, in recognizing the rights of women). Indeed it is a myth that the common law evolves to reflect, and that legislation always is in conflict with, the requirements of human nature. The same minds that employ induction and deduction to decide a particular case, making common law, can employ those methods to legislate universal laws. (See Carl Menger's *Investigations into the Methods of the Social Sciences*, 1883, pp. 223–224.)

6. Finally, although property rights help to "ration" scarcity, scarcity is not the basis of property rights. The view that it *is*, expressed in the third paragraph of Mr. Kinsella's letter, appears to reverse cause and effect in that it sees rights as a function of society's needs rather than as inherent in the individual who in turn must live in society.

—Murray I. Franck, New York, NY □

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Is Intellectual Property Legitimate?

Intellectual Property Practice Group Newsletter - Volume 3, Issue 3, Winter 2000

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As Socrates pointed out, the unexamined life is not worth living. As citizens, lawyers, and, more particularly, as intellectual property lawyers, we should, from time to time, examine just what it is we are doing in our lives and careers. It is interesting, for example, that patent lawyers take for granted the legitimacy of having a patent system. In other words, most of us think we should have patent laws — and copyright and trademark and trade secret laws, as well. It would probably surprise many IP lawyers to know that the legitimacy of IP laws historically has been, and continues to be, the subject of some controversy, at least in theoretical or academic circles. Since we are in the business of obtaining protection for clients under these IP laws, perhaps the legitimacy of IP laws bears examining.

Locke and Bentham

Proponents of IP laws typically use two types of arguments to justify IP laws — such as copyright and patent laws, which I will focus on here. The first is a Lockean-style natural law or natural rights argument, which argues that creations of the mind are entitled to protection just as tangible property is. Part of the motivation for this theory is fairness — IP is brought into being by its creator, so as a matter of fairness, the creator has a right to own it and profit from it. The second type of argument is more utilitarian and wealth-maximization based, and essentially argues that production, creativity, and innovation in society is maximized by granting monopolies to writings and inventions so as to "encourage" authors and inventors.

It's Just Natural

One problem with the natural law approach is that intangible property such as patents and copyrights is not like tangible property; most significantly, IP is not naturally "scarce," in the economic sense. Under Lockean theory, the state of nature contains natural property, which is economically scarce, meaning that my use of Blackacre *conflicts* with your use of Blackacre. Use of such property is *exclusive*, since my use excludes yours, and vice-versa. So that scarce property and resources can be used without potential users eternally warring over these tracts, ownership is allocated (to the first user who "mixes his labor" with it, according to Lockean theory; or to the creator for created goods) so as to solve this problem.

However, were we in a Garden of Eden where land and other goods were infinitely abundant, there would be no scarcity and thus no need for property rules. For example, your taking my lawnmower would not really deprive me of it, if I could conjure up another in the blink of an eye. Lawnmower-taking in these circumstances would not be "theft". Thus, classical property rights do not seem to naturally apply to things of infinite abundance.

Like the magically-reproducible lawnmower, ideas (as implemented in inventions or creative works, for example) are also not scarce, at least not in the same way as tangible or physical property. For example, if I invent a new technique for growing bananas, it does not take my technique from me if you also grow bananas in this way. Your use does not exclude mine. We can both use my technique to grow bananas; there is no economic scarcity and no possibility of conflict over the use of a scarce resource, and thus no need for exclusivity.

Similarly, if you copy a book I have written, the original (tangible) book is still there. Thus, books are not scarce in the same sense as is a piece of land or a car. As Thomas Jefferson, himself an inventor and the United States' first Patent Examiner, wrote, "He who receives an idea from me, receives instruction himself without lessening mine; as he who

lights his taper at mine, receives light without darkening me." Thus, the argument goes, since use of another's idea does not deprive him of its use, no conflict over its use is possible, which undermines the natural-law justification for property rights in IP.

A Fair Dinkum

As for the charge that it would be unfair to not provide a right to one's intellectual creations, even advocates of IP do not maintain that the legal system must reward everyone for every single useful idea they come up with. For example, philosophical or mathematical or scientific truths cannot be protected: commerce and social intercourse would grind to a halt were every new phrase, philosophical truth, and the like considered the exclusive property right of its creator. But if it is fair to leave these creators unrewarded (e.g., more theoretical science and math researchers and philosophers), why is it unfair to not reward other types of creators (more practical inventors and entertainment providers)?

Indeed, it could be argued that it is unfair to discriminate between classes of intellectual creators, by providing one group with IP rights and the other group with nothing. For example, I can get a patent on a new mousetrap, but, in one recent case, *In re Trovato*[1], the inventor of a new way to calculate a number representing the shortest path between two points, an extremely useful technique, was denied patent protection because this was "merely" a mathematical algorithm. Why the distinction here (a critic might ask)? Do not both discoveries require creative intellect, and benefit society? In short, the fairness argument falters, since it cannot be applied uniformly and consistently without itself causing unfairness (and virtually no one is willing to provide IP protection broadly enough to eliminate this perceived unfairness).[2]

Utility Belt

The utilitarian defense of IP has also come under attack. Utilitarianism, founded by Jeremy Bentham, holds that utility, by some measure (such as wealth or its proxies, creation and innovation) should be "maximized," and thus favors legislation that causes certain desired results or consequences to be produced. The utilitarian theory is based on the assumption that such creators would not invest the time or capital necessary to produce such products, if others could copy them with impunity. This is the common justification patent lawyers typically give — "patents are needed to encourage inventors to invent". It is also the rationale in the U.S. Constitution's grant of copyright and patent authority, which provides that Congress shall have power "To promote [i.e. *encourage*] the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[3]

Critics point to several problems with justifying IP on utilitarian or similar grounds. The first objection is that utilitarianism is an ends-justifies-the-means philosophy, which is itself problematic. Horrible violations of individual rights can be perpetrated in the name of this philosophy, as the history of this bloody century shows. As for IP, utilitarians hold that the "end" of encouraging more innovation and creativity is used to justify the arguably immoral "means" of restricting the could not rely on a near 20-year monopoly.

Further, some argue that the grant of a patent for processes and discoveries having practical application skews research and development away from theoretical R&D. It is not clear that society is better off with more practical invention and less theoretical R&D. Additionally, many inventions are patented for defensive reasons, and much overhead is spent on patent lawyers' salaries and PTO fees, that would not otherwise have to be spent if there were no patents.

Paying the Bills versus Intellectual Integrity

It is not surprising that IP attorneys seem to take for granted the legitimacy of IP; after all, it pays the bills. This acknowledged self-interest does not necessarily mean that we are wrong to support IP; but it does give us cause to be skeptical of the seductive appeal of what may be makeweight rationalizations. As members of our community and as participants in the governmental and legal machinery, it behooves us to recognize our own built-in bias and, on occasion, to question and reflect on the widely-held justifications that we hear ourselves sometimes repeating by rote.[4]

** The author is a partner in the intellectual property department of Duane, Morris & Heckscher LLP in Houston, and is adjunct professor at South Texas College of Law. The views expressed herein are those of the author alone and should not be attributed to any other person or entity.*

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1. 33 U.S.P.Q.2d 1194 (Fed. Cir. 1994).
2. Except, perhaps, for Galambosians. See Andrew J. Galambos, *Sic Itur ad Astra: The Theory of Volition*: Volume I, Peter N. Sisco, ed. (1999).
3. U.S. Const. Art. I, § 8.
4. For further discussion of some of the ideas in this editorial, see Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 Harv. J. Law & Publ. Pol'y 817 (1990), as well as other articles in same issue (No. 3, Summer 1990) and in Vol. 13, issue no. 1 (Winter 1990) of this journal; Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 Hamline L. Rev. 261 (1989); Wendy McElroy, *Contra Copyright, The Voluntaryist* (June 1985) and *Liberty on Copyright and Patents* (unpublished drafts on file with author); Murray N. Rothbard, *The Ethics of Liberty* (1982), at 123-24; Murray N. Rothbard, 1 *Man, Economy, and State: A Treatise on Economic Principles* (1962), at 652-60; Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stan. L. Rev. 1343 (1989). *Symposium: Toward a Third Intellectual Property Paradigm*, 94 Colum. L. Rev. No. 8 (December 1994). A classic series of essays on economic and other aspects of IP is Sir Arnold Plant, *Selected Economic Essays and Addresses* (1974); see also Edward C. Walterscheid, *The Early Evolution of the U.S. Patent Law: Antecedents*, appearing in multiple parts at 76 JPTOS 697 & 849 (1994); 77 JPTOS 771 & 847 (1996); 78 JPTOS 77, 615, & 665 (1996).

N Kinsella

In Defense of Napster and Against the Second Homesteading Rule

by Stephan Kinsella

Previously by Stephan Kinsella: The Greatest Libertarian Books

Internet bad boy Napster has come under fire. In a lawsuit filed earlier this year by the Recording Industry Association of America (RIAA) on behalf of its members, the RIAA contends that Napster's service "enables and facilitates piracy of music on an unprecedented scale," and seeks to shut down Napster for infringing the copyrights of its members. U.S. District Court Judge Marilyn Hall Patel initially granted the RIAA a preliminary injunction, effectively ordering Napster to shut down. However, the injunction has since been stayed by the U.S. Court of Appeals for the 9th Circuit, pending an appeal.(1)

This case gives rise to the question: Should Napster be shut down by force of law? The answer can be yes only if Napster is violating the individual rights – property rights – of others. To determine this we can ask a two-pronged question: (1) Is Napster violating any positive law?, and (2) If so, is the law legitimate? The second question is necessary because, even if Napster is technically in violation of a legal prohibition, we can only say that Napster "should" be subject to the law's punishments, if the law is itself legitimate. To hold otherwise is to adopt legal positivism and the moral relativism from which it springs. Let us, then, take each of these two questions in turn.

Positive Law

First, does Napster violate U.S. copyright law? In the Napster system, Napster users A and B "find" each other by using a directory maintained by Napster. Napster user A then copies the digital music file (e.g., an MP3 file) of Napster user B, using file transfer software provided by the Napster service. This is known as peer-to-peer file sharing. However, the file is transferred from B to A over the Internet, not through Napster's servers. Napster does not itself do any copying. It is more like an intermediary, who introduces A and B, who then may copy files from each other. It is clear, then, that Napster does not directly infringe any copyrights, because it does not itself reproduce music files.

For this reason, Napster has been accused only of "contributory" infringement (contributing to the direct copyright infringement of its consumer-users)(2) and of "vicarious" infringement (profiting from infringing activity under its control). Napster has several defenses available under the law.

Perhaps the strongest defense to contributory infringement is the "staple article of commerce" doctrine. Under this doctrine, a provider of technology used to perform the direct infringement is not liable as a contributory infringer, if the technology is capable of commercially significant noninfringing uses.(3) If a product has both infringing and noninfringing uses, then the sale of the product is not necessarily contributing to others' acts of infringement. Paraphrasing the NRA, selling technology doesn't infringe – people do! It was under this rationale that the Supreme Court permitted the sale of VCRs, which can be used both for copyright infringement and for legal, noninfringing uses (such as time-shifting).

Likewise, Napster's service is capable of numerous commercially significant noninfringing uses, such as promotion and distribution of songs from independent record labels or new artists, and free (authorized) distribution of songs, in addition to sampling and "space-shifting" (the process of sharing files between hard drives and players). Thus, because Napster can be used for these and other significant noninfringing uses, it is not a contributory infringer.

As for vicarious infringement, there is only liability if Napster has both (1) the right and ability to supervise the infringing activities of its users; and (2) a direct financial interest in the infringing activities. However, despite the District Court's ruling, there is no way for Napster to distinguish between legitimate and illegal copying by its users. Thus, it does not have the "ability" to supervise any infringing activities.

Additionally, Napster is not liable under either theory if its users are not direct infringers. There are two such arguments. First, Napster's users themselves may have a fair use defense to copyright infringement. Most consumer copying is not for commercial purposes, but for sampling or space shifting, which arguably constitute fair use. If Napster users have a fair use defense, they are not direct infringers.

Second, under the Audio Home Recording Act (AHRA), consumers have a right to create and transfer digital music for noncommercial purposes.(4) Because Napster users typically share files for free, the copying is arguably for a "noncommercial purpose." Thus, either due to a fair use defense or the AHRA, Napster users are not direct infringers, meaning that there is no direct infringement to which Napster can contribute or be vicariously liable for.

Legitimacy of Copyright Law

Even assuming Napster violates positive copyright law, we must inquire into the legitimacy of the law. Unlike most other federal laws, copyright law is clearly authorized by the Constitution.(5) This, however, does not mean the law is legitimate, only that it is constitutional. The question is whether copyright law is justified, i.e. is it in accord with our natural rights?

Redistribution of Property

Let us recall that copyright gives an author partial rights of control – ownership – over the tangible property of everyone else. The author has partial ownership of others' property, because, by virtue of his copyright, he can prohibit them from performing certain actions with their own property. The author, for example, can prohibit a third party from inscribing a certain pattern of words on his own blank pages with his own ink.

That is, by merely authoring an original expression of ideas, by merely thinking of and recording some original pattern of information, the author instantly, magically becomes a partial owner of others' property. He has some say over how third parties can use their property. Copyright changes the status quo by redistributing property from individuals of one class (tangible property owners) to another (authors of original works). Prima facie, therefore, copyright law trespasses against or "takes" the property of tangible property owners, by transferring partial ownership to authors. (The same is also true of other forms of intellectual property, or "IP," such as patent law.) It is this invasion and redistribution of property that must be justified in order for copyright law to be valid. Can this be done?

Utilitarianism

The most common defense of copyright laws is utilitarian. It argues that creativity and wealth are increased by granting monopolies to writings so as to "encourage" authors. Without a copyright in their works, many authors would not bother to write novels, software, or other types of works. In fact, most utilitarians ground their defense of all property rights in utilitarianism. Conservatives and libertarians should be wary of adopting utilitarianism. It is a thoroughly incoherent and immoral doctrine, for several reasons.

First, even if a given policy could increase "net" wealth by redistributing property from A to B, that does not justify the policy. The goal of law is justice, not wealth maximization. B may be helped "more" than A is harmed by redistribution, but how does this justify the harm done to A? By the reasoning of utilitarians, we could not condemn every act of theft, rape, or murder; we would have to weigh the benefit to the thief, rapist, or murderer against the harm suffered by the victim, to determine whether or not the crime should be permitted. In cases where the aggressor enjoys his crime "more" than it harms the victim, it is not a crime at all, and should be permitted, since net wealth is increased. Clearly, this is a wholly immoral and unprincipled view.

Not only is utilitarianism morally insufficient to justify property redistribution, but it is incoherent as well. As Austrian economists have shown, the utilitarian weighing of costs against benefits requires the impossible be done, namely making interpersonal utility comparisons, as when the "costs" of copyright laws are subtracted from the "benefits" to determine whether such laws are a net benefit.(6) In short, there is no way to compare the benefit to B and the detriment to A of a given redistributionist policy, because values and disvalues have no cardinal magnitude. The reason for this is that values are subjective and ordinal, not cardinal.(7)

Finally, even if we set aside the problems of interpersonal utility comparisons and the justice of redistribution and plow ahead and employ standard utilitarian measurement techniques, it is not at all clear that IP laws do lead to an increase or decrease in overall wealth.(8) That is, it has not been demonstrated that the "costs" of copyright and other IP laws outweigh the benefits of such laws.

Utilitarian analysis is thoroughly confused and bankrupt: talk about increasing the size of the pie is methodologically flawed; there is no clear evidence that the pie size is increased by IP rights; and in any event pie growth simply does not justify the use of force against the otherwise-legitimate property of others. For these reasons, utilitarian defenses of IP are not persuasive.

Natural Law and the Second Homesteading Principle

Some advocates of copyright and other forms if IP try to justify IP with natural law–type arguments. For example, some say that the author "creates" a work, and "thus" is entitled to own it. However, this argument begs the question by assuming that the authored work is property in the first place; once this is granted, it seems natural that the "creator" of this piece of property is the natural and proper owner of it.

But "creation" does not justify ownership in things. If I homestead a farm, there need be no "creativity" involved, in the copyright sense; I need only be the first possessor of the land. On the other hand, if I carve a statue into your block of marble, I do not thereby own the resulting statue. In fact, I may owe you damages for trespass or conversion. Thus, creation is neither necessary nor sufficient for ownership.

It is scarcity that is the hallmark of ownable property, and it is by first possession that one comes to own such ownable property. This can be seen by examining the purpose and nature of property rights. Were things in infinite abundance, there would be no need for property rights. But in the real world, there are scarce resources. These things can be used and controlled by only a single person.

Because of this fact of scarcity, there is always the possibility of interpersonal conflict over scarce resources. If I take your lawnmower, you no longer have it. If I take over your house and your land, you lose control of it. These tangible goods are scarce. Property rights exist to allocate ownership in scarce resources to a specified owner, thereby permitting conflicts over the use of these scarce resources to be avoided (and resolved). Thus, it is only things that are scarce, in the economic sense, that can be property. This is why, for example, there can be ownership of tangible, scarce resources such as land, cars, printing press, paper, and ink. Moreover, in the libertarian and conservative view, these property rights in scarce resources are allocated in accordance the Lockean homesteading rule, in which unowned scarce resources are homesteaded by the first possessor.(9)

The intangible "things" covered by copyright are simply not scarce, in this sense. An idea or pattern of words, for example, can be copied by others an infinite amount of times, without "taking" the idea from its originator. Unlike tangible property, several persons can use the idea at the same time, independently. If you copy my novel, I still "have" the novel, and you have it, now, too. Ideas are not scarce and are not property. As Thomas Jefferson, himself an inventor and the United States' first Patent Examiner, wrote, "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." For this reason, copyrightable works should not be viewed as property, and copyrights should not be granted.

In fact, because ideas are not property, granting property rights in them has to end up diluting the property rights accorded to actual, scarce resources. And this is exactly what we see. As pointed out above, to grant an author a

copyright in his novel means that he now has partial ownership rights in all others' tangible property. For example, an author, Arthur, can prevent Brown, owner of Blackacre, from using Blackacre to recreate Arthur's book-pattern. Yet by the Lockean homesteading principle, once the unowned tract Blackacre is homesteaded by Brown's first possession of it, Blackacre is no longer unowned, and no longer subject to homesteading. There is no unowned property left to homestead. Thus, no action by Arthur can result in his homesteading part ownership of Blackacre. Brown is the first possessor and owner of Blackacre, not Arthur.(10)

Indeed, by explaining the situation in these terms, we can see why Arthur has no copyright in his authored work: not only is Blackacre not subject to homesteading (it is already owned), not only is Arthur not the first possessor of Blackacre (Brown beat him to it) – but Arthur is not a possessor at all of Blackacre. Arthur could not even homestead an unowned tract of land, Greenacre, by merely writing a novel. The act of writing a novel is not an act of possession of Greenacre, much less first possession of it.

To grant Arthur rights in Blackacre, merely by virtue of setting down in writing an original expression of ideas, requires the Lockean homesteading rule to be undermined by a new, second homesteading principle. This new rule provides a second way that an individual can come to own tangible property. To-wit, the copyright advocate must propose some homesteading rule along the following lines: "A person who comes up with some creative idea which can be used to imprint a pattern on his own property, thereby instantly gains a right to control all other tangible property in the world, with respect to that property's similar use." This new-fangled homesteading technique is so powerful that it gives the creator rights in third parties' already-owned tangible property. This second rule of homesteading has no justification whatsoever, and can only dilute and undermine private property rights just where they are needed, in scarce resources. For these reasons, property rights in ideas are not justified, and Napster should not be penalized by such unjust laws.

Notes

1. Further information about the Napster lawsuit may be found at: http://www.riaa.com/napster_legal.cfm and http://www.napster.com/pressroom/. See, e.g., the RIAA's motion for preliminary injunction and Napster's brief appealing the district court's preliminary injunction.

2. Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971); see also Melville B. Nimmer & David Nimmer, Nimmer on Copyright (New York: Matthew Bender, 2000), § 12.04[A][2].

3. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984); Nimmer on Copyright, § 12.04[A][2][b].

4. Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001–1010.

5. U.S. Const. art. I, § 8.

6. On the defects of utilitarianism and interpersonal utility comparisons, see Ludwig von Mises, *Human Action*, 3d. rev. ed., Chicago: H. Regnery; Murray N. Rothbard, "Praxeology, Value Judgments, and Public Policy," esp. pp. 90–99, and "Toward a Reconstruction of Utility and Welfare Economics," in *The Logic of Action One* (Cheltenham, UK: Edward Elgar, 1997), esp. pp. 90–99; idem, Man, Economy and State (Auburn AL: Mises Institute, 1993); Jeffrey M. Herbener, "The Pareto Rule and Welfare Economics," *Review of Austrian Economics*, v. 10, no. 1, 1997: pp. 79–106; Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order* (London and New York: Routledge, 1997), pp. 81–82, 92, 98, 144, 149–151. On scientism and empiricism, see Rothbard, "The Mantle of Science," in *The Logic of Action One*; Hans-Hermann Hoppe, "In Defense of Extreme Rationalism: Thoughts on Donald McCloskey's *The Rhetoric of Economics*," *Review of Austrian Economics* 3 (1989): 179. On epistemological dualism, see Luwdig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method*, 2d ed. (Kansas City: Sheed Andrews & McMeel, 1962); idem, *Epistemological Problems of Economics*, George Reisman, trans. (New York: New York University Press,

1981); Hans-Hermann Hoppe, *Economic Science and the Austrian Method* (Auburn, Alabama: Ludwig von Mises Institute, 1995); idem, "In Defense of Extreme Rationalism."

7. It is not merely that all costs do not have a market price. As Mises showed, even for goods that do have a market price, the price does not serve as a *measure* of the good's value. As Mises states: "Although it is usual to speak of money as a measure of value and prices, the notion is entirely fallacious. So long as the subjective theory of value is accepted, this question of measurement cannot arise." Ludwig von Mises, *The Theory of Money and Credit*, H.E. Batson, trans. (Indianapolis: Liberty Fund, [1912] 1980), p. 51 (in chapter 2,"On the Measurement of Value"). Also: "Money is neither a yardstick of value nor of prices. Money does not measure value. Nor are prices measured in money: they are amounts of money." Ludwig von Mises, *Socialism: An Economic and Sociological Analysis*, 3d rev. ed., J. Kahane, trans. (Indianapolis: Liberty Press, 1981), p. 99); see also Mises, *Human Action*, pp. 96, 122, 204, 210, 217, 289.

8. See Julio H. Cole, "Patents and Copyrights: Do the Benefits Exceed the Costs?" (forthcoming; jhcole@ufm.edu.gt) for an excellent survey and critique of the cost-benefit justification for patent and copyright. See also Tom G. Palmer, "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects," *Harv. J. Law & Publ. Pol'y* 13, no. 3 (Summer 1990), pp. 818, 820–821, 850–851, and idem, "Intellectual Property: A Non-Posnerian Law and Economics Approach," *Hamline L. Rev.* 12 (1989): 261, 300–302, for useful discussions of evidence in this regard; also Boudewijn Bouckaert, "What is Property?", *Harv. J. Law & Publ. Pol'y* 13, no. 3 (Summer 1990): 812–813; Leonard Prusak, "Does the Patent System Have Measurable Economic Value?," *AIPLA Quarterly Journal* 10 (1982): 50–59; idem, "The Economic Theory Concerning Patents and Inventions," *Economica 1* (1934): 30–51.

9. On ethical justifications of the libertarian conception of individual rights, including private property rights and the Lockean homesteading rule, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston: Kluwer Academic Publishers, 1989), ch. 7; idem, *The Economics and Ethics of Private Property* (Boston: Kluwer Academic Publishers, 1993); Murray N. Rothbard, *The Ethics of Liberty* (New York and London: New York University Press, 1998 [1982]); idem, "Justice and Property Rights," in *The Logic of Action One* (Cheltenham, UK: Edward Elgar, 1997); N. Stephan Kinsella, "A Libertarian Theory of Punishment and Rights" 30 *Loyola of Los Angeles Law Review* 607 (Spring 1996) (previous version); idem, "New Rationalist Directions in Libertarian Rights Theory," *Journal of Libertarian Studies* 12, no. 2 (Fall 1996): 313–326.

10. This assumes that Arthur does not have a contract with Brown which prohibits Brown from making a copy of Arthur's book-pattern. For further discussion of this matter, see my monograph *Against Intellectual Property.*

September 4, 2000

Stephan Kinsella [send him mail] is an intellectual property attorney in Houston. The views expressed herein are merely the current speculative opinion of the author, and should not be attributed to any other person or entity. He has never used Napster and does not download MP3 files. A more detailed exposition of some of the ideas in this article can be found in the author's article Against Intellectual Property. The author thanks Gil Guillory for helpful comments on an earlier draft. His personal website is located at www.stephankinsella.com.

Intellectual Property and Libertarianism

TAGS Free MarketsLegal SystemMedia and CulturePrivate Property

11/17/2009 Stephan Kinsella

[This article is based on a speech delivered at Mises University 2009 (July 30, 2009; audio; video).]

Most libertarians find some areas of libertarian theory more interesting than others. My own passion has always been rights theory and related areas, such as the theory of contracts, causation, and punishment.[1]

Intellectual property (IP), which has garnered greater attention in recent years, was never my strongest interest, even though I have specialized in this field in my legal practice for more than 16 years. But I've ended up writing a great deal on it from a libertarian perspective anyway. One reason for this is that there are not many libertarian patent attorneys.

Commentary by those familiar with IP law is usually devoid of libertarian principle. Most IP experts are, unsurprisingly, proponents of the status quo, just as government school teachers tend to favor government schooling and astronauts cheer NASA.

And libertarian discussions of IP often confuse the details of the law under debate. In fact, it's common for libertarians to conflate trademark, copyright, and patent (Murray Rothbard talked about a copyright on a mousetrap,[2] which is an invention and therefore the subject of patents).

Another reason is that from the beginning, the IP issue nagged at me. I was never satisfied with Ayn Rand's justification for it. Her argument is a bizarre mixture of utilitarianism with overwrought deification of "the creator" — not *the* Creator up there, but Man, The Creator, who has a property right in what He Creates. Her proof that patents and copyrights are property rights is lacking.[3]

So, I kept trying to find a better justification for IP, and this search continued after I started practicing patent law.

Many libertarians abandon minarchy in favor of anarchy when they realize that even a minarchist government is unlibertarian. That was my experience. And it was like this for me also with IP. I came to see that the reason I had been unable to find a way to justify IP was because it is, in fact, unlibertarian. Perhaps this would have been obvious if Congress had not enacted patent and copyright statutes long ago, making them part and parcel of America's "free-market" legal system — and if early libertarians like Rand had not so vigorously championed such rights.

But libertarianism's initial presumption should have been that IP is invalid, not the other way around. After all, we libertarians already realize that "intellectual" rights, such as the right to a reputation protected by defamation law, are illegitimate.[4] Why, then, would we presume that other laws, protecting intangible, intellectual rights, are valid — especially artificial rights that are solely the product of legislation, i.e., decrees of the fake-law-generating wing of a criminal state?

But IP is widely seen as basically legitimate. Sure, there have always been criticisms of existing IP laws and policies. You can point to hundreds of obviously ridiculous patents, and hundreds of obviously outrageous abuses. There are absurd patents on ways of swinging on a swing, faster-than-light communications, and one-click purchasing; there are $100 million- and billion-dollar patent-lawsuit awards; there are millions of dollars in copyright liability imposed on consumers for sharing a few songs. Books are even banned — quite literally — in the name of copyright.[5]

The terms of patents (about 17 years), and especially copyrights (which expire 70 years after the author's death, or 95 years in the case of works made for hire), are ridiculously long, and Congress keeps extending them at the behest of Mickey Mouse (a.k.a., the Disney company). Copyright is now received automatically, whether you want it or not, and is hard to get rid of.[6] The patent office is an inefficient government bureaucracy; and the patent laws are arbitrary, ambiguous, and vague (generating more work for me — thanks).[7]

So there are plenty of reasons to oppose the current IP system. There are many calls for "reform" of IP law, just as there are always calls for reform of the tax code, welfare, public education, and the way we are fighting the current war. But I became opposed not just to ridiculous patents and outrageous IP lawsuits, but to patent and copyright per se, root and branch. IP laws should be abolished, not reformed, just like the Americans with Disabilities Act and the tax code.

Why, exactly, is this? What is the libertarian case against IP?[8] To answer this question requires a clear, coherent understanding of libertarian principles. I thus take a brief detour here to sketch out the libertarian framework.

The Libertarian Framework

What is the essence of our libertarianism?[9] It is said that libertarianism is about individual rights; property rights;[10] the free market; capitalism; freedom; liberty; justice; and the nonaggression principle or axiom. But capitalism and the free market describe the market conditions that arise or are permitted in a libertarian society, not all aspects of libertarianism.

"There are many calls for 'reform' of IP law, just as there are always calls for reform of the tax code, welfare, public education, and the way we are fighting the current war."
What about individual rights, justice, and freedom from aggression? Well, in my view, these are all derivative — they are defined in terms of property rights. As Rothbard explained, all rights *are* property rights.[11] And justice is just giving someone his due, which depends on what his (property) rights are.[12] Likewise, freedom and liberty also depend on rights, since one ought to have liberty or freedom to do that which is rightful.

The nonaggression principle itself is also dependent on property rights. If you hit me, it is aggression *because* I have a property right in my body. If I take from you the apple you possess, this is trespass, aggression, only *because* you own the apple; if it is my apple, it is not trespass.

In other words, to identify an act of aggression is implicitly to assign a corresponding property right to the victim. (This is, incidentally, one reason why it is better to refer to the nonaggression *principle* instead of the nonaggression *axiom* — because property rights are more basic than freedom from aggression.)

So we have property rights left. But mere "belief in property rights" does not explain what is unique about the libertarian philosophy. This is because a property right is the *exclusive right to control a scarce resource*;[13] property rights just specify who owns, who has the *right to control*, scarce resources. No political system is agnostic on the question of who owns resources. To the contrary — any given system of property rights assigns a particular owner to every scarce resource.[14]

None of the various forms of socialism, for example, denies property rights; each socialist system will specify an owner for every scarce resource. If the state nationalizes an industry, it is asserting ownership of these means of production. If the state taxes you, it is implicitly asserting ownership of the funds taken. If my land is transferred to a private developer by eminent domain, the developer is now the owner. If the law allows a recipient of racial discrimination to sue his employer for a sum of money, the plaintiff acquires ownership of the money.

Even a private thief who steals something of yours is implicitly acting on the maxim that he has the right to control it — that *he* is its owner. He doesn't deny property rights; he simply differs from the libertarian as to who the owner is. In fact, as Adam Smith observed, "If there is any society among robbers and murderers, they must at least, according to the trite observation, abstain from robbing and murdering one another."[15]

Thus, protection of and respect for property rights is not unique to libertarianism.

What *is* distinctive about libertarianism is its particular property-assignment rules — its view as to *who is the owner* of each contestable resource, and how to determine this. So the question is, what are the libertarian property-assignment rules that distinguish our philosophy from others?

Property in Bodies

There are two types of scarce resources: *human bodies*, and *external resources* found in nature.[16] Let us first consider the property assignment rules for bodies.

Of course one's own body is a scarce resource. As Hans-Hermann Hoppe has explained, even in a paradise with a superabundance of goods,

> every person's physical body would still be a scarce resource and thus the need for the establishment of property rules, i.e., rules regarding people's bodies, would exist. One is not used to thinking of one's own body in terms of a scarce good, but in imagining the most ideal situation one could ever hope for, the Garden of Eden, it becomes possible to realize that one's body is indeed the *prototype* of a scarce good for the use of which property rights, i.e., rights of exclusive ownership, somehow have to be established, in order to avoid clashes.[17]

In other words, every person has, controls, and is identified and associated with a unique human body, which is a scarce resource.

"Thus, protection of and respect for property rights is not unique to libertarianism."
The libertarian view is that each person *completely owns his own body* — at least initially, until something changes this, such as if he commits some crime by which he forfeits or loses some of his rights.[18] Now some say that the idea of self-ownership makes no sense. You *are* yourself; how can you *own* yourself? But this is just silly wordplay.

To own means to have the right to control. If A wants to have sex with B's body, *whose decision is it*? Who has the right to control B's body? A, or B? If it is A, then A owns B's body; A has the right to control it, as a master to a slave. But if it is B who has the right to decide, then B owns her own body: she is a self-owner.

And of course, self-ownership is what is implied in the nonaggression principle. Ayn Rand famously said, "So long as men desire to live together, no man may *initiate*.... No man may *start* — the use of physical force against others."[19] To initiate force means to *invade* the borders of someone's body, to use her body without permission or consent.[20] But this presupposes that that person has the right to control her body: otherwise her permission would not be needed, and it would not be aggression to invade or use his body without his consent.

So the libertarian property-assignment rule for bodies is that each person owns his own body. Implicit in the idea of self-ownership is the belief that each person has a *better claim* to the body that he or she directly controls and inhabits than do others. I have a better claim to the right to control my body than you do, because it is *my* body; I have a unique link and connection to my body that others do not, and that is prior to the claim of any other person.

Anyone other than the original occupant of a body is a *latecomer* with respect to the original occupant. Your claim to my body is inferior in part because *I had it first*. The person claiming your body can hardly object to the significance of what Hoppe calls the "prior-later" distinction, since he adopts this very rule with respect to his own body — he has to presuppose ownership of his own body in order to claim ownership of yours.[21]

The self-ownership rule may seem obvious, but it is held only by libertarians. Nonlibertarians do *not* believe in complete self-ownership. Sure, they usually grant that each person has *some* rights in his own body, but they believe each person is partially owned by some other person or entity — usually the state or society. Libertarians are the only ones who really oppose slavery, in a principled way. Nonlibertarians are in favor of at least partial slavery.

This slavery is implicit in state actions and laws such as taxation, conscription, and drug prohibitions. The libertarian says that each person is the full owner of his body: he has the right to control his body, to decide whether or not he ingests narcotics, works for less than minimum wage, pays taxes, joins an army, and so on.

But those who believe in such laws believe that the state is at least a partial owner of the body of those subject to such laws. They don't like to say they believe in slavery, but they do. The modern left-liberal wants tax evaders put in jail (enslaved). The modern conservative wants marijuana users enslaved.

Property in External Things

In addition to human bodies, scarce resources include external objects. Unlike human bodies, however, external things were *initially unowned*.[22] The libertarian view with respect to such external resources is very simple: the owner of a given scarce resource is the person who first homesteaded it — or someone who can trace his title contractually back to the homesteader.

"Your claim to my body is inferior in part because *I had it first*."
This person has a better claim than anyone else who wants the object. Everyone else is a *latecomer* with respect to the first possessor. (Note that we are here speaking of scarce resources — material objects — not infinitely reproducible things such as ideas, patterns, and information.)

This latecomer rule is actually implied in the very idea of owning property. If the earlier possessor of property did not have a better claim than some second person who wants to take the property from him, then why does the second person have a better claim than a third person who comes later still (or than the first owner who tries to take it back)?

To deny the crucial significance of the prior-later distinction is to deny property rights altogether. Every nonlibertarian view is thus incoherent, because it presupposes the prior-later distinction when it assigns ownership to a given person (because it says that person has a better claim than latecoming claimants); while it acts contrary to this principle whenever it takes property from the original homesteader and assigns it to some latecomer.[23]

But what is relevant for our purposes here is the libertarian position, not the incoherence of competing views. In sum, the libertarian position on property rights in external objects is that, in any dispute or contest over any particular scarce resource, the original homesteader — the person who appropriated the resource from its unowned status, by embordering or transforming it[24] (or his contractual transferee) — has a better claim than latecomers, those who did not appropriate the scarce resource.

Libertarianism on IP

Now, back to IP. Given the libertarian understanding of property rights, it is clear that the institutions of patent and copyright are simply indefensible.

Copyrights pertain to "original works," such as books, articles, movies, and computer programs. They are grants by the state that permit the copyright holder to prevent others from using their own property — e.g., ink and paper — in certain ways.

Patents grant rights in "inventions" — useful machines or processes. They are grants by the state that permit the patentee to use the state's court system to prohibit others from using their *own property* in certain ways — from reconfiguring their property according to a certain pattern or design described in the patent, or from using their property (including their own bodies) in a certain sequence of steps described in the patent.

In both cases, the state is assigning to A a right to control B's property: A can tell B not to do certain things with it. Since ownership is the right to control, IP grants to A co-ownership of B's property.

This clearly cannot be justified under libertarian principles. B already owns his property. With respect to him, A is a latecomer. B is the one who appropriated the property, not A. It is too late for A to homestead B's property — B already did that. The resource is no longer unowned. Granting A ownership rights in B's property is quite obviously incompatible with basic libertarian principles. It is nothing more than redistribution of wealth. IP is unlibertarian and unjustified.

Utilitarianism

Why, then, is this a contested issue? Why do some libertarians still believe in IP rights?

One reason is that they approach libertarianism from a utilitarian perspective instead of a principled one. They favor laws that increase general utility, or wealth. And they believe the state's propaganda that state-granted IP rights actually do increase general wealth.

The utilitarian perspective itself is bad enough, because all sorts of terrible policies could be justified this way: why not take half of Bill Gates's fortune and give it to the poor? Wouldn't the total welfare gains to the thousands of recipients be greater than Gates's reduced utility? After all, he would still be a billionaire afterwards. And if a man is extremely desperate for sex, couldn't his gain be greater than the loss suffered by his rape victim, say, if she's a prostitute?

But even if we ignore the ethical and other problems with the utilitarian or wealth-maximization approach, what is bizarre is that utilitarian libertarians are in favor of IP when they have not demonstrated that IP does increase overall wealth. They merely assume that it does and then base their policy views on this assumption.

It is beyond dispute that the IP system imposes significant costs, in monetary terms alone, not to mention its costs in terms of liberty. The usual argument, that the incentive provided by IP law stimulates additional innovation and creativity, has not even been proven. It is entirely possible (even likely, in my view) that the IP system not only imposes many billions of dollars of costs on society but actually impedes innovation, adding damage to damage.

But even if we assume that the IP system does stimulate some additional, valuable innovation, no one has established that the value of the purported gains is greater than the costs. If you ask advocates of IP how they know there is a net gain, you get silence (this is especially true of patent attorneys). They cannot point to any study to support their utilitarian contention; they usually just point to Article 1, Section 8 of the Constitution, as if the backroom dealings of politicians two centuries ago were some sort of evidence.

"Utilitarian libertarians are in favor of IP when they have not demonstrated that IP does increase overall wealth."
In fact, as far as I've been able to tell, virtually *every* study that attempts to tally the costs and benefits of copyright or patent law concludes either that these schemes cost more than they are worth, or that they actually reduce innovation, or that the research is inconclusive. There are no studies showing a net gain. [25] There are only repetitions of state propaganda.

Given the available evidence, anyone who accepts utilitarianism should be opposed to IP.

Libertarian Creationism

Another reason why many libertarians favor IP is their confusion about the origin of property and property rights. They accept the careless observation that you can come to own things in three ways: through homesteading an unowned thing, by contractual exchange, and by creation.

The mistake is the notion that creation is an independent source of ownership, independent from homesteading and contracting. Yet it is easy to see that it is not, that "creation" is neither necessary nor sufficient as a source of ownership. If you carve a statue using your own hunk of marble, you own the resulting creation because you already owned the marble. You owned it before, and you own it now. And if

you homestead an unowned resource, such as a field, by using it and thereby establishing publicly visible borders, you own it because this first use and embordering gives you a better claim than latecomers. So creation is not necessary.

But suppose you carve a statue in someone else's marble, either without permission, or with permission, such as when an employee works with his employer's marble by contract. You do not own the resulting statue, even though you "created" it. If you are using marble stolen from another person, your vandalizing it does not take away the owner's claims to it. And if you are working on your employer's marble, he owns the resulting statue. So creation is not sufficient.

This is not to deny the importance of knowledge, or creation and innovation. Action, in addition to employing scarce owned means, may also be informed by technical knowledge of causal laws or other practical information. To be sure, creation is an important means of increasing *wealth*. As Hoppe has observed,

> One can acquire and increase wealth either through homesteading, *production* and contractual exchange, or by expropriating and exploiting homesteaders, producers, or contractual exchangers. There are no other ways.[26]

While production or creation may be a means of gaining "wealth," it is not an independent source of ownership or rights. Production is not the creation of new matter; it is the transformation of things from one form to another — the transformation of things someone already owns, either the producer or someone else.

Using your labor and creativity to transform your property into more valuable finished products gives you greater wealth, but not additional property rights. (If you transform someone else's property, he owns the resulting transformed thing, even if it is now more valuable.) So the idea that you own anything you create is a confused one that does not justify IP.

The Contractual Approach

Many libertarians also argue as if some form of copyright or possibly patent could be created by contractual tricks — for example, by selling a patterned medium (book, CD, etc.) or useful machine to a buyer on the condition that it not be copied. For example, Brown sells an innovative mousetrap to Green on the condition that Green not reproduce it.[27]

For such contractual IP to emulate statutory IP, however, it has to bind not only seller and buyer, but all third parties. The contract between buyer and seller cannot do this — it binds only the buyer and seller. In the example given above, even if Green agrees not to copy Brown's mousetrap, Black has no agreement with Brown. Brown has no contractual right to prevent Black from using Black's own property in accordance with whatever knowledge or information Black has.

Now if Green were to sell Brown's watch to Black without Brown's permission, most libertarians would say that Brown still owns the watch and could take it from Black. Why doesn't a similar logic apply in the case of the mousetrap design?

The difference is that the watch is a scarce resource that has an owner, while the mousetrap design is merely information, which is not a type of thing that can be owned. The watch is a scarce resource still owned by Brown. Black needs Brown's consent to use it. But in the mousetrap case, Black merely learns how to make a mousetrap. He uses this information to make a mousetrap, by means of his own body and property. He doesn't need Brown's permission, simply because he is not using Brown's property.

The IP advocate thus has to say that Brown owns the information about how his mousetrap is configured. This move is question begging, however, since it asserts what is to be shown: that there are intellectual property rights.

If Black does not return Green's watch, Green is without his watch, precisely because the watch is a scarce good. But Black's knowing how to make a mousetrap does not take away Green's own mousetrap-making knowledge, highlighting the nonscarce nature of information or patterns. In short, Brown may retake his property from Black but has no right to prevent Black from using information to guide his actions. Thus, the contract approach fails as well.[28]

IP, Legislation, and Statism

A final problem with IP remains: patent and copyright are statutory schemes, schemes that can be constructed only by legislation, and therefore *have always* been constructed by legislation. A patent or copyright code could no more arise in the decentralized, case-based legal system of a free society than could the Americans with Disabilities Act. IP requires both a legislature, and a state. For libertarians who reject the legitimacy of the state,[29] or legislated law,[30] this is yet another defect of IP, and a conclusive one.

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Notes

[1] See various publications located at my website.

[2] See Rothbard, "Knowledge, True and False," which is discussed at pp. 51–55 of Kinsella, *Against Intellectual Property* (Mises Institute, 2008).

[3] See my speech "The Intellectual Property Quagmire, or, The Perils of Libertarian Creationism," Austrian Scholars Conference 2008 (Ludwig von Mises Institute, Auburn, AL, March 13, 2008); and my blog posts "Objectivist Law Prof Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors," *Mises Economics Blog* (Jan. 3, 2008); "Regret: The Glory of State Law," *Mises Economics Blog* (July 31, 2008); and "Inventors are Like Unto…. GODS…..," *Mises Economics Blog* (Aug. 7, 2008).

[4] Murray N. Rothbard, "Knowledge, True and False," in *The Ethics of Liberty* (New York and London: New York University Press, 1998).

[5] See my post "Book Banning Courtesy of Copyright Law," *The LRC Blog* (July 2, 2009).

[6] See my post "Copyright is Very Sticky!," *Mises Economics Blog* (Jan 24, 2009).

[7] For more on the contentions in this paragraph, see my *Against Intellectual Property* (Auburn, Ala.: Ludwig von Mises Institute, 2008); and my various blog posts on *Mises Economics Blog* and *Against Monopoly*.

[8] For a more elaborate argument, see *Against Intellectual Property.*

[9] This section is adapted from my "What Libertarianism Is." More detailed notes and references pertaining to this section may be found there.

[10] The term "private" property rights is sometimes used by libertarians, which I have always found odd, since property rights are necessarily public, not private, in the sense that the borders or boundaries of property must be *publicly visible* so that nonowners can avoid trespass. For more on this aspect of property borders, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Boston: Kluwer Academic Publishers, 1989), pp. 140–41; Stephan Kinsella, "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability," Download PDF *Journal of Libertarian Studies* 17, no. 2 (Spring 2003): n. 32 and accompanying text; idem, *Against Intellectual Property,* pp. 30–31, 49; also Randy E. Barnett, "A Consent Theory of Contract," *Columbia Law Review* 86 (1986): p. 303.

[11] Murray N. Rothbard, "'Human Rights' As Property Rights," in *The Ethics of Liberty*; idem, *For A New Liberty: The Libertarian Manifesto* (rev. ed.; New York: Libertarian Review Foundation, 1985), pp. 42 *et pass*.

[12] "Justice is the constant and perpetual wish to render every one his due.… The maxims of law are these: to live honestly, to hurt no one, to give every one his due." *The Institutes of Justinian: Text, Translation, and Commentary*, trans. J.A.C. Thomas (Amsterdam: North-Holland, 1975).

[13] As Professor Yiannopoulos explains:

> *Property* may be defined as an *exclusive right to control an economic good* …; it is the name of a concept that refers to the rights and obligations, privileges and restrictions that govern the relations of man with respect to *things of value*. People everywhere and at all times desire the possession of things that are necessary for survival or valuable by cultural definition and which, as a result of the demand placed upon them, *become scarce*. Laws enforced by organized society control the competition for, and guarantee the enjoyment of, these desired things. What is guaranteed to be one's own is property … [Property rights] *confer a direct and immediate authority over a thing*.

A.N. Yiannopoulos, *Louisiana Civil Law Treatise, Property* (West Group, 4th ed. 2001), §§ 1, 2 (first emphasis in original; remaining emphasis added). See also *Louisiana Civil Code*, Art. 477 ("Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law").

[14] For a systematic analysis of various forms of socialism, from Socialism Russian-Style to Socialism Social-Democratic Style, the Socialism of Conservatism, and the Socialism of Social Engineering, see Hoppe, *A Theory of Socialism and Capitalism*, chapters 3–6. Recognizing the common elements of various forms of socialism and their distinction from libertarianism (capitalism), Hoppe incisively defines socialism as "an institutionalized interference with or aggression against private property and private property claims." Ibid., p. 2. See also the quote from Hoppe in note 19, below.

[15] Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Fund, [1759] 1982), II.II.3.

[16] On the importance of the concept of scarcity and the possibility of conflict for the emergence of property rules, see Hoppe, *A Theory of Socialism and Capitalism*, p. 134; and the discussion thereof in Stephan Kinsella, "Thoughts on the Latecomer and Homesteading Ideas; or, Why the Very Idea of 'Ownership' Implies that only Libertarian Principles are Justifiable," *Mises Economics Blog* (Aug. 15, 2007).

[17] Hoppe, *A Theory of Socialism and Capitalism,* pp. 8–9. See also Stephan Kinsella & Patrick Tinsley, "Causation and Aggression,"Download PDF *Quarterly Journal of Austrian Economics* 7, no. 4 (Winter 2004): pp. 111–12 (discussing the use of other humans' bodies as means).

[18] See Kinsella, "A Libertarian Theory of Contract,"Download PDF pp. 11–37; idem, "Inalienability and Punishment: A Reply to George Smith,"Download PDF 14, no. 1 *Journal of Libertarian Studies* (Winter 1998–99): pp. 79–93; and idem, "Knowledge, Calculation, Conflict, and Law,"Download PDF *Quarterly Journal of Austrian Economics* 2, no. 4 (Winter 1999): n. 32; also Kinsella, "A Libertarian Theory of Punishment and Rights,"Download PDF *Loyola of Los Angeles Law Review* 30 (1997): pp. 607–45; and idem, "Punishment and Proportionality: The Estoppel Approach,"Download PDF *Journal of Libertarian Studies* 12, no. 1 (Spring 1996): pp. 51–73.

[19] Ayn Rand, "Galt's Speech," in *For the New Intellectual*, quoted in *The Ayn Rand Lexicon*, "Physical Force" entry. Ironically, Objectivists often excoriate libertarians for having a "context-less" concept of aggression — that is, that "aggression" or "rights" are meaningless unless these concepts are embedded in the larger philosophical framework of Objectivism — despite Galt's straightforward definition of aggression as the initiation of physical force against others. See also Rothbard, *For A New Liberty*, p. 23; idem, *The Ethics of Liberty*: "The fundamental axiom of libertarian theory is that each person must be a self-owner, and that no one has the right to interfere with such self-ownership" (p. 60), and "What … aggressive violence

means is that one man invades the property of another without the victim's consent. The invasion may be against a man's property in his person (as in the case of bodily assault), or against his property in tangible goods (as in robbery or trespass)" (p. 45). Hoppe writes:

> If … an action is performed that uninvitedly invades or changes the physical integrity of another person's body and puts this body to a use that is not to this very person's own liking, this action … is called *aggression* … Next to the concept of action, *property* is the most basic category in the social sciences. As a matter of fact, all other concepts to be introduced in this chapter — aggression, contract, capitalism and socialism — are definable in terms of property: *aggression* being aggression against property, *contract* being a nonaggressive relationship between property owners, *socialism* being an institutionalized policy of aggression against property, and *capitalism* being an institutionalized policy of the recognition of property and contractualism.

Hoppe, *A Theory of Socialism and Capitalism*, pp. 12, 7.

[20] The following terms and formulations may be considered as roughly synonymous, depending on context: aggression; initiation of force; trespass; invasion; unconsented to (or uninvited) change in the physical integrity (or use, control, or possession) of another person's body or property.

[21] For elaboration on this point, see Stephan Kinsella, "How We Come To Own Ourselves," *Mises Daily* (Sept. 7, 2006); idem, "Defending Argumentation Ethics"; idem, "Thoughts on the Latecomer and Homesteading Ideas"; Hoppe, *A Theory of Socialism and Capitalism*, chapters 1, 2, and 7. See also Hoppe, "The Idea of a Private Law Society," *LewRockwell.com* (August 1, 2006): "Outside of the Garden of Eden, in the realm of all-around scarcity, the solution [to the problem of social order — the need for rules to permit conflicts to be avoided] is provided by four interrelated rules.… First, every person is the proper owner of his own physical body. Who else, if not Crusoe, should be the owner of Crusoe's body? Otherwise, would it not constitute a case of slavery, and is slavery not unjust as well as uneconomical?"

[22] For further discussion of the difference between bodies and things homesteaded for purposes of rights, see Kinsella, "A Libertarian Theory of Contract,"Download PDF pp. 29 *et seq*.; and idem, "How We Come To Own Ourselves."

[23] For more on the prior-later distinction, see Hoppe, *A Theory of Socialism and Capitalism*, pp. 141–44; idem, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy*(Boston: Kluwer, 1993), pp. 191–93; see also discussion of these and related matters in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas"; idem, "Defending Argumentation Ethics"; and idem, "How We Come To Own Ourselves." See also, in this connection, Anthony de Jasay, *Against Politics*, further discussed and quoted in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas," as well as in Kinsella, "Book Review of Anthony de Jasay, *Against Politics*."Download PDF As Hoppe explains in "The Idea of a Private Law Society," the second of the four interrelated rules that provide the solution to the problem of social order is: "Secondly, every person is the proper owner of all nature-given goods that he has perceived as scarce and put to use by means of his body, *before* any other person. Indeed, who else, if not the first user, should be their owner? The second or third one? Were this so, however, the first person would not perform his act of original appropriation, and so the second person would become the first, and so on and on. That is, no one would ever be permitted to perform an act of original appropriation, and mankind would instantly die out. Alternatively, the first user together with all latecomers become part owners of the goods in question. Then conflict will not be avoided, however, for what is one to do if the various part owners have incompatible ideas about what to do with the goods in question? This solution would also be uneconomical because it would reduce the incentive to utilize goods perceived as scarce for the first time."

See also de Jasay's argument (note 24, below) that since an appropriated thing has no other owner, *prima facie* no one is entitled to object to the first possessor claiming ownership. De Jasay's "let exclusion stand" idea, along with the Hoppean emphasis on the prior-later distinction, sheds light on the nature of homesteading itself. Often the question is asked as to what types of acts constitute or are sufficient for homesteading (or "embordering" as Hoppe sometimes refers to it); what type of "labor" must be "mixed with" a thing; and to what property does the homesteading extend? What "counts" as "sufficient" homesteading? We can see that the answer to these questions is related to the issue of what is the thing in dispute. In other words, if B claims ownership of a thing possessed (or formerly possessed) by A, then the very framing of the dispute helps to identify what the thing is in dispute, and what counts as possession of it. If B claims ownership of a given resource, he wants the right to control it, to a certain extent, and according to its nature. Then the question becomes, did someone else previously control it (whatever is in dispute), according to its nature; i.e., did someone else already homestead it, so that B is only a latecomer? This ties in with de Jasay's "let exclusion stand" principle, which rests on the idea that if someone is actually able to control a resource such that others are excluded, then this exclusion should "stand." Of course, the physical nature of a given scarce resource and the way in which humans use such resources will determine the nature of actions needed to "control" it and exclude others. See also Rothbard's discussion of the "relevant technological unit" in Law, Property Rights, and Air Pollution; also B.K. Marcus, "The Spectrum Should Be Private Property: The Economics, History, and Future of Wireless Technology" and idem, "Radio Free Rothbard."Download PDF

[24] On the nature of appropriation of unowned scarce resources, see Hoppe's and de Jasay's ideas quoted and discussed in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas." In particular, see Hoppe, *A Theory of Socialism and Capitalism*, pp. 13, 134–36, 142–44; and Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order*(London & New York: Routledge, 1997), pp. 158 *et seq*., 171 *et seq*., *et pass*. De Jasay is also discussed extensively in my "Book Review of Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order*," Download PDF *Quarterly Journal of Austrian Economics* 1, no. 3 (Fall 1998): pp. 85–93. De Jasay's argument presupposes the value of justice, efficiency, and order. Given these goals, he argues for three principles of politics: (1) if in doubt, abstain from political action (pp. 147 *et seq*.); (2) the feasible is presumed free (pp. 158 *et seq*.); and (3) let exclusion stand (pp. 171 *et seq*.). In connection with principle (3), "let exclusion stand," de Jasay offers insightful comments about the nature of homesteading or appropriation of unowned goods. De Jasay equates property with its owner's "excluding" others from using it, for example by enclosing or fencing in immovable property (land) or finding or creating (and keeping) movable property (corporeal, tangible objects). He concludes that since an appropriated thing has no other owner, *prima facie* no one is entitled to object to the first possessor claiming ownership. Thus, the principle means "let ownership stand," i.e., that claims to ownership of property appropriated from the state of nature or acquired ultimately through a chain of title tracing back to such an appropriation should be respected. This is consistent with Hoppe's defense of the "natural" theory of property. Hoppe, *A Theory of Socialism and Capitalism*, pp. 10–14 and chapter 7. For further discussion of the nature of appropriation, see Jörg Guido Hülsmann, "The A Priori Foundations of Property Economics," Download PDF *Quarterly Journal of Austrian Economics* 7, no. 4 (Winter 2004): pp. 51–57.

[25] See my post "Yet Another Study Finds Patents Do Not Encourage Innovation," Mises Economics Blog (July 2, 2009).

[26] Hans-Hermann Hoppe, "Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order,"Download PDF *Review of Austrian Economics* 4 (1990): pp. 55-87, p. 60. Emphasis added.

[27] This is Rothbard's example, from "Knowledge, True and False," which is discussed at pp. 51–55 in *Against Intellectual Property*.

[28] On the title-transfer theory of contract, see Williamson M. Evers, "Toward a Reformulation of the Law of Contracts,"Download PDF *Journal of Libertarian Studies* 1, no. 1 (Winter 1977): pp. 3–13; Rothbard, "Property Rights and the Theory of Contracts," chapter 19 in idem, *The Ethics of Liberty*; Kinsella, "A Libertarian Theory of Contract."Download PDF

[29] See Stephan Kinsella, "What It Means To Be an Anarcho-Capitalist," *LewRockwell.com* (Jan. 20, 2004); also Jan Narveson, "The Anarchist's Case,"Download PDF in *Respecting Persons in Theory and Practice* (Lanham, Md.: Rowman & Littlefield, 2002).

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30. See Stephan Kinsella, "Legislation and the Discovery of Law in a Free SocietyDownload PDF," *Journal of Libertarian Studies* 11 (Summer 1995): p. 132.

Ideas Are Free: The Case Against Intellectual Property

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TAGS The EntrepreneurFree MarketsLegal SystemEntrepreneurship

11/23/2010 Stephan Kinsella

[Lightly edited transcript of speech given at the 2010 Annual Meeting of the Property and Freedom Society, June 6, 2010.]

In addition to defense, security, education, money and banking, scientific research, providing for the poor, space exploration, food and drug safety, roads and transportation, the definition of marriage, immigration and border control, unemployment insurance, and healthcare — all of which have been monopolized, co-opted, or corrupted by the state — the state also monopolizes dispute resolution, the court system, and the production of law, both by government courts and, primarily, by state legislation and rules promulgated by state agencies. And the state's legal system, and thus most aspects of economic life, is permeated by what is called intellectual-property law.

Intellectual-property law consists primarily of patent, copyright, trade-secret, and trademark law, and also more modern innovations such as semiconductor maskworks, databases, moral rights, boat hull designs, and reputation rights such as defamation, libel, and slander law.[1]

To take one example of a modern patent system, out of all the patent systems of the roughly 200 countries in the world, consider the US patent system. US patents are granted by the United States Patent and Trademark Agency Office (the USPTO). It is an agency of the US Department of Commerce. It has about 10,000 employees; most of them are called patent examiners.

In 2008, about 485,000 patents were filed in the United States; about 185,000 were issued or granted or approved. As of the end of 2008, there were about 1.2 million patent applications pending for examination at the Patent Office.[2] There are about 2.5 million live US patents right now — patents that are enforced, that can be infringed. IBM, for example, one of the largest patent procurers, was awarded over 4,000 US patents in 2008. They hold about 40,000-50,000 live patents at present.

Patents are classified by group, class, and subclass. They're divided into four main groups: for instance, group number one is chemical and related arts, two is communications and radiant energy, and so on. There are about 1000 classes and several thousand sub- and sub-subclasses.

The PTO grants issued patents after reviewing patent applications filed by individuals and corporations. Corporations have invention-disclosure programs. They tell their engineers, "Submit an idea to us. We'll pay you $5,000."

A patent committee usually reviews these ideas and decides which ones to file. A patent attorney files the application. The cost is $10,000–$20,000, for example.

The end result is a patent that is issued after a couple years of what is called "prosecution" with the Patent Office. Prosecution is the going back and forth between the patent attorney and the USPTO. The end result is called a "red-ribbon copy." I brought one with me. I'm holding pure evil in my hands [*laughter*]. In fact, I'll pass this around if anyone wants to take a look. I just need it back because it's my employer's [*laughter*].

So that becomes part of a company's *patent portfolio*, which can be used to sue, to countersue, or to license for profit.

Now, what are the results of the patent system itself? The results are distorted research, protectionism, wealth transfers, and enrichment of the patent bar. Large companies, such as IBM, amass giant patent portfolios. And they license them — IBM, for example, makes hundreds of millions of dollars every year off of licensing.

It's also used for cross-licensing. Larger companies engage in cross-licensing agreements, which makes it difficult for smaller companies to enter; so this practice sets up barriers to entry.

Let me give some examples of some patents:[3]

- There's Amazon's *One Click* patent, which is a patent on clicking once to purchase something instead of twice. They used it to sue Barnes & Noble at the dawn of e-commerce.
- There was a company called Cendant that asserted Amazon had violated patent monopoly on *recommending books to customers*.
- There was an attempt by Dustin Stamper, who was President Bush's top economist, to get a patent on a system and method for a multistate tax analysis.
- Apple has filed a patent application for digital karaoke.
- Facebook was sued by someone who had a patent on a "system for creating a community of users with common interests to interact in."
- There was an absurdly broad patent issued to a company called Blackboard for the common use of technology that is employed in education and in online encyclopedias.
- Carfax has a patent on "a method for perusing selected vehicles having a clean title history."
- And then there is the fun patent covering swinging on the swing *sideways* [*laughter*]. That's a method patent.

Another result of the patent system is patent lawsuits. Many patents are granted that are ridiculous, such as some of the ones I read. But the problem with the patent system is not ridiculous patents. It's valid patents. They can be used for suing.

Kodak, for example, first sued Apple for violating their imaging patents. Now Apple countersues Kodak, before the US International Trade Commission, over its digital-camera technology.

There are some Android-related patent lawsuits going on right now in the smart-phone industry. Apple suing HTC suing Kodak suing Nokia. This is just an example — this is the patent battle in the smart-phone industry right now. All these suits went back and forth. This is what these companies deal with and engage in.

HTC signed an agreement with Microsoft providing rights to use Microsoft software on mobile phones, related to one of their patents. What happened was Microsoft got a royalty on every Android phone that is made by HTC. Microsoft might prefer to make its own phones, but if they can get a royalty from every Android phone sold, that's pretty good too.

This, right here, is called the "smart-phone nuclear war" in the patent industry. There are lawsuits going back and forth. One patent litigator was quoted as saying,

> We've seen this in the tech industry, with the LCD industry, and it goes all the way back to semiconductors. Patents aren't a barrier to entry so much as patent holders want people to pay. If you can tax your competitors with your royalty then you have set yourself up for profits. In a low-margin business, that's important.

Source: *New York Times*
Just for examples, here are some more recent patent suits:

- In a stent case, Boston Scientific agreed to pay Johnson & Johnson $1.7 billion to settle three patent cases.
- There was a $1.6 billion patent infringement verdict found in favor of Johnson & Johnson against Abbott.
- A $400 million settlement paid to Abbott by Medtronics, again regarding stents.
- Qualcomm has been enjoined against importing chips that help conserve power in cell phones.

- One New Jersey doctor was awarded $432 million against Boston Scientific as a "reasonable royalty" for infringing his "method and apparatus for managing macromolecular distribution."
- Even though the practice of saving seeds after a harvest to plant the next season is as old as farming itself, patents prevent farmers from saving their patented seeds.
- Apple was sued over a caller ID idea on the iPhone.
- Blackberry's manufacturer, RIM, was forced to pay $612 million after the patents of NTP were asserted against them and threatened to shut down the Blackberry.
- Microsoft was on the receiving end of a $1.5 billion jury verdict for infringing an mp3 patent held by Alcatel-Lucent.

It's also used in connection with IPOs (initial private offerings) of companies. Quite often one competitor will hold on to its patent, wait until their competitor files their S-1 to go public, and then they'll hit them with a patent lawsuit because this has to be disclosed in the IPO, and it can damage or scuttle the IPO.

For example, a company called Optium went public in late 2006 and the company Emcore sued them for patent infringement as soon as they filed their S-1.[4]

In another very recent case, which is ongoing now, a company called Neophotonics, which has recently filed its S-1 — they're not public yet — has been sued along with three other defendants by Finisar for patent infringement. What's interesting about this is that one of the patent claims — I've reviewed these — that is being asserted covers "a system and method for protecting eye safety during operation of a fiber optic transceiver." So, in other words, so that the engineers working on the lasers don't get their eyes burned, there's an alarm set if you have too much power going to it. It's something that has been used for years; it's a common idea. Patents are supposed to be "nonobvious," by the way. This is not.

And, of course, each of these defendants has countersued Finisar with their own patents. Now you have literally millions of dollars being spent by these five companies on legal fees because of this patent suit.

Now what about copyright? Copyright is also bad. It lasts a lot longer than patents, usually over a hundred years. It can even lead quite literally to censorship and thought control.

- There is a case where the seminal German silent film *Nosferatu* was deemed a derivative work of *Dracula* and the courts ordered all copies destroyed.
- Shortly after the death of the author J.D. Salinger, author of *Catcher in the Rye* — courts banned the publication of a novel called *Sixty Years Later: Coming Through the Rye*. Banned it. Based on copyright.
- Some get lucky though, and they say the work was a fair use. There was a parody called *The Wind Done Gone* which is an unauthorized rewrite of *Gone With the Wind* from another character's point of view.
- In another interesting case, fantasy author Mary Zimmer Bradley, who actually *encouraged* and allowed a lot of her fans to write fantasy without suing them for copyright infringement, came across an idea that fans had submitted to her that was similar to one she was using herself in a novel she was writing. So she wrote to the fan to tell her what was going on and even offered to pay her a little bit of money and to acknowledge in the book that they had come up with the same idea. But the fan replied she wanted full coauthorship of the book *and* half the money or she would sue. So Mary Zimmer Bradley scrapped the novel rather than risk a lawsuit; it was never written.
- Sometimes lawyers who send cease and desist letters claim copyright in the letter and threaten to sue you if you republish it on the web [*laughter*].
- The Australian band, Men at Work*,* was recently found guilty of plagiarizing "Kookaburra Bird" on their 1980 CD, *Down Under*. The judge held that a flute rift in *Down Under* bore an unmistakable resemblance to "Kookaburra Bird Sits in the Old Gum Tree," a folk tune taught to Australian school children for 75 years [*laughter*].
- RIAA wants a law passed that would impose a penalty of $1.5 million per CD copied.
- Ford Motor Company has attacked Ford enthusiasts, claiming that they hold those rights to any image of a Ford vehicle, even if it is a picture that you took of your own car.
- The NFL has prohibited churches from holding Superbowl parties on TV sets larger than 55 inches.
- And, of course, there are recent extensions of copyright such as the Digital Millennium Copyright Act, or DMCA, which criminalizes even the mere possession of technology that can be used to circumvent digital-protection systems. But I say DVD ripping devices don't steal; people do.

Trademark is also bad:

- Subway has claimed a trademark on the term "foot-long" to describe their sandwich. They threatened a hotdog seller who has been selling foot-longs for decades.
- A court has said the University of Southern California is the only one who can use "USC." Sorry, University of South Carolina [*laughter*].
- "Who dat?" The National Football League has stewed over this expression being put on t-shirts.
- There are modern extensions of trademark law that are even worse, such as rights against cybersquatting and rights against trademark dilution; the latter don't even require consumer confusion, which is required in normal trade lawsuits.

Even trade secret, which is the least objectionable of the four main types of IP, has been corrupted by the state. For example, when information about the then-secret iPad was leaked back in January of this year, Apple's law firm used trade-secret law to threaten new publications such as Valleywag and Gawker to make them stop publishing information, even though Valleywag and Gawker had never signed a non-disclosure agreement or contract with Apple.

Now, Western IP laws are bad enough, but the US-led Western countries have long tried to extend the reach of their mercantilist IP laws to countries like Russia, India, and China. They use the World Trade Organization, the WTO, to twist the arms of other countries.

And now we have the dreaded ACTA, the Anti-Counterfeiting Trade Agreement, coming down the pipe and I suspect it will be ratified. It is a worldwide treaty that will impose draconian Western-style patent and copyright protection, including DMCA-type anticircumvention rules, on every country. It will also provide the legal authority for surveillance of Internet file transfers and searches of personal property. As science-fiction author Corey Doctorow notes, "ACTA is a radical re-writing of the world's internet laws, taking place in secret without public input."[5]

Now these IP laws are, quite obviously, unlibertarian. They're nothing but grants of privilege by the state, leading to protectionism, market distortion and inefficiencies, wealth transfer from consumers and smaller companies to big media, big pharma, and so on, with the state taking a handsome handling charge. In our statist world we have taxation, we have regulation, we have incarceration for victimless crimes, and we have war. So the existence of IP law should come as no surprise. The question is not why we have IP law. We have IP law because we have the state. The question is *why in the world would any libertarian support IP*? But some of them do support it.

There are, of course, utilitarian arguments in favor of IP law, but these are hardly worth mentioning. First of all, there is no evidence at all that IP creates net worth. There are incoherent standards even in determining this. It leads to crazy schemes, advocated even by some libertarians and people such as Joseph Stiglitz and *Forbes* who openly endorse the idea of, say, a $30 or $80 billion tax-funded medical innovation prize fund or innovation contracts, either to replace the patent system or supplement it. On a debate on Cato's website, one Dean Baker argued that copyright and patent should be abolished and replaced with such a tax-funded innovation prize.[6]

Cato's Tim Lee opposed this idea. He says,

> I can't agree with Baker that all copyright and patent protection monopolies are illegitimate. Copyright and patent protections have existed since the beginning of the Republic and, *if properly calibrated*, they can promote the progress of science and the useful arts. Like any government intervention in the economy, they need to be carefully constrained, but if they are so limited, they can be a positive force in the American economy.

That's really a relief. We just need to "calibrate" [*laughter*].

Galambos believed that man has property rights in his own life, which he called "primordial property," and thus in all nonprocreative derivatives of his life. (You don't own your children, I guess.) The first derivatives of a man's life are his thoughts and ideas, according to Galambos. These are primary property. Since action is based on primary property, you own your actions too. This is *liberty*.

Second derivatives, such as land, televisions, and other tangible goods, are *produced* by ideas and actions. So, in other words, in Galambos's hierarchy, primary property is your thoughts, ideas, and actions. Secondary property are lowly things like this.[7]

Now, sometimes I start a speech with a joke. I didn't do so today. I couldn't think of a good IP lawyer joke. But I have one now. Ayn Rand incredibly said, "Patents are the heart and core of property rights."

That's a joke [*laughter*].

It's so positivist, for Ayn Rand. I suppose we had no property rights in existence until 1790, the first Patent Act, or perhaps in 1624 with England's Statute of Monopolies. (By the way, many libertarian advocates of the patent system deny that patents are monopolies even though they originated in the Statute of Monopolies.)

Statists used to be much more honest. We used to have the Department of War. In 1949, it was changed to the Department of Defense. Advocates of patents used to call them monopolies. Now they deny that they're monopolies.

Recently, I was relistening to a 1991 lecture by an Objectivist IP attorney, Murray Franck. I'm going to play a little bit here:

> In the words of Forvald Solberg, a former register of copyrights, "When we come to weigh the rights of the several sorts of property which can be held by man, and in this judgment take into consideration only the absolute question of justice, leaving out the limitations of expediency and prejudice, it will be clearly seen that intellectual property is after all the *only* absolute possession in the world. The man who brings out of the nothingness some child of his thoughts has rights therein which cannot belong to any other sort of property. Land or chattels are pre-existing in some form, and the rights therein are limited in many ways, and are held in the great service of the world, but the inventor of a book or other contrivance of thought holds his property, as a god holds it, by right of creation."

So this is how the Objectivists look at it. We're gods. We create things and we own these things that we create. In fact, Franck recounts that when he met Ayn Rand, and she learned he was an IP lawyer, she said, "Intellectual property is the most important field of law."

Now what about the fact that IP is necessarily based upon legislation? No problem, according to Murray Franck.

> Just as the common law evolved to recognize trespass by barbecue smoke, you would have evolved to recognize property in intellectual creations. But even if it could somehow be established that common law would never recognize IP rights, this would not be an argument against these rights. The common law often required legislation to correct it; for example, recognizing the rights of women. Indeed, it is a myth that the common law evolved to reflect and that legislation is always in conflict with the requirements of human nature. The same minds that employ induction and deduction to decide a particular case, as judges in making the common law, can employ those methods to legislate universal law.[8]

Some of the arguments for IP made by defenders of the system are so unbelievable they seem like they must be made in jest. For example, in a recent online debate, antipatent philosopher and ontologist — if there is such a term — David Koepsell, had mentioned that in the 19th and early 20th centuries two of the most innovative countries on the earth, the Netherlands and Switzerland, had no patent systems at all.

In response, a patent attorney who was defending the system, says, "Thank goodness the Swiss did have a patent office. That is where Albert Einstein worked and, during his time as a patent examiner, came up with his Theory of Relativity."[9]

Free-market economist William Shughart, a senior fellow with The Independent Institute, recently argued, "It is true that other means exist for creative people to profit from their effort. In the case of copyright, authors can charge fees for reading their works to paying audiences. Charles Dickens did this, but his heavy work schedule of public performances in the United States, where his works were not protected by copyright, arguably contributed to his untimely death."[10]

So, in other words, we need IP law because Charles Dickens died early.

Support for IP rights even leads some libertarian thinkers, such as Cato's Doug Bandow, Richard Epstein, and Michael Kraus to oppose free trade and, in particular, to oppose reimportation because this permits consumers to partially evade the patent-monopoly tax.[11]

Now what is the reason these libertarians make this mistake? I think it can be traced to three big causes: *Locke*, *America*, and *Ayn Rand* (plus two minor causes: legislation and utilitarianism.)

John Locke unnecessarily assumed the *ownership of labor* in his theory of homesteading. You don't need to assume that we own our labor to have the best claim to a homesteaded resource. You have the best claim to a homesteaded resource because you have a better connection to it, because you were the first user of it. There is no need to assume the ownership of labor, but this assumption has transformed into the Randian and other libertarian idea that we own our creation because we mix our labor with creations such as intellectual ideas as well.

America is also part of the problem. America instituted a patent system on utilitarian grounds in the beginning. And since the modern libertarian movement arose in America, and because early America is naively seen as a total libertarian paradise, state patent and copyright laws get a pass. And this is compounded with the influence of Ayn Rand who, in her desire to adopt the values of the superior United States over the communist Russia that she escaped and despised, she became too pro-American. I've even been told that Murray Rothbard's correspondence indicates that around 1954 someone convinced Ayn Rand to oppose eminent domain, which is the state's ability to take property. She had previously favored eminent domain because the Constitution endorses it. So, she is giving too much credence to the American Constitution.

I think there are two other contributing causes related to the others. One is the rise of legislation as a means of law-making. Recall Objectivist Murray Franck's approval of legislation as a means of making law. But, of course, legislation requires a state.

The second contributing cause is rise of utilitarianism and wealth mechanization as justifications for law. Now the founders may be forgiven for their hubris and assumptions, but not today's econometricians. The evidence is *against* them, but like the left-liberal do-gooders of Thomas Sowell's *The Vision of the Anointed* — the "Humanitarians with a Guillotine" — they persevere in claiming IP law generates net wealth without a shred of proof. Some claim that the success of the United States shows that IP law generates wealth. They forget that correlation is not causation. If they're right, we can also attribute Western prosperity to the income tax, antitrust laws, and war. So I guess we should export these policies to other nations, too. Oh, wait.

At least Jefferson had the decency not to pretend that the temporary, artificial, state-granted patent and copyright privileges were natural rights, unlike modern pro-IP libertarians.[12]

So what is the right way to view this?

Let's think about property rights in the context of the nature of human action.[13]

There are various ways to explain what is wrong with IP. You can explain that IP requires a state and legislation, which are both necessarily illegitimate. You can point out that there is no proof that IP generates net wealth. You can explain that IP grants rights in nonscarce things, which are necessarily enforced with physical force against tangible property, thus supplanting already-existing rights and scarce resources.

Another way, I believe, to seeing the error in treating information, ideas, and patterns as ownable property is to consider IP in the context of a structure of human action. Mises explains in *The Ultimate Foundation of Economic Science* that "To act means: to strive after ends, that is, to choose a goal and to resort to means in order to attain the goal sought."[14] Obviously, the means have to be causally efficacious to obtain the desired end. So as Mises has observed, if there was not causality, men "could not contrive any means for the attainment of any ends." Knowledge and information, of course, play a key role in action as well. They guide action. The actor is guided by his knowledge and information. Bad information results in unsuccessful action or loss. As Mises puts it, "Action is purposive conduct. It is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and *guided by ideas concerning the suitability or unsuitability of definite means*" (emphasis added).

So all action employs means and all action is guided by knowledge and information.[15] As Mises says, means are necessarily scarce resources. He said, "Means are necessarily always limited, i.e. scarce, with regard to the services for which man wants to use them."

So, in other words, to have successful action, you have to have knowledge about causal laws to know which means to employ. You have to have the ability to employ these means suitable for the goal that you are seeking. So the scarce resources that you need to use as means need to be owned by you. This is why there are property rights in these things. The nature of a scarce resource is that use by one person excludes use by another; but you don't need to own the information that guides your action in order to have successful action. For example, two people can make a cake at the same time. They each have to have their own ingredients, but they can use the same recipe at the same time.

Material progress is made over time in human society because information is not scarce. It can be infinitely multiplied, learned, taught, and built on. The more patterns, recipes, causal laws that are known add to the stock of knowledge available to all actors and act as a greater and greater wealth multiplier by allowing actors to engage in ever-more efficient and productive actions. It is a good thing that ideas are infinitely reproducible, not a bad thing. There is no need to impose artificial scarcity on these things to make them more like scarce resources, which, unfortunately, are scarce. As Bastiat said,

> All innovation goes through three stages. One possesses unique knowledge and profits from it. Others imitate and share profits. Finally, the knowledge is widely shared and no longer profitable on its own which thereby inspires new knowledge.[16]

What patents do is artificially prolong the first stage at the expense of the others. For example, a recent news story reports that Acer is the latest PC maker to jump into the tablet PC market, which has been gaining increasing attention since Apple launched its iPad in January. With more than one million units sold so far, the iPad's success has sent other PC makers scrambling to come up with similar devices. This competition to make similar devices is not a bad thing, but IP advocates have to have mixed feelings about this imitation.

Granting copyrights to scarce resources, but not to ideas, is precisely what is needed to promote successful action as well as societal progress and prosperity. So we can see that an essential defect of IP is that it seeks to impede learning and the spread of ideas and knowledge. Honest (or naive) IP advocates even admit this. Recall that above I quoted the comment from William Shughart. He says, "To paraphrase the late economist John Robinson, patents and copyrights slow down the diffusion of new ideas for a reason, to assure there will be more new ideas to diffuse."[17]

So they admit this. By the way, Professor Hoppe realized this as far back as 1988. At a panel discussion on ethics with Hoppe, Rothbard, David Gordon, and Leland Yeager, there was the following exchange, and I'll conclude with it:

> AUDIENCE QUESTION: I have a question for Professor Hoppe. Does the idea of personal sovereignty extend to knowledge? Am I sovereign over my thoughts, ideas, and theories? …
>
> HOPPE: … in order to have a thought you must have property rights over your body. That doesn't imply that you own your thoughts. The *thoughts can be used by anybody who is capable of understanding them*.[18]

This article is a lightly edited transcript of "Ideas are Free: The Case Against Intellectual Property: or, How Libertarians Went Wrong," a speech given at the 2010 Annual Meeting of the Property and Freedom Society, June 6, 2010.

1. See Kinsella, *Against Intellectual Property.*
2. See US Patent Statistics Chart, Calendar Years 1963–2009.
3. For further details, see my blog post "The Patent, Copyright, Trademark, and Trade Secret Horror Files." That post also contains further details regarding the examples given below regarding patent lawsuits and abuses concerning copyright, trademark, and trade secret.
4. See this Optium 10-Q filed a short time later.
5. See my post "Intellectual Property Imperialism."
6. See my post "$30 Billion Taxfunded Innovation Contracts: The 'Progressive-Libertarian' Solution."
7. See my posts "Galambos and Other Nuts" and this post “Authors: Don't Make the Buddy Holly Mistake."
8. See my "Legislation and Law in a Free Society."
9. See my post "Shughart's Defense of IP."
10. See my post, "Shughart's Defense of IP."
11. See my post "Pilon on Patents."
12. See my post "Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and 'Rearranging'."
13. See Tucker and Kinsella, "Goods, Scarce and Nonscarce" and my post Intellectual Property and the Structure of Human Action.

14. See Kinsella and Tinsley, "Causation and Aggression."
15. See also Guido Hülsmann's "Knowledge, Judgment, and the Use of Property," p. 44.
16. See Jeff Tucker, “Apple the Monopolist” and Nicholas Snow, "The Three Stages of Invention."
17. See "Shughart's Defense of IP."
18. See my post “Owning Thoughts and Labor.”

6

Law and Intellectual Property in a Stateless Society

✣

I've written a large number of articles on intellectual property, or IP, over the years, starting with *Against Intellectual Property*, first published in 2001.[*] This chapter, originally intended for a symposium issue of the *Griffith Law Review* but withdrawn/rejected because of a dispute with the editors, was originally published in my journal *Libertarian Papers* in 2013. It was the most comprehensive article I'd written on IP since *AIP*.[†] It incorporates much of the material from that work and includes some additional material that I had published in the intervening decade or so. Chapter 15 contains additional arguments developed subsequently and complements this work and *AIP*. These two chapters, together, contain a good presentation of my current views and arguments related to IP, although I may someday write a new, comprehensive treatment of this topic from scratch, in a book tentatively entitled *Copy This Book: The Case for Abolishing Intellectual Property*.[‡]

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[*] *Journal of Libertarian Studies* 15, no. 2 (Spring 2001): 1–53. Hereinafter, *AIP*. In this chapter I will cite the 2008 edition of *AIP* (www.c4sif.org/aip). In *AIP* I thanked "Wendy McElroy and Gene Callahan for helpful comments on an earlier draft." My article "In Defense of Napster and Against the Second Homesteading Rule," *LewRockwell.com* (September 4, 2000) presented a summary version of the argument later elaborated in *AIP*. I thanked Gil Guillory for helpful comments on that piece.

[†] Stephan Kinsella, "Law and Intellectual Property in a Stateless Society," *Libertarian Papers* 5, no. 1 (2013): 1–44. The publication history is detailed at Kinsella, "Kinsella, 'Law and Intellectual Property in a Stateless Society,'" *C4SIF Blog* (March 1, 2013). The structure of the article is similar to the more concise "Intellectual Property and Libertarianism," *Mises Daily* (Nov. 17, 2009). The title is slightly misleading because the article was really about why IP is unjust, and had little to do with anarchy or stateless societies; the title and the slight emphasis on stateless societies in the text was intended to make the article fit the theme of the symposium issue it was intended for, which was "Law and Anarchy: Legal Order and the Idea of a Stateless Society." I've chosen to retain the original title here.

[‡] For those interested in reading my original *AIP*, I suggest instead the similar version "The Case Against Intellectual Property," in *Handbook of the Philosophical Foundations of Business Ethics* (Prof. Dr. Christoph Lütge, ed.; Springer, 2013) (chapter 68, in Part 18, "Property Rights: Material and Intellectual," Robert McGee, section ed.).

For other articles and blog posts related to IP, see Kinsella, "You Can't Own Ideas: Essays on Intellectual Property: A Skeletal E-book," *StephanKinsella.com* (2023); also: the *AIP* Supplementary Material linked at www.c4sif.org/aip; the Resources page at www.c4sif.org/resources; Kinsella, "A Selection of my Best Articles and Speeches on IP," *C4SIF Blog* (Nov. 30, 2015); and my six-lecture Mises Academy course on IP, available at Kinsella, "KOL172 | "Rethinking Intellectual Property: History, Theory, and Economics: Lecture 1: History and Law (Mises Academy, 2011)," *Kinsella on Liberty Podcast* (Feb. 14, 2015). For criticism of IP by other writers from a libertarian or free market perspective, see Kinsella, ed., "The Anti-IP Reader: Free Market Critiques of Intellectual Property: A Skeletal E-book," *StephanKinsella.com* (2023).

> a long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason.
>
> —Thomas Paine[1]

I. INTRODUCTION

It is widely recognized that the institutional protection of property rights was a necessary (though probably not sufficient)[2] condition for the radical prosperity experienced in the West since the advent of the industrial revolution. And property rights include so-called "intellectual property" (IP) rights which emerged in their modern form around the same time.[3] Or so we have been told. The idea that IP rights are a legitimate type of property right, and a necessary part of a free market economy, has been taken for granted since the dawn of modern patent and copyright approximately two centuries ago.

Despite the widespread assumption that IP is legitimate, even its proponents seem somewhat uneasy with it. Thus most of them favor limited terms for patent and copyright—about 17 years for the former, and usually over 100 years for the latter—unlike the potentially perpetual ownership of traditional forms of property.[4] And there is continual dissatisfaction with the state of

[1] Thomas Paine, "Introduction," *Common Sense* (1776).

[2] See Hans-Hermann Hoppe, "From the Malthusian Trap to the Industrial Revolution: An Explanation of Social Evolution," in *The Great Fiction: Property, Economy, Society, and the Politics of Decline*, Second Expanded Edition (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/tgf); see also *idem*, "PFP041 | Hans-Hermann Hoppe, From the Malthusian Trap to the Industrial Revolution: An Explanation of Social Evolution (PFS 2009)," *Property and Freedom Podcast* (Jan. 20, 2022; https://propertyandfreedom.org/pfp).

[3] In this chapter, IP refers primarily to patent and copyright unless the context indicates otherwise. For arguments against other forms of IP, such as trademark and trade secret, see *AIP*. Although defamation (libel and slander) is not usually considered a type of IP, I believe it should be, since arguments in favor of the "reputation rights" that this law protects are similar to those of other forms of IP, like trademark. See Kinsella, "Defamation as a Type of Intellectual Property," in Elvira Nica & Gheorghe H. Popescu, eds., *A Passion for Justice: Essays in Honor of Walter Block* (New York: Addleton Academic Publishers, forthcoming). For a criticism of defamation law as being incompatible with libertarian property rights principles, see Murray N. Rothbard, "Knowledge, True and False," in *The Ethics of Liberty* (New York: New York University Press, 1998; https://mises.org/library/knowledge-true-and-false); Walter E. Block, "The Slanderer and Libeler," in *Defending the Undefendable* (2018; https://mises.org/library/defending-undefendable).

[4] Yet some defenders of IP go so far as to support perpetual terms, such as Lysander Spooner, Andrew J. Galambos, some Randians (though not Rand herself), Robert Wenzel, Victor Yarros, possibly J. Neil Schulman, etc.

the law, its ambiguities and arbitrary standards, and with patent office efficiency and competence, or lack thereof. There are incessant calls for "reform," and for curbs on "misuse" or "abuse" of patent and copyright. But in these complaints and debates, it is almost always taken for granted that some form of copyright and patent are essential, even if reform is needed.

In recent years, however, increasing numbers of libertarians have begun to doubt the very legitimacy of IP.[5] In this chapter I argue that patent and copyright should be abolished entirely, not merely reformed.

As a preliminary matter, it is necessary to describe the libertarian view of property rights. As this discussion will make clear, IP rights such as patent and copyright are inconsistent with the private property order that would characterize a stateless, private-law society. I will follow with a discussion of what practices or laws might prevail in the absence of IP.

II. The Libertarian Framework[6]

A. Property, Rights, and Liberty

Libertarians tend to agree on a wide array of policies and principles. Nonetheless, it is not easy to find consensus on what libertarianism's defining characteristic is, or on what distinguishes it from other political theories and systems.

Various formulations abound. It is said that libertarianism is concerned with individual rights, property rights,[7] the free market, capitalism, freedom, liberty, justice, or the nonaggression principle. But are any of these ideas truly fundamental or foundational? "Capitalism" and "the free market," for example, describe the catallactic conditions that arise or are permitted in a libertarian

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See, e.g., Lysander Spooner, "A Letter to Scientists and Inventors, on the Science of Justice, and their Rights of Perpetual Property in their Discoveries and Inventions" and "The Law of Intellectual Property or an Essay on the Right of Authors and Inventors to a Perpetual Property in their Ideas," in Charles Shively, ed., *The Collected Works of Lysander Spooner*, vol. 3, reprint ed. (Weston, Mass.: M&S Press, 1971 [1855], http://www.lysanderspooner.org/works); discussion of Galambos in *AIP*; *idem*, "Transcript: Debate with Robert Wenzel on Intellectual Property," *C4SIF Blog* (April 11, 2022). Re Yarros, see Kinsella, "Benjamin Tucker and the Great Nineteenth Century IP Debates in *Liberty* Magazine," *C4SIF Blog* (July 11, 2022) and *idem*, "James L. Walker (Tak Kak), 'The Question of Copyright' (1891)," *C4SIF Blog* (July 28, 2022); "Conversation with Schulman about Logorights and Media-Carried Property" (ch. 17). See also Jeffrey A. Tucker, "Eternal Copyright," *C4SIF Blog* (Feb. 21, 2012); and Wendy McElroy, "Intellectual Property," in *The Debates of Liberty: An Overview of Individualist Anarchism, 1881-1908* (Lexington Books, 2002; https://perma.cc/ZQM2-82B9), reprinted without endnotes as "Copyright and Patent in Benjamin Tucker's Periodical," *Mises Daily* (July 28, 2010; https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical).

[5] See Kinsella, "The Death Throes of Pro-IP Libertarianism," *Mises Daily* (July 28, 2010); *idem*, "The Four Historical Phases of IP Abolitionism," *Mises Economics Blog* (April 13, 2011); *idem*, "The Origins of Libertarian IP Abolitionism," *Mises Economics Blog* (April 1, 2011); Kinsella, ed., "The Anti-IP Reader."

[6] The issues in this section are elaborated on in other chapters, e.g. "What Libertarianism Is" (ch. 2) and "How We Come to Own Ourselves" (ch. 4).

[7] As noted in "What Libertarianism Is" (ch. 2), n.1, the term "private" property rights is sometimes used by libertarians, yet property rights are necessarily public, in the sense that the borders or boundaries of property must be *publicly visible* so that nonowners can avoid trespass. For more on this aspect of property borders, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989], www.hanshoppe.com/tsc), pp. 167–68; "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability" (ch. 9), at n.38; *AIP*, pp. 30–31, 49; also Randy E. Barnett, "A Consent Theory of Contract," *Colum. L. Rev.* 86 (1986; http://www.randybarnett.com/pre-2000): 269–321, at 303.

society, but they do not encompass other aspects of libertarianism.[8] And individual rights, justice, and nonaggression collapse into property rights. As Murray Rothbard explained, individual rights are property rights.[9] And justice simply means giving someone his due, which depends on what his (property) rights are.[10]

The nonaggression principle is also dependent on property rights, since what aggression is depends on what our (property) rights are. If you hit me, it is aggression *because* I have a property right in my body. If I take from you the apple you possess, this is trespass—aggression—only *because* you own the apple. One cannot identify an act of aggression without implicitly assigning a corresponding property right to the victim. "Freedom" and "liberty" face difficulties similar to that of the concept of aggression, as indicated in the common saying "your freedom ends where my nose begins!"

So capitalism and the free market are too narrow, and justice, individual rights, liberty, freedom, and aggression all boil down to, or are defined in terms of, property rights.

What of property rights, then? Is this what differentiates libertarianism from other political philosophies—that we favor property rights, and all others do not? Surely such a claim is untenable. After all, a property right is simply the *exclusive right to control a scarce resource*. As Professor Yiannopoulos explains:

> *Property* may be defined as an *exclusive right to control an economic good*…; it is the name of a concept that refers to the rights and obligations, privileges and restrictions that govern the relations of man with respect to *things of value*. People everywhere and at all times desire the possession of things that are necessary for survival or valuable by cultural definition and which, as a result of the demand placed upon them, *become scarce*. Laws enforced by organized society control the competition for, and guarantee the enjoyment of, these desired things. What is guaranteed to be one's own is property… [Property rights] *confer a direct and immediate authority over a thing*.[11]

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[8] "Catallactics" is a term used by the Austrian economist Ludwig von Mises to refer to the economics of an advanced free market system which employs money prices and entrepreneurial calculation, as opposed to a barter or Crusoe economy. See the Wikipedia entry on "Catallactics" at https://en.wikipedia.org/wiki/Catallactics and the Introduction *et pass.* in Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar's ed. (Auburn, Ala.: Mises Institute, 1998; https://mises.org/library/human-action-0).

[9] Murray N. Rothbard, "Human Rights' as Property Rights," in *The Ethics of Liberty* (http://mises.org/rothbard/ethics/fifteen.asp); *idem*, *For A New Liberty*, 2nd ed. (Auburn, Ala.: Mises Institute, 2006; https://mises.org/library/new-liberty-libertarian-manifesto), pp. 42 *et pass.*

[10] "Justice is the constant and perpetual wish to render every one his due… The maxims of law are these: to live honestly, to hurt no one, to give every one his due." J.A.C. Thomas, ed., trans., *The Institutes of Justinian: Text, Translation, and Commentary* (Amsterdam: North-Holland Publishing Company, 1975). See also Thomas Aquinas, *Summa Theologica*, I–II, Q 64, art 2, in Anton C. Pegis, ed., *Basic Writings of St. Thomas Aquinas* (New York: Random House, 1945), 2: 491 ("the act of justice is to render what is due"), quoted in Tom Bethell, *The Noblest Triumph: Property and Prosperity through the Ages* (New York: St. Martin's Griffin, 1998), p. 161. See also Thomas Aquinas, *Summa Theologica* (New Advent, https://www.newadvent.org/summa), *Secunda Secundæ Partis*, Question 58, arts. 1, 11.

[11] A.N. Yiannopoulos, *Louisiana Civil Law Treatise, Property* (West Group, 4th ed. 2001), §§ 1, 2 (first emphasis in original; remaining emphasis added). See also Louisiana Civil Code (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), art. 477 ("Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law"). See also "What Libertarianism Is" (ch. 2), at n.5 *et pass.*

In other words, property rights specify which persons own—that is, have the right to control—various scarce resources in a given region or jurisdiction. Yet every political theory advances *some* theory of property. None of the various forms of socialism deny property rights *per se*; each system will specify an owner for each contestable scarce resource.[12] If the state nationalizes an industry, it is asserting ownership of those means of production. If the state taxes you, it is implicitly asserting ownership of the funds taken. If my land is transferred to a private developer by eminent domain statutes, the developer is now the owner. If the law allows a recipient of racial discrimination to sue his employer for a sum of money, he is the owner of the money.[13]

Protection of and respect for property rights is thus not unique to libertarianism. What *is* distinctive about libertarianism is its *particular property assignment rules*: that is, the rules that determine who owns each contestable resource.

B. Property in Bodies

As indicated above, every legal system assigns a particular owner to each scarce resource. These resources obviously include natural resources such as land, fruits on trees, and so on. Things found in nature are not the only scarce resources, however. Each human actor has, controls, and is identified and associated with a unique human body, which is also a scarce resource.[14] Both human bodies and nonhuman, scarce resources are desired for use as *means* by actors in the pursuit of various goals.[15]

Accordingly, any political theory or system must assign ownership or control rights in human bodies as well as in external things.[16] However, there are relevant differences between these

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[12] For a systematic analysis of various forms of socialism, such as Socialism Russian-Style, Socialism Social-Democratic Style, the Socialism of Conservatism, and the Socialism of Social Engineering, see Hoppe, *A Theory of Socialism and Capitalism*, chaps. 3–6. Recognizing the common elements of various forms of socialism and their distinction from libertarianism (capitalism), Hoppe incisively defines socialism as "an institutionalized interference with or aggression against private property and private property claims." Ibid., p. 2. See also the quote from Hoppe in note 18, below.

[13] Even the private thief, by taking your watch, is implicitly acting on the maxim that *he* has the right to control it—that he is its owner. He does not deny property rights—he simply differs from the libertarian as to *who the owner is*. In fact, as Adam Smith observed: "If there is any society among robbers and murderers, they must at least, according to the trite observation, abstain from robbing and murdering one another." Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Fund, 1982 [1759]), II.II.3.2.

[14] As Hoppe observes, even in a paradise with a superabundance of goods,

> [E]very person's physical body would still be a scarce resource and thus the need for the establishment of property rules, i.e., rules regarding people's bodies, would exist. One is not used to thinking of one's own body in terms of a scarce good, but in imagining the most ideal situation one could ever hope for, the Garden of Eden, it becomes possible to realize that one's body is indeed the prototype of a scarce good for the use of which property rights, i.e., rights of exclusive ownership, somehow have to be established, in order to avoid clashes.

Hoppe, *A Theory of Socialism and Capitalism*, 19. See also "Causation and Aggression" (ch. 8) (discussing the use of other humans' bodies as means). See also "How We Come to Own Ourselves" (ch. 4).

[15] This analysis draws on Ludwig von Mises's "praxeological" view of the nature of human action, in which actors or agents employ scarce means to causally achieve desired ends. See the section "The Structure of Human Action: Means and Ends" in Kinsella, "Intellectual Freedom and Learning versus Patent and Copyright," *Economic Notes* No. 113 (Libertarian Alliance, Jan. 18, 2011) and *idem*, "Ideas Are Free: The Case Against Intellectual Property," *Mises Daily* (Nov. 23, 2010). See also "*Against Intellectual Property* After Twenty Years" (ch. 15), Part IV.E.

[16] The term "thing" here is used as a synonym for scarce resources, including not only material objects but also human bodies. This usage draws on the that of the civil law in which the term "things" refers to "material objects" that

two types of scarce resources that justify treating them separately.

Let us consider first the libertarian property assignment rules with respect to human bodies, and the corresponding notion of aggression as it pertains to bodies. Libertarians often vigorously assert the "nonaggression principle." As Ayn Rand said, "So long as men desire to live together, no man may *initiate*—do you hear me? No man may *start*—the use of physical force against others."[17] Or, as Rothbard put it:

> The libertarian creed rests upon one central principle, or "axiom": that no man or group of men may aggress against the person or property of anyone else. This may be called the "nonaggression axiom." "Aggression" is defined as the initiation of the use or threat of physical violence against the person or property of anyone else. Aggression is therefore synonymous with invasion.[18]

In other words, at least when it comes to human bodies, libertarians maintain that the only way to violate rights is by *initiating* force—that is, by committing aggression. And, correspondingly, that force used *in response* to aggression—such as defensive, restitutive, or retaliatory/retributive force—is justified.[19]

Now in the case of the body, it is clear what aggression is: invading the borders of someone's body, commonly called battery, or, more generally, using the body of another without his or her consent.[20] The very notion of interpersonal aggression presupposes property rights in bodies—more particularly, that each person is, at least *prima facie*, the owner of his own body.[21] And the

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are "susceptible of appropriation"—that is, to "the objects of patrimonial rights." *See* Yiannopoulos, *Louisiana Civil Law Treatise, Property*, §§ 12, 201; Louisiana Civil Code, arts. 448, 453, *et pass*. For more discussion of the concept of "things," see "What Libertarianism Is" (ch. 2), at n.5.

[17] Ayn Rand, "Galt's Speech," in *For the New Intellectual*, quoted in "Physical Force" entry, *The Ayn Rand Lexicon: Objectivism from A to Z*, Harry Binswanger, ed. (New York: New American Library, 1986; https://perma.cc/L4YA-96CC). Ironically, Objectivists often excoriate libertarians for having a "context-less" concept of aggression—that is, that "aggression" or "rights" are meaningless unless these concepts are embedded in the larger philosophical framework of Objectivism—despite Galt's straightforward definition of aggression as the initiation of physical force against others. However, there are distinctions to be drawn between property rights in an actor's body, and in external resources homesteaded by that actor or some previous owner. See, on this, Kinsella, "The Relation between the Non-aggression Principle and Property Rights: a response to Division by Zer0," *Mises Economics Blog* (Oct. 4, 2011). See also the related discussion in "What Libertarianism Is" (ch. 2), at n.13.

[18] Rothbard, *For a New Liberty*, 23. See also *idem*, *The Ethics of Liberty*: "The fundamental axiom of libertarian theory is that each person must be a self-owner, and that no one has the right to interfere with such self-ownership" (p. 60), and "What…aggressive violence means is that one man invades the property of another without the victim's consent. The invasion may be against a man's property in his person (as in the case of bodily assault), or against his property in tangible goods (as in robbery or trespass)" (p. 45). Hoppe writes:

> If … an action is performed that uninvitedly invades or changes the physical integrity of another person's body and puts this body to a use that is not to this very person's own liking, this action … is called *aggression*…. Next to the concept of action, *property* is the most basic category in the social sciences. As a matter of fact, all other concepts to be introduced in this chapter—aggression, contract, capitalism and socialism—are definable in terms of property: *aggression* being aggression against property, *contract* being a nonaggressive relationship between property owners, *socialism* being an institutionalized policy of aggression against property, and *capitalism* being an institutionalized policy of the recognition of property and contractualism.

Hoppe, *A Theory of Socialism and Capitalism*, 22–23, 18.

[19] See "Punishment and Proportionality" (ch. 5).

[20] The following terms and formulations may be considered as roughly synonymous, depending on context: aggression; initiation of force; trespass; invasion; unconsented to (or uninvited) change in the physical integrity (or use, control or possession) of another person's body or property.

[21] "*Prima facie*," because some rights in one's body are arguably forfeited or lost in certain circumstances, e.g.,

notion of self-ownership corresponds to the non-aggression principle. Both imply each other, or are alternate ways of stating the same basic idea: that no person may use another's body without his or her consent; to do so is unjustified and impermissible aggression.

Non-libertarian political philosophies do not accept the libertarian self-ownership principle. According to them, each person has *some* limited rights in his own body, but not complete or exclusive rights. Society—or the state, purporting to be society's agent—has certain rights in each citizen's body, too. The state may limit or override the individual's control over his own body. This partial slavery is implicit in state actions and laws such as taxation, conscription, drug prohibitions, and other regulations and laws.

The libertarian says that each person is the *full owner* of his body: he has the right to control his body, to decide whether or not he ingests narcotics, joins an army, and so on. Others, however, maintain that the state, or society, is at least a partial owner of the bodies of those subject to such laws—or even a nearly complete owner in the case of conscriptees or nonaggressor "criminals" incarcerated for life, or those killed by government bombs. Libertarians believe in *self*-ownership. Non-libertarians—statists—of all stripes advocate some form of slavery. This is virtually implicit in the nature of the state as an agency that asserts the right to be "the ultimate arbiter in every case of conflict, including conflicts involving itself, [and that] allows no appeal above and beyond itself."[22] This arrangement permits the state to override individuals' self-ownership rights—to, in effect, become their master or overlord.

As an illustration, consider this exchange between a communist party official and a farmer in China in 1978, when farmers were prohibited from private ownership of their crop yields: "At one meeting with communist party officials, a farmer asked: 'What about the teeth in my head? Do I own those?' Answer: No. Your teeth belong to the collective."[23]

Libertarians believe the farmer should own his teeth, his body, his home, his farm, and his crop yields.

C. Self-Ownership and Conflict-Avoidance

There is always the possibility of conflict over contestable (scarce, conflictable)[24] resources.

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when one commits a crime, thus authorizing the victim to at least use defensive force against the body of the aggressor (implying the aggressor is to that extent *not* the owner of his body). For more on this see "What Libertarianism Is" (ch. 2), at n.17; "How We Come to Own Ourselves" (ch. 4); "A Libertarian Theory of Contract" (ch. 9); "Inalienability and Punishment: A Reply to George Smith" (ch. 10).

[22] See Hans-Hermann Hoppe, "The Idea of a Private Law Society," *Mises Daily* (July 28, 2006; https://mises.org/library/idea-private-law-society):

> Conventionally, the state is defined as an agency that possesses two unique characteristics. First, the state is an agency that exercises a territorial monopoly of ultimate decision-making. That is, it is the ultimate arbiter in every case of conflict, including conflicts involving itself, and it allows no appeal above and beyond itself. Furthermore, the state is an agency that exercises a territorial monopoly of taxation. That is, it is an agency that unilaterally fixes the price private citizens must pay for its provision of law and order.

See also Hoppe's definition of the state in note 52, below.

[23] David Kestenbaum & Jacob Goldstein, "The Secret Document That Transformed China," NPR's *Planet Money* blog (Jan. 20, 2012; https://perma.cc/C4SP-XSC7).

[24] On the term "conflictable," see See "*Against Intellectual Property* After Twenty Years" (ch. 15), text at n.29 *et pass*.; Kinsella, "On Conflictability and Conflictable Resources," *StephanKinsella.com* (Jan. 31, 2022); see also "What Libertarianism Is" (ch. 2), n.5; "How We Come to Own Ourselves" (ch. 4), text at n.10; "A Libertarian Theory of

This is in the very nature of scarce, or rivalrous, resources. By assigning an owner to each resource, the legal or property rights system establishes objective, publicly visible or discernible boundaries or borders that nonowners can avoid. This makes conflict-free, productive, cooperative use of resources possible. This is true of human bodies as well as of external objects.[25] If we seek rules that permit peaceful, productive, and conflict free use of our very bodies, some rules allocating body ownership must be established. These basic values, or *grundnorms*—peace, conflict-avoidance, prosperity—and related ones such as justice, cooperation, and civilization, are the reason that libertarians, indeed any civilized person who adopts these basic values, seek property assignment rules in the first place.[26] We prefer society and civilization to mayhem and fighting and violence. Libertarians believe that self-ownership (and other property acquisition rules discussed further below) is the only property assignment rule compatible with these *grundorms*; it is implied by them.

As noted above, the libertarian view is that the appropriate body-ownership rule is that each person is, *prima facie*, a self-owner: each person owns his own body. It might be argued, however, that *any* property assignment rule would suffice to permit conflict-free use of resources, that the libertarian self-ownership rule is not necessary. As long as everyone knows who owns a given resource—even if it is a king or tyrant—then people can avoid conflict by respecting existing property boundaries. In the case of bodies, this would mean some form of slavery, where some people are owned partially or completely by others.[27] Whether a person *A* is a self-owner, or owned

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Punishment and Rights" (ch. 5), at n.62; "Dialogical Arguments for Libertarian Rights" (ch. 6), at n.6; "Causation and Aggression" (ch. 8), n.19.

[25] On the importance of the concept of scarcity and the possibility of conflict for the emergence of property rules, see Hoppe, *A Theory of Socialism and Capitalism*, 160; and the discussion thereof in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas; or, Why the Very Idea of 'Ownership' Implies that only Libertarian Principles are Justifiable," *Mises Economics Blog* (Aug. 15, 2007).

[26] "Grundnorm" was legal philosopher Hans Kelsen's term for the hypothetical basic norm or rule that serves as the basis or ultimate source for the legitimacy of a legal system. See Hans Kelsen, *General Theory of Law and State*, Anders Wedberg, trans. (Cambridge, Mass.: Harvard University Press, 1949). I employ this term to refer to the fundamental norms presupposed by civilized people, e.g., in argumentative discourse, which in turn imply libertarian political norms.

That the libertarian *grundnorms* are, in fact, necessarily presupposed by all civilized people to the extent they are civilized—during argumentative justification, that is—is shown by Hoppe in his argumentation-ethics defense of libertarian rights. On this, see Hoppe, *A Theory of Socialism and Capitalism*, chap. 7; "What Libertarianism Is" (ch. 2), at n.2; "Dialogical Arguments for Libertarian Rights" (ch. 6); "Defending Argumentation Ethics" (ch. 7).

For discussion of why people (to one extent or the other) *do* value these underlying norms, see Kinsella, "The Division of Labor as the Source of Grundnorms and Rights," *Mises Economics Blog* (April 24, 2009), and *idem*, "Empathy and the Source of Rights," *Mises Economics Blog* (Sept. 6, 2006). See also "Punishment and Proportionality" (ch. 5), at Part I and IV.G:

> Civilized people are also concerned about *justifying* punishment. They want to punish, but they also want to know that such punishment is justified. They want to be able to punish legitimately …. Theories of punishment are concerned with justifying punishment, with offering decent people who are reluctant to act immorally a reason why they may punish others. This is useful, of course, for offering moral people guidance and assurance that they may properly deal with those who seek to harm them.

[27] As Rothbard argues, there are only two alternatives to self-ownership: either

> 1. a certain class of people, A, have the right to own another class, B; or
>
> 2. everyone has the right to own his equal quota share of everyone else.
>
> The first alternative implies that, while class A deserves the rights of being human, class B is in reality subhuman and, therefore, deserves no such rights. But since they are indeed human beings, the first alternative contradicts itself in denying natural human rights to one set of humans. Moreover, allowing class A to own

by some other person or group *B*, everyone can know who gets to decide who can use *A*'s body, and thus conflict can be avoided so long as everyone respects this property right allocation.

The libertarian view is that only its particular property assignment rule—*self*-ownership, as opposed to *other*-ownership (slavery)—fulfills the conflict-avoidance role of property rights. This is so for several interrelated reasons.

First, as Professor Hoppe has argued, the assignment of ownership to a given resource must not be random, arbitrary, particularistic, or biased, if the property norm is to serve the function of conflict-avoidance.[28] This is because any possible norm designed to avoid conflict must be justified in the context of argumentation, in which participants put forth *reasons* in support of their proposed norms. The norms proposed in genuine argumentation claim universal acceptability, i.e. they must be universalizable. Reasons must be provided that can in principle be acceptable to both sides as grounded in the nature of things, not merely arbitrary or "particularistic" rules such as "I get to hit you but you do not get to hit me, because I am me and you are you." Such an arbitrary assertion fails to even attempt to justify the proposed norm. For another example, *B*'s claim that he owns his own body and also owns *A*'s body, while *A* does not get to own his own body, is an obviously particularistic claim that makes arbitrary distinctions between two otherwise-similar agents, where the distinction is not grounded in any objective difference between *A* and *B*. Such particularistic norms or reasons are not universalizable; that is, they are *not reasons at all*, and thus are contrary to

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> class B means that the former is allowed to exploit and, therefore, to live parasitically at the expense of the latter; but, as economics can tell us, this parasitism itself violates the basic economic requirement for human survival: production and exchange.
>
> The second alternative, which we might call "participatory communalism" or "communism," holds that every man should have the right to own his equal quota share of everyone else. If there are three billion people in the world, then everyone has the right to own one-three-billionth of every other person. In the first place, this ideal itself rests upon an absurdity—proclaiming that every man is entitled to own a part of everyone else and yet is not entitled to own himself. Second, we can picture the viability of such a world—a world in which no man is free to take any action whatever without prior approval or indeed command by everyone else in society. It should be clear that in this sort of "communist" world, *no one would be able to do anything, and the human race would quickly perish*.

Murray N. Rothbard, "Justice and Property Rights," in Samuel L. Blumenfeld, ed., *Property in a Humane Economy* by (LaSalle, Ill.: Open Court, 1974; https://mises.org/library/property-humane-economy), at 107–108 (emphasis added) (also published in Murray N. Rothbard, *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/economic-controversies)). A similar version of this article under the same title was published in Rothbard, *Egalitarianism as a Revolt Against Nature and Other Essays*, second ed. (Auburn, Ala.: Mises Institute, 2000 [1974]; https://mises.org/library/egalitarianism-revolt-against-nature-and-other-essays). Interestingly, the former piece, published shortly after the latter piece, appended a crucial final paragraph distancing Rothbard from some of the more leftish implications from the latter piece. See Kinsella, Kinsella, "Justice and Property Rights: Rothbard on Scarcity, Property, Contracts…," *The Libertarian Standard* (Nov. 19, 2010) and *idem*, "Rothbard on the 'Original Sin' in Land Titles: 1969 vs. 1974," *StephanKinsella.com* (Nov. 5, 2014). See Hoppe's similar argument, discussed in "How We Come to Own Ourselves" (ch. 4), n.14, and similar comments in David Boaz, *The Libertarian Mind: A Manifesto for Freedom* (New York: Simon & Schuster, 2015), p. 140.

On Rothbard's critique of this "communist" approach to property rights assignment, see also "How We Come to Own Ourselves" (ch. 4), at n.14; "Defending Argumentation Ethics" (ch. 7), at n.31; and Kinsella, "Argumentation Ethics and Liberty: A Concise Guide," *Mises Daily* (May 27, 2011), at n. 1.

[28] See Hoppe, *A Theory of Socialism and Capitalism*, 157–65; "What Libertarianism Is" (ch. 2), at n.23; "How We Come to Own Ourselves" (ch. 4), n.15; "A Libertarian Theory of Punishment and Rights" (ch. 5), Parts III.C and III.D; "Dialogical Arguments for Libertarian Rights" (ch. 6), at n.43; "Defending Argumentation Ethics" (ch. 7); and Kinsella, "The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle," *StephanKinsella.com* (Nov. 10, 2011).

the purpose and nature of the activity of justificatory argumentation.

When assigning property title to a disputed or contested resource, such as *A*'s body, some objective link must be found between the claimant and the resource, so that ownership can be established that can be recognized publicly by others and also acceptable as fair and as grounded in the nature of things. As I wrote elsewhere:

> [T]here are only two fundamental alternatives for acquiring rights in unowned property: (1) by doing something with the property with which no one else had ever done before, such as the mixing of labor or homesteading; or (2) by mere verbal declaration or decree. The second alternative is arbitrary and cannot serve to avoid conflicts. Only the first alternative, that of Lockean homesteading, establishes an objective link between a particular person and a particular scarce resource; thus, no one can deny the Lockean right to homestead unowned resources.[29]

Thus, as Hoppe has argued, property title has to be assigned to one of competing claimants based on "the existence of an objective, intersubjectively ascertainable link between owner and the" resource claimed.[30] In the case of one's own body, it is the unique relationship between a person and his body—*his direct and immediate control* over his body, and the fact that, at least in some sense, a body is a given person and vice versa—that constitutes the objective link sufficient to give that person a claim to his body superior to those of typical third party claimants.

Moreover, any outsider who claims another's body cannot deny this objective link and its special status, since the outsider also necessarily presupposes this in his own case. This is so because, in seeking dominion over the other and in asserting ownership over the other's body, he has to presuppose his own ownership of his body. In so doing, the outsider demonstrates that he *does* place a certain significance on this link, even as (at the same time) he disregards the significance of the other's link to his own body.[31]

For these reasons, libertarianism recognizes that only the self-ownership rule is universalizable and compatible with the *grundnorms* of peace, cooperation, and conflict-avoidance. We recognize that each person is *prima facie* the owner of his own body because, by virtue of his unique link to and connection with his own body—his direct and immediate control over it—he has a better claim to it than anyone else.[32]

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[29] "Punishment and Proportionality" (ch. 5), Part III.F.

[30] Hoppe, *A Theory of Socialism and Capitalism*, 23.

[31] For elaboration on this point, see "How We Come To Own Ourselves" (ch. 4), the sections "Direct Control" and "Summary"; "Defending Argumentation Ethics" (ch. 7), text following n.36; Hoppe, *A Theory of Socialism and Capitalism*, chaps. 1, 2, and 7. See also Hoppe, "The Idea of a Private Law Society":

> Outside of the Garden of Eden, in the realm of all-around scarcity, the solution [to the problem of social order—the need for rules to permit conflicts to be avoided] is provided by four interrelated rules… First, every person is the proper owner of his own physical body. Who else, if not Crusoe, should be the owner of Crusoe's body? Otherwise, would it not constitute a case of slavery, and is slavery not unjust as well as uneconomical?

[32] See "How We Come to Own Ourselves" (ch. 4). Note that if an agent *A* has committed an act of aggression against *B*, as discussed in note 21, above, then *B*'s claim to be able to do things to *A*'s body without *A*'s permission *would* be making a distinction between *A* and *B*, but one grounded in the nature of things. As long as *A* and *B* have not attacked each other there is no *relevant* distinction between them, rendering any unequal allocation of rights between them (such as *B* can own or hit *A*, but not vice-versa) non-universalizable, particularistic, and unacceptable in genuine argumentation. But matters are different if *A* has forcefully invaded *B*'s body without *B*'s consent. In this case we could say *A* is estopped from denying *B*'s similar right to invade *A*'s body, that is, to retaliate or defend himself. For similar reasons, critics of Hoppe's argumentation ethics who claim that the very possibility of a master arguing

D. Property in External Things

Libertarians apply similar reasoning in the case of other scarce resources—namely, external objects in the world. One key difference between bodies and external resources—and the reason for their separate treatment—is that the latter were at one point *unowned*, and are *acquired by* human actors who are *already necessarily body-owners*. This difference implies a related distinction: as noted above, in the case of bodies, the idea of aggression being impermissible immediately implies (*prima facie*) self-ownership. In the case of external objects, however, we must identify who the owner of the object is before we can determine what uses of it constitute aggression.

As in the case with bodies, humans need to be able to use external objects as means to achieve various ends. Because these things are scarce (rivalrous), there is also the potential for conflict. And, as in the case with bodies, libertarians favor assigning property rights so as to permit the peaceful, conflict-free, productive use of such resources. Thus, as in the case with bodies, property is assigned to the person with the best claim or link to a given scarce resource—with the "best claim" standard based on the shared *grundnorms* of permitting peaceful, cooperative, conflict-free human interaction and use of resources.

Unlike human bodies, however, external objects are not parts of one's identity, are not directly controlled by one's will, and—significantly—they are *initially unowned*.[33] Here, the relevant objective link is *appropriation*—the transformation, possession or embordering of a previously unowned resource, i.e. Lockean homesteading.[34] Under this approach, the first (prior)

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with his slave invalidates argumentation ethics. In the case of chattel slavery, the master would be unable to argumentatively justify his use of force against the slave. He would be engaged in a contradiction: only peaceful, mutually-rights respecting norms can be argumentatively justified, because of the normatively peaceful presuppositions of argumentation itself; yet at the same time the master would be employing dominating force against the slave. The implicit logic of his stance in argumentation would condemn his enslaving actions. If he is consistent he would have to quit arguing and be a brute; or release the slave. But if the "master" is a victim who is employing some kind of force in response to aggression, such as retaliatory force, then in this case there would be no contradiction involved if the master/victim were to engage in discourse with his slave/aggressor, since he could point to a justification for treating the slave/aggressor as a slave. I discuss this point also in "Defending Argumentation Ethics" (ch. 7).

[33] For further discussion of the difference between bodies and things homesteaded for purposes of rights, see "A Libertarian Theory of Contract" (ch. 9), Part III.B; "What Libertarianism Is" (ch. 2), the sections "Property in Bodies" and "Property in External Things," and, in particular, n. 26; and "How We Come to Own Ourselves" (ch. 4).

[34] On the nature of appropriation of unowned scarce resources, see Hoppe's and de Jasay's ideas quoted and discussed in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas," and note 39, below, and accompanying text. In particular, see Hoppe, *A Theory of Socialism and Capitalism*, 24, 160–62, 169-71; and Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order* (London & New York: Routledge, 1997), pp. 158 *et seq*., 171 *et seq*., *et pass*. (De Jasay is also discussed extensively in "Book Review of Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order*" (ch. 20). See also "What Libertarianism Is" (ch. 2), at n.27.) De Jasay's argument presupposes the value of justice, efficiency, and order. Given these goals, he argues for three principles of politics: (1) if in doubt, abstain from political action (pp. 147 *et seq*.); (2) the feasible is presumed free (pp. 158 *et seq*.); and (3) let exclusion stand (pp. 171 *et seq*.). In connection with principle (3), "let exclusion stand," de Jasay offers insightful comments about the nature of homesteading or appropriation of unowned goods. De Jasay equates property with its owner's "excluding" others from using it, for example by enclosing or fencing in immovable property (land) or finding or creating (and keeping) movable property (corporeal, tangible objects). He concludes that since an appropriated thing has no other owner, *prima facie* no one is entitled to object to the first possessor claiming ownership. Thus, the principle means "let ownership stand," i.e., that claims to ownership of property appropriated from the state of nature or acquired ultimately through a chain of title tracing back to such an appropriation should be respected. This is consistent with Hoppe's defense of the "natural" theory of property. *See* Hoppe, *A Theory of Socialism and Capitalism*, 21–25 and chap. 7. For further discussion of the nature of appropriation, see Jörg Guido Hülsmann, "The A Priori

user of a previously unowned thing has a *prima facie* better claim than a second (later) claimant, solely by virtue of his being earlier.

Why is appropriation the relevant link for determination of ownership? First, keep in mind that the question with respect to such scarce resources is: who is the resource's *owner*? Recall that ownership is the *right* to control, use, or possess,[35] while possession is *actual* control—"the *factual authority* that a person exercises over a corporeal thing."[36] The question is not who has physical possession; it is who has ownership. Asking who is the owner of a resource presupposes a crucial *distinction* between ownership and possession—between the right to control, and actual control. And the answer has to take into account the nature of previously unowned things—namely, that they must at some point become owned by a first owner to become goods at all.

The answer must also take into account the presupposed goals of those seeking this answer: rules that permit conflict-free use of resources. For this reason, the answer cannot be whoever has the *resource or whoever is able to take it* is its owner. To hold such a view is to endorse might-makes-right, where ownership collapses into possession for want of a distinction.[37] Such a system, far from avoiding conflict, makes conflict inevitable.[38]

An aspect of ownership and property rights that is not often made explicit is what has been called the "prior-later distinction." This is the idea that it *makes a difference* who came first.[39] The prior-later distinction is implicit in the very idea of ownership, as the owner has a better claim—again, *prima facie*—to his resource than "latecomers."[40] If the owner did not have a better claim to the resource than someone who just comes later and physically wrests it from him, then he is not an owner, but merely the current user or possessor, and we are operating under the amoral might-makes-right principle instead of property rights and ownership.

More generally, latecomers' claims are inferior to those of prior possessors or claimants, who either homesteaded the resource or who can trace their title back to the homesteader or earlier owner.[41] The crucial importance of the prior-later distinction to libertarian theory is the reason

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Foundations of Property Economics," *Q.J. Austrian Econ.* 7, no. 4 (Winter 2004; https://mises.org/library/priori-foundations-property-economics-0): 41–68, at 51.

[35] See note 11, above, and accompanying text.

[36] Yiannopoulos, *Louisiana Civil Law Treatise, Property*, § 301 (emphasis added); see also Louisiana Civil Code, art. 3421 ("Possession is the *detention* or *enjoyment* of *a corporeal thing*, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name" [emphasis added]); and "What Libertarianism Is" (ch. 2), notes 28–29 and accompanying text, *et pass*.

[37] See, in this connection, the quote from Adam Smith in note 13, above.

[38] This is also, incidentally, the reason the mutualist "occupancy" position on land ownership is unlibertarian. See Kinsella, "A Critique of Mutualist Occupancy," *Mises Economic Blog* (Aug. 2, 2009); and "What Libertarianism Is" (ch. 2), at n.31.

[39] See Hoppe, *A Theory of Socialism and Capitalism*, 202; *idem*, "Of Common, Public, and Private Property and the Rationale for Total Privatization," in *The Great Fiction*; also Kinsella, "Thoughts on the Latecomer and Homesteading Ideas"; also "What Libertarianism Is" (ch. 2), n.32.

[40] See Kinsella, "Thoughts on the Latecomer and Homesteading Ideas."

[41] See Louisiana Code of Civil Procedure (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=68&level=Parent), art. 3653, providing:

> To obtain a judgment recognizing his ownership of immovable property … the plaintiff … shall:
>
> 1. Prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant is in possession thereof; or
>
> 2. Prove a *better title* thereto than the defendant, if the court finds that the latter is not in possession thereof.

Professor Hoppe repeatedly emphasizes it in his writing.[42]

To sum up, the libertarian position on property rights is that, in order to permit conflict-free, productive use of scarce resources, property titles to particular resources are assigned to particular owners. As noted above, however, the title assignment must not be random, arbitrary, or particularistic; instead, it has to be assigned based on "the existence of an objective,

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> *When the titles of the parties are traced to a common author, he is presumed to be the previous owner*. [emphasis added]

See also Louisiana Civil Code, arts. 526, 531–32; Yiannopoulos, *Louisiana Civil Law Treatise, Property*, §§ 255–79 and 347 *et pass*.; and "What Libertarianism Is" (ch. 2), at n.33.

One could make an analogy here, between the prior-later distinction and how current title can, in principle, be traced back to the original act of appropriation of a given resource, and Mises's regression theorem that explains the origin of the value of a commodity money, by explaining its value today based on the change from its value yesterday, and so on back to the original use of the commodity as money. On the latter, see Mises, *Human Action*, chap. 17, § 4. In fact, some of Mises's comments suggest this analogy. As he writes: "When we consider the natural components of goods, apart from the labour components they contain, and when we follow the legal title back, we must necessarily arrive at a point where this title originated in the appropriation of goods accessible to all." Ludwig von Mises, *Socialism: An Economic and Sociological Analysis*, J. Kahane, trans. (Indianapolis, Ind: Liberty Fund, 1981; https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis), chap. 1, §2, p. 32.

[42] See, e.g., Hoppe, *A Theory of Socialism and Capitalism*, 202; *idem*, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute, 2006 [1993], www.hanshoppe.com/eepp), pp. 327–30; see also discussion of these and related matters in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas; "Defending Argumentation Ethics" (ch. 7); and "How We Come to Own Ourselves" (ch. 4). As Hoppe explains in "The Idea of a Private Law Society":

> every person is the proper owner of all nature-given goods that he has perceived as scarce and put to use by means of his body, *before* any other person. Indeed, who else, if not the first user, should be their owner? The second or third one? Were this so, however, the first person would not perform his act of original appropriation, and so the second person would become the first, and so on and on. That is, no one would ever be permitted to perform an act of original appropriation and mankind would instantly die out. Alternatively, the first user together with all late-comers become part-owners of the goods in question. Then conflict will not be avoided, however, for what is one to do if the various part-owners have incompatible ideas about what to do with the goods in question? This solution would also be uneconomical because it would reduce the incentive to utilize goods perceived as scarce for the first time.

See also, in this connection, de Jasay, *Against Politics*, further discussed and quoted in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas." See also de Jasay's argument (note 34, above) that since an appropriated thing has no other owner, *prima facie* no one is entitled to object to the first possessor claiming ownership. De Jasay's "let exclusion stand" idea, along with the Hoppean emphasis on the prior-later distinction, sheds light on the nature of homesteading itself. Often the question is asked as to what types of acts constitute or are sufficient for homesteading (or "embordering" as Hoppe sometimes refers to it); what type of "labor" must be "mixed with" a thing; and to what property does the homesteading extend? What "counts" as "sufficient" homesteading? We can see that the answer to these questions is related to the issue of what is the thing in dispute. In other words, if *B* claims ownership of a thing possessed (or formerly possessed) by *A*, then the very framing of the dispute helps to identify what the thing is in dispute, and what counts as possession of it. If *B* claims ownership of a given resource, he wants the right to control it, to a certain extent, and according to its nature. Then the question becomes, did someone else previously control it (whatever is in dispute), according to its nature; i.e., did someone else already homestead it, so that *B* is only a latecomer? This ties in with de Jasay's "let exclusion stand" principle, which rests on the idea that if someone is actually able to control a resource such that others are excluded, then this exclusion should "stand." Of course, the physical nature of a given scarce resource and the way in which humans use such resources will determine the nature of actions needed to "control" it and exclude others. See also on this Murray N. Rothbard's discussion of the "relevant technological unit" in "Law, Property Rights, and Air Pollution," in *Economic Controversies*; also B.K. Marcus, "The Spectrum Should Be Private Property: The Economics, History, and Future of Wireless Technology," *Mises Daily* (Oct. 29, 2004; https://mises.org/library/spectrum-should-be-private-property-economics-history-and-future-wireless-technology), and *idem*, "Radio Free Rothbard," *J. Libertarian Stud.* 20, no. 2 (Spring 2006; https://mises.org/library/radio-free-rothbard): 17–51.

intersubjectively ascertainable link between owner" and the resource claimed.[43] As can be seen from the considerations presented above, the link is the physical transformation or embordering by the original homesteader, or a contractual chain of title traceable back to him (or to some previous possessor whose claim no one else can defeat).[44]

E. Consistency and Principle

Most people give some weight to some of the above considerations. In their eyes, a person is the owner of his own body—usually. A homesteader owns the resource he appropriates—unless the state takes it from him "by operation of law."[45] This is the principal distinction between libertarians and typical non-libertarians (excluding criminals, sociopaths, tyrants, government leaders, and so on): libertarians are consistently opposed to aggression, defined in terms of invasion of property borders, where property rights are understood to be assigned on the basis of self-ownership in the case of bodies. And in the case of non-bodily external objects, rights are understood on the basis of prior possession or homesteading and contractual transfer of title.

This framework for rights is motivated by the libertarian's consistent and principled valuing of peaceful interaction and cooperation—in short, of civilized behavior. Consider the Misesian view of human action. According to Mises, human action is aimed at alleviating some *felt uneasiness*.[46] Thus, the actor employs scarce means, according to his understanding of causal laws, to achieve various ends—ultimately, the removal of uneasiness.

Just as felt uneasiness in general is the cause of action aimed at alleviating it, a certain type of "moral" uneasiness gives rise to the practice of normative justification aimed at its alleviation. To-wit, civilized man (evidently) feels morally uneasy at the prospect of violent struggles with others. On the one hand, he wants, for some practical reason, to control a given scarce resource and to use violence against another person, if necessary, to achieve this control. On the other hand,

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[43] Hoppe, *A Theory of Socialism and Capitalism*, 23.

[44] On the title transfer theory of contract, see "A Libertarian Theory of Contract" (ch. 9). See also references in note 41, above, including art. 3653 of the Louisiana Code of Civil Procedure, providing that, in the case of a dispute over immovable property (land or realty), "When the titles of the parties are traced to a common author, he is presumed to be the previous owner." See also "What Libertarianism Is" (ch. 2), at n.33.

[45] State laws and constitutional provisions often pay lip service to the existence of various personal and property rights, but then take it back by recognizing the right of the state to regulate or infringe the right so long as it is "by law" or "not arbitrary." See, e.g., *Constitution of Russia*, art. 25 ("The home shall be inviolable. No one shall have the right to get into a house against the will of those living there, except for the cases established by a federal law or by court decision") and art. 34 ("Everyone shall have the right to freely use his or her abilities and property for entrepreneurial or any other economic activity not prohibited by the law"); *Constitution of Estonia*, art. 31 ("Estonian citizens shall have the right to engage in commercial activities and to form profit-making associations and leagues. The law may determine conditions and procedures for the exercise of this right"); *Universal Declaration of Human Rights*, art. 17 ("Everyone has the right to own property alone as well as in association with others… No one shall be arbitrarily deprived of his property"); art. 29(2) ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society"). Even the Thirteenth Amendment to the US Constitution, said to have abolished slavery, makes an exception for "crimes" (which, of course, the state can arbitrarily decree, such as drug crimes, tax evasion, evading conscription, etc.): "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." (Emphasis added.)

[46] Mises, *Human Action*, pp. 13–14, *et pass.*

he also wants to avoid a wrongful use of force. Civilized man, for some reason, feels reluctance and uneasiness at the prospect of conflict or violent interaction with his fellow man. Perhaps he is reluctant to violently clash with others over certain objects because he has empathy with them.[47] Perhaps the instinct to cooperate is a result of social evolution. As Mises noted,

> There are people whose only aim is to improve the condition of their own ego. There are other people with whom awareness of the troubles of their fellow men causes as much uneasiness as or even more uneasiness than their own wants.[48]

Whatever the reason, because of this uneasiness, when there is the potential for violent conflict, the civilized man *seeks justification* for the use of force or violence to control or defend the use of a desired scarce resource that some other person opposes or threatens. Empathy—or whatever spurs man to adopt the libertarian *grundnorms*—gives rise to a certain form of uneasiness, which gives rise to the attempt to justify violent action.

Civilized man may be thus defined as *he who seeks justification for the use of interpersonal violence*. When the inevitable need to engage in violence arises—for defense of life or property—civilized man seeks justification. Naturally, since this justification-seeking is done by people who are inclined to reason and peace (justification is after all a peaceful activity that necessarily takes place during discourse),[49] what they seek are rules that are fair, potentially acceptable to all relevant parties, grounded in the nature of things, and universalizable, and which permit conflict-free use of resources.

As noted in foregoing sections, libertarian property rights principles emerge as the only candidate that satisfies these criteria. We favor *prima facie* self-ownership of bodies, as the only fair and justifiable body ownership rule that permits conflict-free of the resources of our bodies. And in the case of resources external to human bodies, we favor property rights on the basis of prior possession or homesteading and contractual transfer of title. That is, the libertarian position on property rights in external objects is that, in any dispute or contest over any particular scarce resource, the original homesteader—the person who appropriated the resource from its unowned status, by embordering or transforming it (or his contractual transferee)—has a better claim than latecomers, those who did not appropriate the scarce resource. This is the only fair and justifiable property assignment rule that permits harmonious, productive, conflict-free use of such external scarce resources.

Thus, if civilized man is he who seeks justification for the use of violence, the libertarian is he who is *serious* about this endeavor. He has a deep, principled, innate opposition to violence, and an equally deep commitment to peace and cooperation.

For the foregoing reasons, libertarianism may be said to be the political philosophy that *consistently* favors social rules aimed at promoting peace, prosperity, and cooperation.[50] It

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[47] For further discussion of the role of empathy in the adoption of libertarian *grundnorms*, see note 26, above.

[48] Mises, *Human Action*, p. 14.

[49] As Hoppe explains, "Justification—proof, conjecture, refutation—is *argumentative* justification." Hoppe, *The Economics and Ethics of Private Property*, p. 384; see also ibid., p. 413 and Hoppe, *A Theory of Socialism and Capitalism*, p. 155, *et pass*.

[50] See also "What Libertarianism Is" (ch. 2). For this reason Henry Hazlitt's proposed name "cooperatism" for the freedom philosophy, has some appeal. See Henry Hazlitt, Foundations of Morality (Irvington-on-Hudson, New York: Foundation for Economic Education, 1994 [1964]; https://fee.org/resources/foundations-of-morality/), p. xii; Kinsella, "The new libertarianism: anti-capitalist and socialist; or: I prefer Hazlitt's 'Cooperatism,'"

recognizes that the only rules that are compatible with the *grundnorms* of civilized men are the self-ownership principle and the Lockean homesteading principle, applied as consistently as possible.

F. The State

Libertarians oppose all forms of crime (aggression). Thus we oppose not only private aggression: we also oppose *institutionalized* or public aggression. The opposition to institutionalized aggression is based on the view, espoused by Bastiat, that an act of aggression that is unjust for a private actor to perform remains illegitimate when performed by agencies, institutions, or collectives.[51] Murder or theft by ten, or a hundred, or a million, people is not better than theft by a lone criminal. It is for this reason that libertarians view the state itself as inherently criminal. For the state does not just happen to engage in institutionalized aggression; it necessarily does so on a systematic basis as part of the very nature of the state. As Hoppe notes:

> What must an agent be able to do to qualify as a state? This agent must be able to insist that all conflicts among the inhabitants of a given territory be brought to him for ultimate decision-making or be subject to his final review. In particular, this agent must be able to insist that all conflicts involving himself be adjudicated by him or his agent. And implied in the power to exclude all others from acting as ultimate judge, as the second defining characteristic of a state, is the agent's power to tax: to unilaterally determine the price that justice seekers must pay for his services.[52]

Such an agency necessarily commits aggression against either human bodies or owned property (usually both), either by taxing, or by outlawing competition (usually both).[53] For these reasons, the consistent libertarian, in opposing aggression, is also anarchist.[54]

StephanKinsella.com (June 19, 2009).

[51] As Bastiat writes:

> Sometimes the law defends plunder and participates in it. Thus the beneficiaries are spared the shame and danger that their acts would otherwise involve… But how is this legal plunder to be identified? Quite simply. See if the law takes from some persons what belongs to them and gives it to the other persons to whom it doesn't belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime. Then abolish that law without delay—No legal plunder; this is the principle of justice, peace, order, stability, harmony and logic.

Frederic Bastiat, *The Law*, 17–18 (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, Dean Russell trans. 1950 [1850]; https://fee.org/resources/the-law/).

[52] See Hans-Hermann Hoppe, "Reflections on the Origin and the Stability of the State," *LewRockwell.com* (June 23, 2008; https://www.lewrockwell.com/2008/06/hans-hermann-hoppe/to-battle-the-state/); also Kinsella, "The Nature of the State and Why Libertarians Hate It," *The Libertarian Standard* (May 3, 2010; http://libertarianstandard.com/2010/05/03/the-nature-of-the-state-and-why-libertarians-hate-it/).

[53] States invariably claim both powers, but either one alone is sufficient to give the state its unique status, and in fact each power implies the other. The power to tax alone would provide the agency with the ability to outcompete competing agencies that do not have this power, in the same way that public (government) schools outcompete private schools. Thus, the power to tax gives the taxing agency the practical ability to monopolize the field and outlaw or restrict competition. And the power to exclude competition alone would permit the monopolizing agency to charge monopoly prices for its services, akin to a tax.

[54] See "What It Means To Be an Anarcho-Capitalist" (ch. 3); also Jan Narveson, "The Anarchist's Case," in *Respecting Persons in Theory and Practice* (Lanham, Md.: Rowman & Littlefield, 2002; https://web.archive.org/web/20140914044736/www.arts.uwaterloo.ca/~jnarveso/articles/Anarchist's_Argument.pdf) and Hans-Hermann Hoppe, "Anarcho-Capitalism: An Annotated Bibliography," *LewRockwell.com* (Dec. 31, 2001; https://archive.lewrockwell.com/hoppe/hoppe5.html); Kinsella, "The Greatest Libertarian Books," *StephanKinsella.com* (Aug. 7, 2006); and other references in "Legislation and the Discovery of Law in a Free Society"

This also implies that legislation is illegitimate—as legislation requires a state—and that a law that is purely a result of legislation, and that cannot emerge in a decentralized legal order, is also invalid.[55]

III. LIBERTARIANISM APPLIED TO IP

Given the foregoing libertarian (and Austrian-economics-informed) understanding of property rights, it is clear that the institutions of patent and copyright are simply indefensible. Here is why.

Copyrights pertain to "original works," such as books, articles, movies, and computer programs. They are grants by the state that permit the copyright holder to prevent others from using their own property—e.g., ink and paper—in certain ways. Thus copyright literally results in censorship—not surprising given its origins in suppressing the spread of ideas not favored by crown and church.[56] For example, shortly before his death, author J.D. Salinger, author of *Catcher in the Rye*, convinced U.S. courts to actually ban the publication of a novel called *60 Years Later: Coming Through the Rye*, based on copyright claims. And when a grocery store in Canada mistakenly sold 14 copies of a new Harry Potter book a few days before its official release on Saturday, July 16, 2005, a Canadian judge "ordered customers not to talk about the book, copy it, sell it or even read it before it is officially released at 12:01 a.m. July 16."[57]

Patents grant rights in "inventions"—useful machines or processes. They are grants by the state that permit the patentee to use the state's court system to prohibit others from using their *own property* in certain ways—from reconfiguring their property according to a certain pattern or design described in the patent, or from using their property (including their own bodies) in a certain sequence of steps described in the patent.[58]

Both patent and copyright are simply state grants of monopoly privilege. In both cases, the state is assigning to *A* a right to control *B*'s property: *A* can force *B* not to engage in certain actions with *B*'s resources. Since ownership is the right to control, IP grants to *A* a co-ownership right (a negative servitude) in *B*'s property.[59] This clearly cannot be justified under libertarian principles. *B*

(ch. 13), n.25.

[55] See "Legislation and the Discovery of Law in a Free Society" (ch. 13).

[56] The Stop Online Piracy Act (SOPA), defeated a few years back through widespread Internet-based outrage, is a good example of a threat to freedom of expression in the name of copyright law. See Kinsella, "SOPA is the Symptom, Copyright is the Disease: The SOPA wakeup call to ABOLISH COPYRIGHT," *The Libertarian Standard* (Jan. 24, 2012). Regarding the origins of copyright, see Karl Fogel, "The Surprising History of Copyright and The Promise of a Post-Copyright World," *Question Copyright* (2006; https://perma.cc/DV92-TEH3); Michele Boldrin & David K Levine, *Against Intellectual Monopoly* (2008; againstmonopoly.org), chap. 2; Eric E. Johnson, "Intellectual Property and the Incentive Fallacy," *Florida State U. L. Rev.* 39 (2012; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746343): 623–79, at 625 ("the monopolies now understood as copyrights and patents were originally created by royal decree, bestowed as a form of favoritism and control. As the power of the monarchy dwindled, these chartered monopolies were reformed, and essentially by default, they wound up in the hands of authors and inventors."); Tom W. Bell, *Intellectual Privilege: Copyright, Common Law, and the Common Good*, chap. 3 (Arlington, Virginia: Mercatus Center, 2014; https://perma.cc/JLC2-396Y).

[57] See Kinsella, "The Patent, Copyright, Trademark, and Trade Secret Horror Files," *Mises Economics Blog* (Feb. 3, 2010).

[58] For examples, see ibid.

[59] See "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), Part IV.B. As I noted in *AIP*, "ownership of an idea, or ideal object, effectively gives the IP owners a property right in every

already owns his property. With respect to him, *A* is a latecomer. *B* is the one who appropriated the property, not *A*. It is too late for *A* to homestead the resource in question—*B*, or his ancestor in title, already did that. The resource is no longer unowned. Granting *A* ownership rights in *B*'s property is quite obviously incompatible with basic libertarian principles. It is nothing more than redistribution of wealth. IP is therefore unlibertarian and unjustified.

A. Utilitarianism

Why, then, is this a contested issue? Why do some libertarians still believe in IP rights?

One reason is that they approach libertarianism from a utilitarian perspective instead of a principled one. They favor laws that increase general utility, or wealth. And they believe the state's propaganda that state-granted IP rights actually do increase general wealth.

The utilitarian perspective itself is bad enough, because all sorts of terrible policies could be justified this way: why not take half of Henry Ford's fortune and give it to the poor? Wouldn't the total welfare gains to the thousands of recipients be greater than Ford's reduced utility? After all, he would still be a billionaire afterwards. To take another example: if a man is extremely desperate for sex, could not his gain be greater than the loss suffered by his rape victim (say, if she is a prostitute), thus justifying rape, in some cases, on utilitarian grounds? Most people will recognize that there is something wrong with utilitarian reasoning if it could lead to such results.

But even if we ignore the ethical and methodological problems[60] with the utilitarian or wealth-maximization approach, what is bizarre is that utilitarian libertarians are in favor of IP when they have not demonstrated that IP does increase overall wealth. They merely assume that it does and then base their policy views on this assumption.

It is beyond dispute that the IP system imposes significant costs, in monetary terms alone, not to mention costs in terms of liberty.[61] The usual argument, that the incentive provided by IP law stimulates additional innovation and creativity, has not even been proven.[62] It is entirely possible (even likely, in my view) that the IP system not only imposes many billions of dollars of cost on society but actually impedes innovation, adding damage to injury.

But even if we assume that the IP system does stimulate some additional, valuable innovation, no one has established that the value of the purported gains is greater than the costs.[63] If one asks advocates of IP how they know there is a net gain, the result is silence (this is especially true of patent attorneys). They cannot point to any study to support their utilitarian contention; they usually just point to Article 1, Section 8 of the Constitution (if they are even aware of it), as if the backroom dealings of politicians two centuries ago are some sort of empirical evidence in

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physical embodiment of that work or invention." See *AIP*, the section "IP Rights and Relation to Tangible Property," following n.29.

[60] On the defects of utilitarianism and interpersonal utility comparisons, see the sources cited in *AIP*, at n. 40.

[61] See studies cited in references in note 64, below; also Kinsella, "Reducing the Cost of IP Law," *Mises Daily* (Jan. 20, 2010); *idem*, "What Are the Costs of the Patent System?," *Mises Economics Blog* (Sep. 27, 2007); Julio H. Cole, "Patents and Copyrights: Do the Benefits Exceed the Costs?", *J. Libertarian Stud.* 15, no. 4 (Fall 2001; https://mises.org/library/patents-and-copyrights-do-benefits-exceed-costs-0): 79–105, the section "Costs of the Patent System," p. 89 *et seq*.

[62] See Kinsella, "Yet Another Study Finds Patents Do Not Encourage Innovation," *Mises Economics Blog* (July 2, 2009).

[63] See Boldrin & Levine, *Against Intellectual Monopoly*, *supra* note 56; and references in note 62, above.

favor of state grants of monopoly privilege.

In fact, as far as I am able to tell, *every* study that attempts to tally the costs and benefits of copyright or patent law concludes either that these schemes cost more than they are worth, or that they actually reduce innovation, or that the research is inconclusive. There are no studies unambiguously showing a net societal gain.[64] There are only repetitions of state propaganda.

The Founders only had a hunch that copyrights and patents might "promote the Progress of Science and useful Arts"[65]—that the cost of this system would be "worth it." But they had no serious evidence. A hundred and fifty years later there was still none. In an exhaustive 1958 study prepared for the U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, economist Fritz Machlup concluded:

> No economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss upon society. The best he can do is to state assumptions and make guesses about the extent to which reality corresponds to these assumptions… If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one.[66]

And the empirical case for patents has not been shored up at all in the last fifty years. As George Priest wrote in 1986, "[I]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property."[67] Similar comments are echoed by other researchers. François Lévêque and Yann Ménière, for example, of the Ecole des Mines de Paris (an engineering university), observed in 2004:

> The abolition or preservation of intellectual property protection is… not just a purely theoretical question. To decide on it from an economic viewpoint, we must be able to assess all the consequences of protection and determine whether the total favorable effects for society outweigh the total negative effects. Unfortunately, this exercise [an economic analysis of the cost and benefits of intellectual property] is no more within our reach today than it was in Machlup's day [1950s].[68]

More recently, Boston University Law School Professors (and economists) Michael Meurer and Jim Bessen conclude that on average, the patent system discourages innovation. As they write: "it seems unlikely that patents today are an effective policy instrument to encourage innovation overall" (p. 216). To the contrary, it seems clear that nowadays "patents place a drag on

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[64] See Kinsella, "The Overwhelming Empirical Case Against Patent and Copyright," *C4SIF Blog* (Oct. 23, 2012); *idem*, "Legal Scholars: Thumbs Down on Patent and Copyright," *C4SIF Blog* (Oct. 23, 2012); *idem*, "KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished," *Kinsella on Liberty Podcast* (Nov. 24, 2021); and *idem*, "Yet Another Study Finds Patents Do Not Encourage Innovation," *Mises Economics Blog* (July 2, 2009).

[65] *U.S. Const.*, Art. I, Sec. 8, Cl. 8. For more background on the origins of copyright in America, see references in note 56, above.

[66] Fritz Machlup, *An Economic Review of the Patent System* (1958; https://mises.org/library/economic-review-patent-system), 79-80.

[67] George Priest, "What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung," *Research in Law & Econ.* 8 (1986): 19–24.

[68] François Lévêque & Yann Ménière, *The Economics of Patents and Copyrights* (Berkely Electronic Press, 2004; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=642622), at 102.

innovation" (p. 146). In short, "the patent system fails on its own terms" (p. 145).[69]

And in a recent paper, economists Boldrin and Levine state:

> The case against patents can be summarized briefly: there is no empirical evidence that they serve to increase innovation and productivity .... This disconnect is at the root of what is called the "patent puzzle": in spite of the enormous increase in the number of patents and in the strength of their legal protection, the US economy has seen neither a dramatic acceleration in the rate of technological progress nor a major increase in the levels of research and development expenditure…
>
> Our preferred policy solution is to abolish patents entirely to find other legislative instruments, less open to lobbying and rent seeking, to foster innovation when there is clear evidence that laissez-faire undersupplies it.[70]

The Founders' hunch about IP was wrong. Copyright and patent are not necessary for creative or artistic works, invention, and innovation. They do not even encourage it. These monopoly privileges enrich some at the expense of others, distort the market and culture, and impoverish us all.[71] Given the available evidence, anyone who accepts utilitarianism should be *opposed* to patent and copyright.[72]

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[69] James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* (Princeton University Press, 2008).

[70] Michele Boldrin & David K. Levine, "The Case Against Patents," *J. Econ. Perspectives* 27 no. 1 (Winter 2013; https://perma.cc/Q5NT-9CGA): 3–22.

[71] See, e.g., Kinsella, "Leveraging IP," *Mises Economics Blog* (Aug. 1, 2010); and *idem*, "Milton Friedman (and Rothbard) on the Distorting and Skewing Effect of Patents," *C4SIF Blog* (July 3, 2011).

[72] Another problem with the wealth-maximization approach is that it has no logical stopping point. If adding (and increasing) IP protection is a cost worth paying to stimulate additional innovation and creation over what would occur on a free market—that is, if the amount of innovation and creation absent IP law is *not enough*, then how do we know that we have enough now, under a system of patent and copyright? Maybe the penalties or terms should be increased: impose capital punishment, triple the patent and copyright term. And what if there still is not enough? Why don't we expropriate taxpayer funds and set up a government award or prize system, like a huge state-run Nobel prize with thousands of winners, to hand out to deserving innovators, so as to incentivize even more innovation? Incredibly, this has been suggested, too—even by Nobel Prize winners. See Kinsella, "$30 Billion Taxfunded Innovation Contracts: The 'Progressive-Libertarian' Solution," *Mises Economics Blog* (Nov. 23, 2008); *idem*, "Libertarian Favors $80 Billion Annual Tax-Funded 'Medical Innovation Prize Fund,'" *Mises Economic Blog* (Aug. 12, 2008).

In addition to (or sometimes overlapping with) the utilitarian or consequentialist or incentive-based argument implied by the Constitution's authorization for IP law ("to promote the progress…") and discussed in this section, and the "creationism" argument discussed in the next section and in (ch. 15, Part IV.C), which is related to or a type of natural rights argument; there are a variety of other arguments in favor of IP, e.g. theories related to personality or personhood, fairness, welfare, and culture. See, e.g., Justin Hughes, "The Philosophy of Intellectual Property," *Georgetown L.J.* 77, no. 2 (Dec. 1988; https://perma.cc/U4XX-5DZV): 287–366; William Fisher, "Theories of Intellectual Property," in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001; https://perma.cc/4YLX-P8JF); *idem*, "IP Theory" (https://perma.cc/Y48K-HCTV); Mick Soepboer, "Libertarian views on intellectual property law: An analysis of laissez-faire theories applied on the modern day IP system," University of Cape Town, School for Advanced Legal Studies, Master Dissertation Commercial Law (July 2009; https://perma.cc/4HR6-743V), §3.3; Edwin C. Hettinger, "Justifying Intellectual Property," *Philosophy & Public Affairs* 18, no. 1 (Winter 1989): 31–52; Vallabhi Rastogi, "Theories of Intellectual Property Rights," *Enhelion Blogs* (Feb. 27, 2021; https://perma.cc/U9D5-9V4U); Oishika Banerji, "Theories of protection of intellectual property rights," *IPleaders.in Blog* (Oct. 24, 2021; https://perma.cc/M2BU-T7BC); Kahsay Debesu Gebray, "Justifications for Claiming Intellectual Property Protection in Traditional Herbal Medicine and Biodiversity Conservation: Prospects and Challenges," *WIPO-WTO Colloquium Papers* vol. 4 (2013; https://perma.cc/3TXQ-LNFX); Adam D. Moore &

B. Libertarian Creationism[73]

Another reason why many libertarians favor IP is their confusion about the origin of property and property rights. They accept the careless observation that an individual can come to own things in three ways: through homesteading an unowned thing, by contractual exchange, and by creation. Therefore, they reason, if you own what you create, this is especially true for useful ideas. For example, libertarian philosopher Tibor Machan has stated: "it would seem that so called intellectual stuff is an even better candidate for qualifying as private property than is, say, a tree or mountain."[74] And Objectivist philosopher David Kelley writes:

> [T]he essential basis of property rights lies in the phenomenon of creating value… [F]or things that one has created, such as a new product, one's act of creation is the source of the right, regardless of scarcity.[75]

The mistake is the notion that creation is an independent source of ownership, independent from homesteading and contracting. Yet it is easy to see that "creation" is neither necessary nor sufficient as a source of ownership. If you carve a statue using your own hunk of marble, you own the resulting creation because you already owned the marble. You owned it before, and you own it now.[76] And if you homestead an unowned resource, such as a field, by using it and thereby

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Kenneth Einar Himma, "Intellectual Property," in Edward N. Zalta, ed., *Stanford Encyclopedia of Philosophy* (Stanford University, 2011; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980917), §3.

[73] See also Part IV.C in "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15).

[74] Tibor Machan, "Intellectual Property and the Right to Private Property," Mises.org working paper (2006; https://mises.org/wire/new-working-paper-machan-ip), discussed in Kinsella, "Owning Thoughts and Labor," *Mises Economics Blog* (Dec. 11, 2006), and in *idem*, "Remembering Tibor Machan, Libertarian Mentor and Friend: Reflections on a Giant," *StephanKinsella.com* (April 19, 2016). See also the similar "ontology" based argument of J. Neil Schulman, mentioned in "Conversation with Schulman about Logorights and Media-Carried Property" (ch. 17).

[75] Quoted in Kinsella, "Rand on IP, Owning 'Values', and 'Rearrangement Rights,'" *Mises Economics Blog* (Nov. 16, 2009). The idea that you own what you "produce" or "create" is widespread. See, e.g., Kirzner on Mill:

> "The institution of property," John Stuart Mill remarked, "when limited to its essential elements, consists in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those who produced it. The foundation of the whole is the right of producers to what they themselves have produced." The purpose of this paper is to point out the ambiguity of the phrase "what a man has produced", and to draw attention, in particular, to one significant, economically valid, meaning of the term,—a meaning involving the concept of entrepreneurship—which seems to have been overlooked almost entirely. … Precision in applying the term "what a man has produced" seems to be of considerable importance.

Israel M. Kirzner, "Producer, Entrepreneur, and the Right to Property," *Reason Papers* No. 1 (Fall 1974; https://reasonpapers.com/archives/): 1–17, p.1, quoting J.S. Mill, *Principles of Political Economy* (Ashley Edition, Londen, 1923), p. 218. As another example, patent attorney Dale Halling writes: "A patent is a property right it is not a monopoly. Like all property the source of the property right is creation." See comments in Kinsella, "Pro-IP Libertarians Upset about FTC Poaching Patent Turf," *Mises Economics Blog* (Aug. 24, 2011).

[76] See, on this point, Sheldon Richman, "Intellectual 'Property' Versus Real Property: What Are Copyrights and What Do They Mean for Liberty?," *The Freeman* (12 June 2009; https://fee.org/resources/intellectual-property-versus-real-property):

> If someone writes or composes an original work or invents something new, the argument goes, he or she should own it because it would not have existed without the creator. I submit, however, that as important as creativity is to human flourishing, it is not the source of ownership of produced goods… So what is the source? Prior ownership of the inputs through purchase, gift, or original appropriation. This is sufficient to establish ownership of the output. Ideas contribute no necessary additional factor. If I build a model airplane out of wood and glue, I own it not because of any idea in my head, but because I owned the wood, the glue, and myself. If Howard Roark's evil twin trespassed on your land and, *using your materials*, built the most creatively

establishing publicly visible borders, you own it because this first use and embordering gives you a better claim than latecomers.[77] Thus, creation is not necessary for ownership to arise.

But suppose you carve a statue in someone else's marble, either without permission, or with permission, such as when an employee works with his employer's marble by contract. You do not own the resulting statue, even though you "created" it. If you are using marble stolen from another person; your vandalizing it does not take away the owner's claims to it. And if you are working on your employer's marble, he owns the resulting statue. Thus, creation is not sufficient for ownership rights to arise.

This is not to deny the importance of knowledge, or creation and innovation. Human action, which necessarily employs (ownable) scarce means, is also *informed* by technical knowledge of causal laws or other practical information. An actor's knowledge, beliefs and values affect the ends he chooses to pursue and the causal means he selects to achieve the end sought (as discussed further in the next section).

It is true that creation is an important means of increasing *wealth*. As Hoppe has observed,

> One can acquire and increase wealth either through homesteading, *production* and contractual exchange, or by expropriating and exploiting homesteaders, producers, or contractual exchangers. There are no other ways.[78]

While production or creation can certainly increase *wealth*, it is not an independent source of ownership or rights. Production is not the creation of new matter; it is the transformation of things from one form to another—the transformation of things someone already owns, either the producer or someone else. Using your labor and creativity to transform your property into more valuable finished products gives you greater wealth, but not additional property rights.[79] (If you

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original house ever seen, would he own it? Of course not. *You* would—and you'd have every right to tear it down.

See also Dan Sanchez, "The Fruit of Your Labor …is a good, not its form," *Medium* (Oct. 30, 2014; https://perma.cc/GD28-JS44).

[77] See "What Libertarianism Is" (ch. 2); Hoppe, *A Theory of Socialism and Capitalism*, chaps. 1, 2, and 7; David Hume, *A Treatise of Human Nature*, Selby-Bigge, ed. (Oxford, 1968), Book III, Part II, Section III n16:

> Some philosophers account for the right of occupation, by saying, that every one has a property in his own labour; and when he joins that labour to any thing, it gives him the property of the whole: But, 1. There are several kinds of occupation, where we cannot be said to join our labour to the object we acquire: As when we possess a meadow by grazing our cattle upon it. 2. This accounts for the matter by means of accession; which is taking a needless circuit. 3. We cannot be said to join our labour to any thing but in a figurative sense. Properly speaking, we only make an alteration on it by our labour. This forms a relation betwixt us and the object; and thence arises the property, according to the preceding principles.

See also "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), at notes 56–57.

[78] Hans-Hermann Hoppe, "Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order," in *The Economics and Ethics of Private Property*, at 50 (emphasis added).

[79] See Kinsella, "Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and 'Rearranging,'" *Mises Economics Blog* (Sep. 29, 2010). See also Pierre-Joseph Proudhon, "Les Majorats littéraires," trans. Luis Sundkvist (1868), in L. Bently & M. Kretschmer, eds., *Primary Sources on Copyright* (1450–1900), at pp. 11 *et seq.*:

> The masters of science instruct us all—and the supporters of literary property are the first to argue this—that man does not have the capability of creating a single atom of matter; that all his activity consists of appropriating the forces of nature, of channeling these and modifying their effects, of composing or decomposing substances, of changing their forms, and, by this steering of the natural forces, by this transformation of substances, by this separation of elements, of making nature [la création] more useful, more fertile, more beneficial, more brilliant, more profitable. So that all human production consists (1º) of an

transform someone else's property, he owns the resulting transformed thing, even if it is now more valuable.)

In other words, creation is not the basis for property rights in scarce goods. Creating something does not make you its owner. A mother who creates a child does not own it. A vandal who creates a mural on someone else's property does not own it. An employee who creates a consumer device using his employer's facilities and materials does not own it. Creation is not sufficient to generate rights. And those who transform their own property to create a more valuable product own the resulting product because they already owned the original material, not because of creation. The creator of an idea does not thereby own the idea.[80]

C. The Contractual Approach

Many libertarians also argue that some form of copyright or patent could be created by contractual techniques—for example, by selling a patterned medium (book, CD, etc.) or useful machine to a buyer on the condition that it not be copied or revealed to others. For example, Brown sells an innovative mousetrap to Green on the condition that Green not reproduce it.[81]

For such contractual IP to emulate statutory IP, however, it has to bind not only seller and buyer, but all third parties. The contract between buyer and seller cannot do this—it binds only the buyer and seller. In the example given above, even if Green agrees not to copy Brown's mousetrap, Black has no agreement with Brown. Brown has no contractual right to prevent Black from using Black's own property in accordance with whatever knowledge or information Black has.

Now if Green were to sell Brown's watch to Black without Brown's permission, most libertarians would say that Brown still owns the watch and could take it from Black. Why doesn't a similar logic apply in the case of the mousetrap design?

The difference is that the watch is a scarce resource that has an owner, while the mousetrap design is merely information, which is not a type of thing that can be owned. The watch is a scarce resource still owned by Brown. Black needs Brown's consent to use it. But in the mousetrap case, Black merely learns how to make a mousetrap. He uses this information to make a mousetrap, by means of his own body and property. He doesn't need Brown's permission, simply because he is not using Brown's property.

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expression of ideas; (2º) a displacement of matter.

[80] In fact, as Proudhon notes:

> in the strict sense of the term, we do not produce our ideas any more than we produce physical substances. Man does not create his ideas—he receives them. He does not at all make truth—he discovers it. He invents neither beauty, nor justice—they reveal themselves to his soul spontaneously, like the conceptions of metaphysics, in the perception of the phenomena of the world, in the relations between things. The intelligible estate [fonds] of nature is, in the same way as its tangible estate, outside of our domain: neither reason, nor the substance of things are ours. Even that very ideal which we dream about, which we pursue, and which causes us to commit so many acts of folly—this mirage of our understanding and our heart—we are not its creators, we are simply those who are able to see it.

Proudhon, "Les Majorats littéraires," at p. 12. Or as Isaac Newton put it, "If I have seen further it is only by standing on the shoulders of giants." Letter to Robert Hooke (February 15, 1676).

[81] This is Rothbard's example, from "Knowledge, True and False," in *The Ethics of Liberty*, which is discussed at pp. 51–55 in *AIP*. See also Kinsella, "Richard O. Hammer: Intellectual Property Rights Viewed As Contracts," *C4SIF Blog* (June 13, 2021).

The IP advocate thus has to say that Brown owns the information about how his mousetrap is configured. This move is question begging, however, since it asserts what is to be shown: that there are intellectual property rights.

If Black does not return Green's watch, Green is without his watch, precisely because the watch is a scarce good. But Black's knowing how to make a mousetrap does not take away Green's own mousetrap-making knowledge, highlighting the nonscarce nature of information or patterns. In short, Brown may retake his property from Black but has no right to prevent Black from using information to guide his actions. Thus, the contract approach fails as well.[82]

D. Learning, Emulation and Knowledge in Human Action

Another way to understand the error in treating information, ideas, recipes, and patterns as ownable property is to consider IP in the context of human action. Mises explains that "[t]o act means: to strive after ends, that is, to choose a goal and to resort to means in order to attain the goal sought."[83] Knowledge and information of course play a key role in action as well. As Mises puts it, "Action … is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and *guided by ideas concerning the suitability or unsuitability of definite means*."[84]

Rothbard further elaborates on the importance of knowledge to *guide* actions:

> There is another unique type of factor of production that is indispensable in every stage of every production process. This is the "technological idea" of how to proceed from one stage to another and finally to arrive at the desired consumers' good. This is but an application of the analysis above, namely, that for any action, there must be some *plan* or idea of the actor about how to use things as means, as definite pathways, to desired ends. Without such plans or ideas, there would be no action. These plans may be called *recipes*; they are ideas of recipes that the actor uses to arrive at his goal. A *recipe* must be present at each stage of each production process from which the actor proceeds to a later stage. The actor must have a recipe for transforming iron into steel, wheat into flour, bread and ham into sandwiches, etc.[85]

Moreover, "[m]eans are necessarily always limited, i.e. scarce, with regard to the services

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[82] On the title-transfer theory of contract, see "A Libertarian Theory of Contract" (ch. 9). For criticism of Rothbard's attempt to justify something he confusingly calls "common-law copyright" (since that is something totally different in the common law) by use of contracts, see Kinsella, *AIP*, the section "Contract vs. Reserved Rights." Schulman also seems to think that IP, or "logorights," is somehow "an intellectual artifact of contract law," whatever that means. See "Conversation with Schulman about Logorights and Media-Carried Property" (ch. 17).

[83] Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; https://mises.org/library/ultimate-foundation-economic-science), p. 4.

[84] Mises, *Human Action*, 93.

[85] Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholars ed., second ed. (Auburn, Ala.: Mises Institute, 2009; https://mises.org/library/man-economy-and-state-power-and-market), p. 11. See also See also Guido Hülsmann, "Knowledge, Judgment, and the Use of Property," *Rev. Austrian Econ.* 10, no. 1 (1997; https://perma.cc/DKQ8-JX45): 23–48, p. 44 ("The quantities of means we can dispose of—our property—are always limited. Thus, choice implies that some of our ends must remain unfulfilled. We steadily run the danger of pursuing ends that are less important than the ends that could have been pursued. We have to choose the supposedly most important action, though what we choose is how we use our property Action means to employ our property in the pursuit of what appears to be the most important ends. … *In choosing the most important action we implicitly select some parts of our technological knowledge for application*."; emphasis added). See also the related discussion in "Goods, Scarce and Nonscarce" (ch. 18), text at n.32.

for which man wants to use them."[86] This is why property rights emerged. Use of a resource by one person excludes use by another. Property rights are assigned to scarce resources to permit them to be used productively and cooperatively, and to permit conflict to be avoided. In contrast, ownership of the information that guides action is not necessary. For example, two people who each own the ingredients (scarce goods) can simultaneously make a cake with the same recipe.

Material progress is made over time because information is *not* scarce. It can be infinitely multiplied, learned, taught, and built on. The more patterns, recipes, and causal laws that are known, the greater the wealth multiplier as individuals engage in ever-more efficient and productive actions. It is *good* that ideas are infinitely reproducible. There is no need to impose artificial scarcity on ideas to make them more like physical resources, which—unfortunately—*are* scarce.[87]

E. IP, Legislation, and the State

A final problem with IP remains: patent and copyright are statutory schemes, schemes that can be constructed only by legislation, and therefore *have always* been constructed by legislation. A patent or copyright code could no more arise in the decentralized, case-based legal system of a free society than could the Americans with Disabilities Act or Medicare. IP requires both a legislature, and a state. For libertarians who reject the legitimacy of the state,[88] or legislated law,[89] this is the final nail in the IP coffin.

IV. IMAGINING AN IP-FREE WORLD

It is fairly straightforward to explain what is wrong with IP: patent and copyright are artificial state-granted monopoly privileges that undercut and invade property rights, as elaborated above. But the consequentialist and utilitarian mindset is so entrenched that even people who see the ethical problems with IP law sometimes demand that the IP opponent explain how innovation would be funded in an IP-free world. How would authors make money? How would blockbuster movies be funded? Why would anyone invent if they could not get a patent? How could companies afford to develop pharmaceuticals if they had to face competition?

When I see such demands and questions, I am reminded of John Hasnas's comments in his classic article "The Myth of the Rule of Law."[90] After arguing against the state and for anarchy, Hasnas observes:

> What would a free market in legal services be like?
>
> I am always tempted to give the honest and accurate response to this challenge, which is that to ask the question is to miss the point. If human beings had the wisdom and knowledge-generating capacity to be able to describe how a free market would work,

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[86] Ibid.

[87] For elaboration on the ideas discussed in this section, see Kinsella, "Intellectual Freedom and Learning Versus Patent and Copyright" and "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), the section "The Separate Roles of Knowledge and Means in Action."

[88] See note 54, above, and accompanying text.

[89] See "Legislation and the Discovery of Law in a Free Society" (ch. 13).

[90] John Hasnas, "The Myth of the Rule of Law," *Wis. L. Rev.* 1995, no. 1 (1995; https://www.copblock.org/40719/myth-rule-law-john-hasnas/): 199–234.

> that would be the strongest possible argument for central planning. One advocates a free market not because of some moral imprimatur written across the heavens, but because it is impossible for human beings to amass the knowledge of local conditions and the predictive capacity necessary to effectively organize economic relationships among millions of individuals. It is possible to describe what a free market in shoes would be like *because we have one*. But such a description is merely an observation of the current state of a functioning market, not a projection of how human beings would organize themselves to supply a currently non-marketed good. To demand that an advocate of free market law (or Socrates of Monosizea, for that matter) describe in advance how markets would supply legal services (or shoes) is to issue an impossible challenge. Further, for an advocate of free market law (or Socrates) to even accept this challenge would be to engage in self-defeating activity since the more successfully he or she could describe how the law (or shoe) market would function, the more he or she would prove that it could be run by state planners. Free markets supply human wants better than state monopolies precisely because they allow an unlimited number of suppliers to attempt to do so. By patronizing those who most effectively meet their particular needs and causing those who do not to fail, consumers determine the optimal method of supply. If it were possible to specify in advance what the outcome of this process of selection would be, there would be no need for the process itself.

In other words: the answer such a challenge might be, as Leonard Read said, "I don't know."[91]

To return to the current subject: with the advent of state IP legislation, the state has interrupted and preempted whatever other customs, business arrangements, contractual regimes and practices, and so on, that would no doubt have arisen in its absence. So it is natural for those accustomed to IP to be a bit nervous about replacing the current flawed IP system with… a vacuum. It is natural for them to wonder, "Well, what would occur in its absence?" As noted above, the reason we are not sure what an IP-free world would look like is that the state has snuffed out alternative institutions and practices.

Consider the analogous situation in which the FCC preempted and monopolized the field of property rights in airwaves just as they were starting to develop in the common law. Nowadays people are used to the idea of the state regulating and parceling out airwave or spectrum rights and might imagine there would be chaos if the FCC were abolished. Still, we have some idea as to what property rights might emerge in airwaves absent central state involvement.[92]

In any case, because people are bound to ask the inevitable: we IP opponents try to come up with some predictions and solutions and answers. Thus, in the end we must agree with Hasnas:

> Although I am tempted to give this response, I never do. This is because, although true, it never persuades. Instead, it is usually interpreted as an appeal for blind faith in the free market, and the failure to provide a specific explanation as to how such a market would provide legal services is interpreted as proof that it cannot. Therefore, despite the self-defeating nature of the attempt, I usually do try to suggest how a free market in law might work.

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[91] Leonard Read, "I Don't Know," *Mises Daily* (Nov. 2, 2011 [1965]; https://mises.org/library/i-dont-know).

[92] For more on this see David Kelley & Roger Donway, *Laissez Parler: Freedom in the Electronic Media* (1985), as discussed in Kinsella, "Why Airwaves (Electromagnetic Spectra) Are (Arguably) Property," *Mises Economics Blog* (Aug. 9, 2009).

So, how would content creators be rewarded in an IP-free market? First, we must recognize that what advocates of IP want is a world where competition is tamed. Their view is that

> Governments adopt intellectual property laws in the belief that a privileged, monopolistic domain operating on the margins of the free-market economy promotes long-term cultural and technological progress better than a regime of *unbridled competition*.[93]

Thus, they favor the grant of monopolies by the state that shelter various market actors from competition. But in a free society with no IP rights, content creators and innovators would face competition just as others do.

It must be recognized that the position of the creator of content that is easily copied or imitated is no different in kind from that of any other entrepreneur on the market. Every producer faces competition. If a given entrepreneur makes profit, competitors notice this and start to compete, eroding the initial profits made. Thus market actors continually seek to innovate and find new ways to please consumers in the pursuit of elusive profits. Most producers face a variety of costs, including costs of exclusion. For example:

> Movie theaters, for example, invest in exclusion devices like ticket windows, walls, and ushers, all designed to exclude non-contributors from enjoyment of service. Alternatively, of course, movie owners could set up projectors and screens in public parks and then attempt to prevent passers-by from watching, or they could ask government to force all non-contributors to wear special glasses which prevent them from enjoying the movie. "Drive-ins," faced with the prospect of free riders peering over the walls, installed—at considerable expense—individual speakers for each car, thus rendering the publicly available visual part of the movie of little interest …. The costs of exclusion are involved in the production of virtually every good imaginable.[94]

What this means is that it is the responsibility of entrepreneurs whose products are easily imitated to find a way to profit, and that they may not use state force to stop competitors. In a sense, this is already the situation facing content creators. Piracy is real and is not going away, unless the big media special interests succeed in having the Internet shut down. Even in the face of widespread file sharing and disregard for copyright, creativity is at an all time high.[95] The only solution to piracy and file sharing is to offer a better service.[96] For example, offering DRM-free movies or music for a reasonable price, as comedian Louis C.K. did, earning $1M in about two weeks.[97] Or use crowd-source fundraising mechanisms like Kickstarter—computer game company

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[93] Jerome H. Reichman, "Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System," *Cardozo Arts & Ent.* L.J. 13 (1995; https://scholarship.law.duke.edu/faculty_scholarship/685/): 475 (emphasis added), quoted in Kinsella, "Intellectual Property Advocates Hate Competition," *Mises Economics Blog* (July 19, 2011).

[94] Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," *Hamline L. Rev.* 12, no. 2 (Spring 1989; https://perma.cc/DH7K-ZCRV): 261–304, at 284–85, quoted in *AIP*, n.67.

[95] Mike Masnick, "We're Living In the Most Creative Time In History," *Techdirt* (Feb. 12, 2012; https://perma.cc/F6HY-QHG9).

[96] See, e.g., Mike Masnick, "Hollywood Wants To Kill Piracy? No Problem: Just Offer Something Better," *Techdirt* (Feb. 6, 2012; https://www.techdirt.com/2012/02/06/hollywood-wants-to-kill-piracy-no-problem-just-offer-something-better/https://perma.cc/73TB-YQX8); Paul Tassi, "You Will Never Kill Piracy, and Piracy Will Never Kill You," *Forbes* (Feb. 3, 2012; https://perma.cc/23W2-E2FT).

[97] Kinsella, "Comedian Louis C.K. Makes $1 Million Selling DRM Free Video via PayPal on his own website," *C4SIF.org* (Dec. 22, 2011).

Double Fine Productions recently used Kickstarter to raise $400,000 to fund a new adventure game ($300,000 for game development, and $100,000 to make a documentary about the process). In fact, as of this writing, $1,095,783 had been raised, from 28,921 backers, in *one day*.[98]

And there are a variety of tactics people can adopt in different industries. A singer or musician can garner fans from his recordings, even if they are distributed for free, and charge fees for concerts. Movie studios can sell tickets to movies that have advantages over home viewing, such as better sound, 3D, large screens, and the like. Most non-fiction authors—such as bloggers or law professors publishing law review articles for free—do not get paid now, but engage in this activity to enhance their reputation and employability, for ad revenues, or for other reasons. A novelist could become popular with her first few books and then get fans to pre-purchase the sequel before releasing it, or get paid to be a consultant on/endorser of a movie version.[99]

We cannot forecast all the ways human entrepreneurial creativity will discover to profit and flourish in a free society with no state-granted protections from competition. But there is every reason to think that in a private-law society, we would be unimaginably richer and freer, with more diversity and intellectual creativity than ever before. The state is nothing but a hindrance to everything good about human society.

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[98] See Kickstarter, https://perma.cc/MYH4-G38W. See also Mike Masnick, "People Rushing To Give Hundreds Of Thousands Of Dollars In Just Hours For Brand New Adventure Game," *Techdirt* (Feb. 9, 2012; https://www.techdirt.com/2012/02/09/people-rushing-to-give-hundreds-thousands-dollars-just-hours-brand-new-adventure-game/); Kyle Orland, "Double Fine seeks to cut out publishers with Kickstarter-funded adventure," *ars technica* (Feb. 9, 2012; https://arstechnica.com/gaming/2012/02/double-fine-seeks-to-cut-out-publishers-with-kickstarter-funded-adventure/).

[99] Kinsella, "Conversation with an author about copyright and publishing in a free society," *C4SIF.org* (Jan. 23, 2012); see also *idem*, "Examples of Ways Content Creators Can Profit Without Intellectual Property," *StephanKinsella.com* (July 28, 2010); *idem*, "Innovations that Thrive Without IP," *StephanKinsella.com* (Aug. 9, 2010); and *idem*, *Do Business Without Intellectual Property* (Liberty.me, 2014).

7

Against Intellectual Property After Twenty Years: Looking Back and Looking Forward

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This chapter is previously unpublished, other than a working draft posted on c4sif.org. It provides a perspective on the IP debates since my A*gainst Intellectual Property* (*AIP*) was published in 2001, and provides an overview of newer arguments about IP that I've made in the twenty-plus years since the publication of *AIP*. It also discusses changes I would make to the original arguments presented in *AIP*. This chapter complements chapter 14, which itself was originally published about a decade after *AIP*.

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Table of Contents

I. BACKGROUND

A*gainst Intellectual Property* originated as a *Journal of Libertarian Studies* article in 2001.[1] At the time there was less interest among libertarians in the topic of intellectual property (IP) than there is now. Libertarian attention was more focused on issues such as taxes, war, central banking, the drug war, government education, asset forfeiture, business regulations, civil liberties, and so on. Not so much on patent and copyright, the two primary forms of IP.

I had no reason to think it was an especially important issue, but I had always been

[1] "Against Intellectual Property" first appeared as part of the symposium Applications of Libertarian Legal Theory, published in the *Journal of Libertarian Studies* 15, no. 2 (Spring 2001): 1–53; it was later published as a monograph by the Mises Institute in 2008 and again by Laissez-Faire Books in 2012 (hereinafter *AIP*, citing the 2008

dissatisfied with various libertarian arguments for IP, and it kept nagging at me throughout college and law school. Ayn Rand's brief article on patent and copyright, for example, included strained arguments as to why a 17 year patent term and a life-plus-50 year copyright term were just about right.[2] She also offered a confused argument as to why it was fair for the first guy to race to the patent office to get a monopoly that could be used against an independent inventor just one day behind him.[3]

It made no sense to me, and didn't seem to fit in well with other aspects of libertarian

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version). The 2001 article was based on "The Legitimacy of Intellectual Property," a paper presented at the Law and Economics panel, Austrian Scholars Conference, Ludwig von Mises Institute, Auburn, Ala., March 25, 2000. It has also been translated into various languages, including, to date, Czech, French, Georgian, German, Italian, Polish, Portuguese, Romanian and Spanish. See www.stephankinsella.com/translations. *AIP* and many other works cited herein are available at www.stephankinsella.com/publications and www.c4sif.org/aip. A version of this article, with hyperlinks, is available at www.c4sif.org/aip. This article is published under a CC0—no rights reserved (public domain) license. And yes, it's actually been 22 years, not 20.

[2] Ayn Rand, "Patents and Copyrights," in *Capitalism: The Unknown Ideal* (New York: New American Library, 1967), p. 133. The term is now life plus 70 years, thanks to the Sonny Bono Copyright Term Extension Act of 1998, aka the Mickey Mouse Protection Act (https://en.wikipedia.org/wiki/Copyright_Term_Extension_Act).

[3] As Rand wrote there:

> As an objection to the patent laws, some people cite the fact that two inventors may work independently for years on the same invention, but one will beat the other to the patent office by an hour or a day and will acquire an exclusive monopoly, while the loser's work will then be totally wasted. This type of objection is based on the error of equating the potential with the actual. The fact that a man *might* have been first does not alter the fact that he *wasn't*. Since the issue is one of commercial rights, the loser in a case of that kind has to accept the fact that in seeking to trade with others he must face the possibility of a competitor winning the race, which is true of all types of competition.

As it turns out, Rand was incorrect about the US patent law she thought she was defending. At the time she wrote, under US patent law, in the case of two inventors who independently invented and filed patent applications for the same invention, the *first to invent* (the first to conceive of the invention) won, *not* the first to file. It was not until the Leahy-Smith America Invents Act, signed into law by President Obama in 2011, that the US switched to the first-to-file standard common in most other countries. See, e.g., "Leahy–Smith America Invents Act," *Wikipedia* (https://en.wikipedia.org/wiki/Leahy%E2%80%93Smith_America_Invents_Act); and Kinsella, "KOL164 | Obama's Patent Reform: Improvement or Continuing Calamity?: Mises Academy (2011)," *Kinsella on Liberty Podcast* (Dec. 9, 2014). Rand's argument defending what she thought was current US patent law was clearly makeweight; if she had known it was first-to-invent she would no doubt have cobbled together some flimsy, disingenuous argument to justify that. Likewise, the patent term of 17 years is now 20 years from the date of filing, and the copyright term of life of the author plus 50 years has been extended to life of the author plus 70 years; there is little doubt she would have found a way to justify that, too. In other words, according to the US-Constitution-worshipping Rand, whatever the nearly infallible US Congress decrees just happens to mirror natural rights. Just so happens. One may recall the scene near the end of *Atlas Shrugged* (1957) in which Judge Narragansett had to make only a few amendments to the Constitution:

> He sat at a table, and the light of his lamp fell on the copy of an ancient document. He had marked and crossed out the contradictions in its statements that had once been the cause of its destruction. He was now adding a new clause to its pages: "Congress shall make no law abridging the freedom of production and trade …."

Ah, that almost-perfect US Constitution! One can understand Rand's enthusiasm for the relative superiority of the US system over the communist system of the USSR that she fled, but that doesn't make it so presumptively libertarian in absolute terms. Let's not be naïve.

As I point out in "Ayn Rand Finally Right about the First-to-File US Patent System," *C4SIF Blog* (Sep. 9, 2011), Rand was also incorrect in stating "An idea as such cannot be protected until it has been given a material form. An invention has to be embodied in a physical model before it can be patented …." No working model needs to be made. For other mistakes she made about how the actual IP system works, see Kinsella, "Ayn Rand and *Atlas Shrugged, Part II*: Confused on Copyright and Patent," *C4SIF Blog* (Oct. 21, 2012).

theory and individual rights. I believed Rand's approach was wrong, or at least flawed, since natural property rights can't expire at an arbitrary time, much less one decreed by legislation, but I still assumed IP rights were, somehow, legitimate property rights. Since I was increasingly interested in libertarian theory (my first scholarly libertarian article was published in 1992)[4] and was beginning to specialize in IP in my law practice (in 1993),[5] I figured that I might be able to come up with a better defense of IP than previous libertarians had managed, since most of them really didn't have a good grasp of how actual patent and copyright law worked. So I dove deep into the literature and tried to find a way to justify IP rights, only to keep hitting dead ends.[6] Every argument I could come up with was as flawed and shaky as Ayn Rand's.

And in my research I came across libertarian and other criticisms of IP,[7] and also deepened my understanding of the crucial role of *scarcity* to property rights, as emphasized in particular by Hans-Hermann Hoppe.[8] I began to see that older criticisms of IP, such as the writings of Benjamin Tucker, Wendy McElroy, Sam Konkin, and Tom Palmer, were correct, even if their criticisms were not comprehensive or complete.[9] With a relief similar to the one I felt when I

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[4] See "Estoppel: A New Justification for Individual Rights," *Reason Papers* No. 17 (Fall 1992): 61–74; elaborated in "A Libertarian Theory of Punishment and Rights" (ch. 5). See also Kinsella, "The Genesis of Estoppel: My Libertarian Rights Theory," *StephanKinsella.com* (Mar. 22, 2016).

[5] I started practicing law in 1992, initially specializing in oil & gas law, and started transitioning to patent law in 1993, taking and passing the US Patent Bar Exam in 1994. For more information, see "On the Logic of Libertarianism and Why Intellectual Property Doesn't Exist" (ch. 24); also Kinsella, "The Start of my Legal Career: Past, Present and Future: Survival Stories of Lawyers," *KinsellaLaw.com* (Dec. 6, 2010) and www.stephankinsella.com/about. I became interested in libertarianism in 10th grade in high school, around 1980, after reading Ayn Rand's *The Fountainhead*. See "How I Became a Libertarian" (ch. 1); Kinsella, "Faculty Spotlight Interview: Stephan Kinsella," *Mises Economics Blog* (Feb. 11, 2011); *idem*, "What Sparked Your Interest in Liberty?", *FEE.org* (April 21, 2016); and other biographical pieces at www.stephankinsella.com/publications/#biographical.

[6] See also the discussion in "Conversation with Schulman about Logorights and Media-Carried Property" (ch. 17) of how both J. Neil Schulman and I tried to find arguments to justify IP, given our dissatisfaction with previous attempts.

[7] Some of the works that influenced me and helped me change my mind on IP include Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," *Hamline L. Rev.* 12, no. 2 (Spring 1989; https://perma.cc/DH7K-ZCRV): 261–304 and *idem*, "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects," *Harv. J. L. & Pub. Pol'y* 13, no. 3 (Summer 1990; https://perma.cc/J8LY-L4MQ): 817–65; Wendy McElroy, "Contra Copyright," *The Voluntaryist* (June 1985), included in *idem*, "Contra Copyright, Again," *Libertarian Papers* 3, art. no. 12 (2011; http://libertarianpapers.org/12-contra-copyright); Boudewijn Bouckaert, "What is Property?", *Harv. J. L. & Pub. Pol'y* 13, no. 3 (Summer 1990): 775–816; and *idem*, "From Property Rights to Property Order," *Encyclopedia of Law and Economics* (Springer, forthcoming 2023). Some of these, and others, are included in Kinsella, ed., "The Anti-IP Reader: Free Market Critiques of Intellectual Property: A Skeletal E-book," *StephanKinsella.com* (2023).

[8] See Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989], www.hanshoppe.com/tsc); also *idem*, "Of Common, Public, and Private Property and the Rationale for Total Privatization," in *The Great Fiction: Property, Economy, Society, and the Politics of Decline* (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf).

[9] See Kinsella, "The Origins of Libertarian IP Abolitionism," *Mises Economics Blog* (April 1, 2011) and *idem*, "The Four Historical Phases of IP Abolitionism," *C4SIF Blog* (April 13, 2011). On Benjamin Tucker, see also Wendy McElroy, "Intellectual Property," in *The Debates of Liberty: An Overview of Individualist Anarchism, 1881-1908* (Lexington Books, 2002; https://perma.cc/ZQM2-82B9), reprinted without endnotes as "Copyright and Patent in Benjamin Tucker's Periodical," *Mises Daily* (July 28, 2010; https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical); See also Kinsella, "Benjamin Tucker and the Great Nineteenth Century IP Debates in *Liberty* Magazine," *StephanKinsella.com* (July 11, 2022). See also the writings by these and others in Kinsella, ed., "The Anti-IP Reader."

finally gave up minarchism and ceded the ground to anarchism, I finally concluded that patent and copyright are completely statist and unjustified derogations from libertarian principles and property rights. No wonder I had been failing in my attempts: I had been trying to justify the unjustifiable!

So I sought to build on the work done by previous thinkers, and clarify and expand it. I gave a few local talks and wrote some short articles on the topic starting in 1995,[10] often with a somewhat tentative tone as I was initially concerned that publicly opposing IP law might harm my budding IP law practice (turns out, it never caused a problem). I then wrote a lengthier treatment, which became *AIP*, mostly to get it out of my system, intending to then turn my attention back to other fields that interest me more, like rights theory, contract theory, causation, and other aspects of libertarian legal theory.[11]

I presented the paper, then entitled "The Legitimacy of Intellectual Property," at the Ludwig von Mises Institute's Austrian Scholars Conference in March 2000. This was the year Objectivist George Reisman started attending Mises Institute events, after having been ousted from Objectivist circles over his favorable remarks about Barbara Branden's biography of Rand, and had reunited with his old friend Ralph Raico, from whom he had been estranged for many years. I remember Reisman asking me, after I delivered my paper, something like, "Let me make sure I understand you. Are you saying all patent and copyright law should be abolished?" I answered yes and, seeming somewhat stunned, he slowly walked away. In any case, I submitted the paper to the *JLS*, where it was published as "Against Intellectual Property," a title suggested by Professor Hans-Hermann Hoppe, then the journal's editor.

AIP, and some other articles around the same time, argues that all forms of intellectual property—including patent, copyright, trademark, and trade secret, but especially the first two—are unjust and unlibertarian laws and should be abolished.[12]

II. The Internet Era and the Growing IP Threat

As noted above, IP had not received a great deal of attention from libertarians before the Internet era. But IP's wallflower status was about to change. Some were starting to sense that the IP issue was becoming more important. The need to shine a light on patent and copyright, heretofore relegated to the shadows and the bailiwick of specialists, was becoming more apparent. An early sign of this among Austro-libertarians, perhaps, was the Mises Institute's awarding me the O.P. Alford III Prize for 2002 for *AIP*.[13]

The Internet is the reason for IP emerging from the shadows. The Internet—and digital

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[10] See, e.g., Kinsella, "Letter on Intellectual Property Rights," *IOS J.* 5, no. 2 (June 1995), pp. 12–13 (see references in *idem*, "Letter on Intellectual Property Rights," *IOS Journal* (June 1995)," *C4SIF Blog* (Aug. 31, 2022)); and *idem*, "Is Intellectual Property Legitimate?", *Pennsylvania Bar Association Intellectual Property Newsletter* 1 (Winter 1998): 3, republished in the Federalist Society's *Intellectual Property Practice Group Newsletter*, 3, no. 3 (Winter 2000); available at www.stephankinsella.com/publications/#againstip.

[11] See, e.g., various chapters in this book.

[12] My article "In Defense of Napster and Against the Second Homesteading Rule," *LewRockwell.com* (September 4, 2000) presented a summary version of the argument also made around the same time in the original version of *AIP*. "Law and Intellectual Property in a Stateless Society" (ch. 14) restates the basic case against IP; a more concise version may be found in Kinsella, "Intellectual Property and Libertarianism," *Mises Daily* (Nov. 17, 2009).

[13] https://perma.cc/E33D-JST6.

information and file sharing, social media and related technologies like cell phones, texting, and ubiquitous video cameras—was at this time gaining steam and becoming a huge social force. It was becoming one of the most important tools to fight statism and to preserve and extend human freedom and prosperity. And this is why it has been under attack by the state, in the guise of anti-pornography, anti-gambling, and anti-terrorism, as well as anti-piracy/copyright protection efforts.

The Internet became the world's biggest copying machine, leading to a dramatic increase in the amount of copyright infringement, and thus in the amount of copyright lawsuits and penalties.[14] At the same time, news of shockingly excessive, absurd, and outrageous copyright persecutions were instantly and widely communicated over the Internet—college students and single mothers sued for millions of dollars for sharing a few songs.[15] No longer were these lawsuits hidden in the dark; Internet users were starting to be made aware of them. Writes Siva Vaidhyanathan:

> By 1991 I noticed that [hip-hop] music had changed. The new work lacked the texture and richness that had marked the finest albums of the late 1980s, such as Public Enemy's *It Takes a Nation of Millions to Hold Us Back* and the Beastie Boys's *Paul's Boutique*. Instead, the digital samples of others' music that made up the intricate bed of sound in those great albums was replaced by a thinner, less interesting, less intricate collection of more obvious samples. The language of sampling seemed to become simpler and less interesting. There was less play and less depth to the music by 1992. I knew that several hip-hop artists had faced copyright suits over sampling in 1990 and 1991. So I wondered if the law had had such a profound effect on the art. After a bit of research, I concluded that it had. With a bit more research, I sought to explain the larger, longer relationship between copyright and creativity in American history. That project … became the germ of my first book, published in 2001, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*.
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> By 2001 copyright had exploded into public consciousness, largely through the remarkable rise and fall of Napster, the first easy-to-use digital file-sharing service. The United States had radically expanded copyright law in the 1990s in anticipation of the "digital moment." But nothing had prepared the copyright industries for the torrent of unauthorized peer-to-peer distribution over the Internet, starting in about 2000. Meanwhile, computer software had blossomed from a mere hobby to a multibillion-dollar global industry in the 1980s and 1990s without any clear sense of how intellectual property would work for it (or against it). At about the same time that U.S. courts ruled that software could enjoy the protection of patent law as well as

[14] In fact, one of my earliest publications on IP concerned one of the first streaming-music services, which was killed by the copyright industry. See Kinsella, "In Defense of Napster and Against the Second Homesteading Rule." Napster "originally launched on June 1, 1999, as a pioneering peer-to-peer (P2P) file sharing software service with an emphasis on digital audio file distribution. … As the software became popular, the company ran into legal difficulties over copyright infringement. It ceased operations in 2001 after losing a wave of lawsuits and filed for bankruptcy in June 2002." "Napster," *Wikipedia* (retrieved May 11, 2022; https://en.wikipedia.org/wiki/Napster).

[15] See, e.g., Kinsella, "The Patent, Copyright, Trademark, and Trade Secret Horror Files," *StephanKinsella.com* (Feb. 3, 2010); *idem*, "KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished," *Kinsella on Liberty Podcast* (Nov. 24, 2021); and *idem*, "First Amendment Defense Act of 2021," *C4SIF Blog* (Jan. 17, 2021). See also *idem*, "We are all copyright criminals: John Tehranian's 'Infringement Nation,'" *Mises Economics Blog* (Aug. 22, 2011); *idem*, "The tepid mainstream 'defenses' of Aaron Swartz," *C4SIF Blog* (Jan. 29, 2013); and *idem*, "Tim Lee and Lawrence Lessig: 'some punishment' of Swartz was 'appropriate,'" *C4SIF Blog* (Jan. 13, 2013).

> copyright, the movement to lock computer code open for the benefit of security, stability, quality, and creativity (and, to some, humanity) grew to be called the "Free and Open-Source Software" movement. As someone thrown into the copyright battles of the early twenty-first century despite my training as a nineteenth-century cultural historian, I felt compelled to make sense of these and other trends that were remaking our global information ecosystem. Those interests are reflected in my second book, published in 2004, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System*.
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> The copyright wars of the first decade of the twenty-first century yielded a global "Free Culture" movement, with law professor Lawrence Lessig as its intellectual leader. Globally, others concerned with issues beyond copyright and creativity, including biopiracy and the cost of pharmaceuticals in developing nations, launched the "Access to Knowledge" movement. During the decade the industries devoted to expanding and strengthening intellectual property succeeded in legislatures and courts around the world. And the United States embedded intellectual property standards into trade treaties with other nations. The issues were becoming more interesting and important every week.
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> Then, in late 2004 Google announced it would begin to scan into electronic form millions of books from dozens of university libraries—many of which would still be covered by copyright. The ensuing debate and lawsuits drew me into the fascinating world of search engines, Internet policy, and the future of libraries and books. That research generated my third book, published in 2011, *The Googlization of Everything and Why We Should Worry*.[16]

Or as Declan McCullogh writes:

> Over the past few years, intellectual property has morphed from an arcane topic of interest mostly to academicians and patent attorneys to the stuff of newsmagazine cover stories. Courtrooms' klieg lights have illuminated how copyright law has been stretched in ways unimaginable just five years ago. Software patents have roiled the computer industry and alarmed developers of open-source programs. Meanwhile, displaying all the temperance of a methadone addict, Congress keeps handing more and more power to copyright owners.[17]

Patent outrages and abuse also increased along with a growing tech sector and economy and were also communicated at light speed to blogs and RSS feeds. And in the meantime the traditional content-producers, ever-resistant to new technologies that disrupt comfortable, established business models, kept lobbying Congress to ratchet up patent and copyright scope and terms and penalties and enforcement,[18] while at the same time the US bullied other countries to keep ratcheting up their own IP laws and enforcement.[19] This culminated in the attempt to enact

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[16] Siva Vaidhyanathan, *Intellectual Property: A Very Short Introduction* (Oxford University Press, 2017), at xviii–xx.

[17] Declan McCullagh, "Foreword," in Adams Thierer and Wayne Crews, eds., *Copy Fights: The Future of Intellectual Property in the Information Age* (Cato, 2002), p. xi.

[18] See Kinsella, "The Mountain of IP Legislation," *C4SIF Blog* (Nov. 24, 2010); Mike Masnick, "How Much Is Enough? We've Passed 15 'Anti-Piracy' Laws In The Last 30 Years," *Techdirt* (Feb. 15, 2012; https://perma.cc/TG7U-768F); and Timothy B. Lee, "Copyright enforcement and the Internet: we just haven't tried hard enough?", *ars technica* (Feb. 16, 2012; https://perma.cc/75P9-KM7E).

[19] See, e.g., the following posts from the *C4SIF Blog*: "Intellectual Property Imperialism" (Oct. 24, 2010); "Covid-19 Relief Bill Adds Criminal Copyright Streaming Penalties and IP Imperialism" (Dec. 22, 2020); "*Intellectual*

anti-piracy legislation such as the Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA), which was—at least for the moment—derailed by a historic Internet uprising.[20]

For these reasons, in the last couple decades, as IP become a more apparent threat to property rights, freedom of expression, and the Internet, the issue became more prominent and libertarians of various stripes—Austrians, anarchists, left-libertarians, civil libertarians, and the young and Internet dependent—started to become more interested in the IP issue and more receptive to anti-IP arguments.[21] And more and more libertarians are writing on this important topic and building on, incorporating, or extending previous analyses, calling for significant reform of IP law or even outright abolition.[22] In addition, outside of libertarianism proper, a host of

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Property Rights: A Critical History and US IP Imperialism" (Dec. 31, 2014); "Blowback from IP Imperialism: Chinese Companies Again Using Patents To Punish Foreign Competitors" (July 14, 2012); "'Free-trade' pacts export U.S. copyright controls" (Oct. 17, 2011); "China and Intellectual Property" (Dec. 27, 2010); "Wikileaks cables reveal that the US wrote Spain's proposed copyright laws" (Dec. 3, 2010); and other posts at www.c4sif.org/tag/ip-imperialism. See also Michael Geist, "U.S. Copyright Lobby Takes Aim at Canadian Copyright Term Through Trans-Pacific Partnership," *MichaelGeist.com* (Aug. 7, 2013; https://perma.cc/9NW4-EMAN); *idem*, "Japan Considering Copyright Term Extension, Canada Next?," *MichaelGeist.com* (July 15, 2013; https://perma.cc/G4R8-SDEF); *idem*, "The Canadian Government Makes its Choice: Implementation of Copyright Term Extension Without Mitigating Against the Harms," *MichaelGeist.com* (April 27, 2022; https://perma.cc/3DER-JUK2); Declan McCullagh, "Free-trade pacts export U.S. copyright controls," *CNET* (Oct. 14, 2011; https://perma.cc/7LJE-PG4J).

[20] See, e.g., Kinsella, "SOPA is the Symptom, Copyright is the Disease: The SOPA wakeup call to ABOLISH COPYRIGHT," *The Libertarian Standard* (Jan. 24, 2012). See also *idem*, "Where does IP Rank Among the Worst State Laws?", *C4SIF Blog* (Jan. 20, 2012); *idem*, "Masnick on the Horrible PROTECT IP Act: The Coming IPolice State," *C4SIF Blog* (June 2, 2012); *idem*, "Copyright and the End of Internet Freedom," *C4SIF Blog* (May 10, 2011); and *idem*, "Patent vs. Copyright: Which is Worse?", *C4SIF Blog* (Nov. 5, 2011).

[21] See Kinsella, "The Death Throes of Pro-IP Libertarianism," *Mises Daily* (July 28, 2010); *idem*, "We, The Web Kids': Manifesto For An Anti-ACTA Generation," *C4SIF Blog* (March 3, 2012). Even many Randians are now anti-IP. See, e.g., *idem*, "An Objectivist Recants on IP," *C4SIF Blog* (Dec. 4, 2009); *idem*, "Yet another Randian recants on IP," *C4SIF Blog* (Feb. 1, 2012); Timothy Sandefur, "A Critique of Ayn Rand's Theory of Intellectual Property Rights," *J. Ayn Rand Stud.* 9, no. 1 (Fall 2007; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117269): 139–61. *But see* Kinsella, "Does Cato's New Objectivist CEO John Allison Presage Retrogression on IP?", *C4SIF Blog* (Aug. 27, 2012).

[22] See, for example, Butler Shaffer, *A Libertarian Critique of Intellectual Property* (Auburn, Ala.: Mises Institute, 2013; https://mises.org/library/libertarian-critique-intellectual-property); Jacob Huebert, "The Fight against Intellectual Property," in *Libertarianism Today* (Santa Barbara, CA: Praeger, 2010; https://mises.org/library/fight-against-intellectual-property); Walter Block, "The Intellectual-Property Denier," in *Defending the Undefendable II: Freedom in All Realms* (UK and USA: Terra Libertas Publishing House, 2013; reprint edition Auburn, Ala.: Mises Institute, 2018; https://mises.org/library/defending-undefendable-2); Jeffrey A. Tucker, "Ideas, Free and Unfree," and other chapters in the "Can Ideas Be Owned?" section of *idem*, *It's a Jetsons World: Private Miracles & Public Crimes* (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/its-jetsons-world-private-miracles-and-public-crimes) (chaps. 37–41); *idem,* several chapters in the "Technology" section of *idem*, *Bourbon for Breakfast: Living Outside the Statist Quo* (Auburn, Ala.: Mises Institute, 2010; https://mises.org/library/bourbon-breakfast); Adam Kokesh, "Intellectual Property," in *Freedom!* (2014; https://archive.org/details/FREEDOMEbook), §VI; Sandefur, "A Critique of Ayn Rand's Theory of Intellectual Property Rights"; Chase Rachels, "Property," in *A Spontaneous Order: The Capitalist Case For A Stateless Society* (2015; https://archive.org/details/ASpontaneousOrder0), section "Intellectual Property"; Vin Armani, "The Ownable And The Unownable," in *Self Ownership: The Foundation of Property and Morality* (2017; https://archive.org/details/ASpontaneousOrder0); Tom W. Bell, "Copyright, Philosophically," in *Intellectual Privilege: Copyright, Common Law, and the Common Good* (Arlington, Virginia: Mercatus Center, 2014; https://perma.cc/JLC2-396Y); Jerry Brito, ed., *Copyright Unbalanced: From Incentive to Excess* (Arlington, Va.: Mercatus Center, 2013); Jack Lloyd, "Property Rights," in *The Definitive Guide to Libertarian Voluntaryism* (2022); Isaac Morehouse, "How I Changed My Mind on Intellectual Property," *FEE.org* (Sept. 27, 2016; https://perma.cc/324H-TPRY), also in Keith Knight, ed., *The Voluntaryist Handbook: A Collection of Essays,*

economists, empirical researchers, and legal scholars, most notably economists Michele Boldrin and David Levine, authors of the groundbreaking *Against Intellectual Monopoly*, have expressed deep skepticism, on empirical grounds, of the claimed pro-innovation effects of patent and copyright.[23]

The issue continues to receive attention from a variety of institutions and outlets. I have myself been interviewed, lectured, and debated countless times on this topic, including on the *Stossel* show and the *Reason.tv*-sponsored Soho Forum debate.[24] I also gave a six-part lecture course on IP for the Mises Academy in 2010 and reprised in 2011,[25] and I have continued to write on this topic.[26]

What about the prospects for reform of patent and copyright law? While more and more libertarians have come to see IP law as unjust, it is unlikely there will be much legislative progress on this matter due to widespread confusion about property rights and entrenched special interests, in particular Hollywood and the American music industry, which rely on copyright, and the pharmaceutical industry, which profits from the patent system. That said, it seems unlikely that copyright terms—once 14 years extendable to 28, and then life of the author plus 50 years, and now life of the author plus 70 years—will be extended any further. And while patent and copyright law will stay on the books for a long time, technology will make them increasingly harder to enforce. Piracy of copyrighted works is already rampant due to the Internet and encryption. As 3D printing technology advances, we may see an increased ability of consumers to evade patent law as well.[27]

III. CHANGES

I've been asked from time to time what changes I would make to *AIP*. In my assessment, the basic arguments in *AIP* are sound. I have yet to see a valid criticism.[28] I might change the structure somewhat, or an emphasis or wording here and there. For example, I would clarify that *scarcity* is meant in the technical economics sense of rivalrousness. I might even propose the use of

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Excerpts, and Quotes (2022; https://perma.cc/N8UX-4PX4). See also various resources collected at www.c4sif.org/resources and Kinsella, ed., "The Anti-IP Reader."

[23] Michele Boldrin & David K. Levine, *Against Intellectual Monopoly* (Cambridge University Press, 2008), at www.againstmonopoly.org. See also Kinsella, "The Overwhelming Empirical Case Against Patent and Copyright," *C4SIF Blog* (Oct. 23, 2012); *idem*, "Legal Scholars: Thumbs Down on Patent and Copyright," *C4SIF Blog* (Oct. 23, 2012); and *idem*, "Yet Another Study Finds Patents Do Not Encourage Innovation," *Mises Economics Blog* (July 2, 2009).

[24] See Kinsella, "KOL308 | Stossel: It's My Idea (2015)," *Kinsella on Liberty Podcast* (Dec. 29, 2020) and *idem*, "KOL364 | Soho Forum Debate vs. Richard Epstein"; and dozens of speeches and appearances on radio shows and podcasts, collected on the Kinsella on Liberty podcast feed at www.stephankinsella.com/kinsella-on-liberty-podcast.

[25] See Kinsella, "KOL172 | "Rethinking Intellectual Property: History, Theory, and Economics: Lecture 1: History and Law" (Mises Academy, 2011)," *Kinsella on Liberty Podcast* (Feb. 14, 2015).

[26] See, e.g., Kinsella, "A Selection of My Best Articles and Speeches on IP," *C4SIF Blog* (Nov. 30, 2015), and other material at www.stephankinsella.com/publications/#againstip and www.c4sif.org/aip.

[27] See Kinsella, "Gary North on the 3D Printing Threat to Patent Law," *C4SIF Blog* (Jan. 31, 2022), and links and references therein.

[28] See Kinsella, "There are No Good Arguments for Intellectual Property," *Mises Economics Blog* (Feb. 24, 2009); *idem*, "Absurd Arguments for IP," *C4SIF Blog* (Sep. 19, 2011); *idem*, "KOL367 | Disenthrall with Patrick Smith: Fisking Strangerous Thoughts' Critique of 'Intellectual Communism,'" *Kinsella on Liberty Podcast* (Dec. 20, 2021); *idem*, "KOL076 | IP Debate with Chris LeRoux," *Kinsella on Liberty Podcast* (Aug. 30, 2013).

the term "conflictable," to emphasize the nature of resources that gives rise to property rights in the first place, and to head off silly arguments like "well IP is justified since good ideas are scarce."[29] Also, I might use "corporeal" or "material" instead of "tangible."[30] I would try to be more careful to use the term *property* to refer *not* to the owned resource that is the subject of property rights, but only to the relationship between the owner and the resource owned, although this can be tedious if overdone.[31] I would streamline the initial section providing a positive legal description of the main forms of IP, and eliminate the Appendix providing examples of obvious IP abuse, since this can be done now in an easily updated online page or post.[32] I would now be a bit harsher on trademark than I was in *AIP*; all trademark law is evil and should be abolished. The aspects of it that can be defended are already present in contract and fraud law.

IV. Additions

But I would not change much, substantively speaking. However, since writing *AIP* over 20 years ago, I have found additional ways of explaining the fundamental problem with IP law—additional arguments, examples, and evidence.[33] So I would add some material, as I did to some degree in a later paper.[34] I'll briefly outline below some of the arguments developed after the initial publication of *AIP*.

A. Empirical Evidence

In the "Utilitarian Defenses of IP" section of *AIP* I explained various defects in the utilitarian case for IP. First, as Austrians have explained, value is not a measurable, cardinal quantity that can be interpersonally compared.[35] Second, even if violating someone's rights to take

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[29] *See* Kinsella, "On Conflictability and Conflictable Resources," *StephanKinsella.com* (Jan. 31, 2022).

[30] In *AIP* I sometimes used the term "tangible" to indicate scarce resources that can be subject to property rights. (I've also sometimes used the term corporeal, a civil-law term.) Hardy Bouillon argues that it might be more precise to focus on the difference between material vs. non-material goods rather than tangible vs. non-tangible goods, as the touchstone of things subject to property rights. As Bouillon writes:

> Though some speak exclusively of tangible and non-tangible goods, I prefer to talk of material and immaterial goods. … The point about material goods is not that they are tangible, for some are not. For instance, atoms and many other small material units are not tangible; they are identifiable only indirectly, though this does not prevent us from calling them material.

Hardy Bouillon, "A Note on Intellectual Property and Externalities," *Mises Daily* (Oct. 27, 2009), previously published in Jörg Guido Hülsmann & Stephan Kinsella, eds., *Property, Freedom and Society: Essays in Honor of Hans-Hermann Hoppe* (Auburn, Ala.: Mises Institute, 2009). I see some merit in his argument, though as noted above I think the essence of what makes some thing a possible subject of property rights is whether it is conflictable or not.

[31] See "What Libertarianism Is" (ch. 2), n.5; also Kinsella, "Property: Libertarian Answer Man: Self-ownership for slaves and Crusoe; and Yiannopoulos on Accurate Analysis and the term 'Property,'" *StephanKinsella.com* (April 3, 2021).

[32] As I did in a later article based on *AIP*, "The Case Against Intellectual Property," in *Handbook of the Philosophical Foundations of Business Ethics*, Prof. Dr. Christoph Lütge, ed. (Springer, 2013) (chapter 68, in Part 18, "Property Rights: Material and Intellectual," Robert McGee, section ed.).

[33] See, generally, Kinsella, "A Selection of My Best Articles and Speeches on IP."

[34] "Law and Intellectual Property in a Stateless Society" (ch. 14) restates the basic case against IP and incorporates some new arguments developed after *AIP*.

[35] See *AIP*, n.41; also Murray N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," in *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/economic-controversies). For a recent article debunking David Friedman's scientistic and confused contention that "Von Neumann proved" that

their resources and redistribute it to someone else makes the recipient better off, it is still a rights violation. And third, the proponent of IP, arguing that IP laws lead to net utility gains, has the burden of proof.[36] And it has become increasingly clearer, in the last 60+ years, that those arguing for IP on empirical grounds have not yet satisfied and cannot satisfy their burden of proof that IP makes us better off.[37] As I wrote in a subsequent paper, "Given the available evidence, anyone who accepts utilitarianism should be *opposed* to patent and copyright."[38]

B. IP Rights as Negative Easements[39]

Additionally, I have come to understand that IP rights can be properly classified as *non-consensual negative easements* (or servitudes),[40] which makes plain exactly how they infringe justly-acquired property rights.[41] All property rights are enforceable rights in material, scarce—conflictable—resources, the type of (causally efficacious) scarce means that human actors can possess and manipulate and employ to causally interfere in the world. It is not that assigning property rights in information or knowledge is *wrong*, but that it is *impossible*.[42] Force cannot be applied to "ideas" or information, but only to scarce resources. Any IP right is just a disguised reassignment of property rights in existing scarce resources. One reason for the confusion here is that people are not careful in distinguishing between motivations and means.

For example, it is sometimes said that people "fight over religion." But this is not accurate. Religion is not a scarce resource over which there can be conflict. Any interpersonal human conflict is *always* over scarce, material, *conflictable* resources. If *A* kills *B* or takes his land or cows in a religious dispute, the religious disagreement is merely the *motivation* or reason for the conflict or clash—the explanation for why parties act as they do—but the clash itself is always over the material things that are the real subject of property rights. We can *explain* a given human action by reference to the ends aimed at, and the means employed. One's motivations and goals factor into the ends; but the actual means employed and the actions taken are what property rights concern.[43]

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utility can be measured or expressed cardinally, see Robert P. Murphy, "Why Austrians Stress Ordinal Utility," *Mises Wire* (Feb. 3, 2022; https://mises.org/wire/why-austrians-stress-ordinal-utility).

[36] See Kinsella, "There's No Such Thing as a Free Patent," *Mises Daily* (Mar. 7, 2005).

[37] See Boldrin & Levine, *Against Intellectual Monopoly*; Kinsella, "The Overwhelming Empirical Case Against Patent and Copyright"; *idem*, "Legal Scholars: Thumbs Down on Patent and Copyright."; *idem*, "Tabarrok, Cowen, and Douglass North on Patents," *C4SIF Blog* (March 11, 2021).

[38] "Law and Intellectual Property in a Stateless Society" (ch. 14), text at n.72.

[39] See also Part IV.F, below.

[40] Servitude is the civil law term; easement the common law term. *See* Gregory W. Rome & Stephan Kinsella, *Louisiana Civil Law Dictionary* (New Orleans, La.: Quid Pro Books, 2011). These rights are also "nonapparent." See Kinsella, "Intellectual Property Rights as Negative Servitudes," *C4SIF Blog* (June 23, 2011). IP rights can also be classified legally as incorporeal movables, although this classification has no relevance here. See Louisiana Civil Code (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), arts. 461, 462, 475; Kinsella, "Are Ideas Movable or Immovable?", *C4SIF Blog* (April 8, 2013). See also related discussion in "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11), n.39 and references and quotes in "What Libertarianism Is" (ch. 2), n.5, related to the nature of "things" in the civil law.

[41] Kinsella, "Intellectual Property Rights as Negative Servitudes."

[42] See also Part IV.G, below, and "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11).

[43] For more on this, see the various discussions of what it means to have a "fight over religion," in "On the Logic of Libertarianism and Why Intellectual Property Doesn't Exist" (ch. 24); also Kinsella, "The Limits of

All rights are human rights, and all human rights are property rights,[44] and property rights just are rights to the exclusive control of certain conflictable resources.[45] In the end, every law, every dispute, boils down to some actor being assigned ownership rights in a given contested (conflictable) resource. A copyright grant gives the holder a partial property right in the printing press and computers of other people. A patent grant gives the holder a partial property right in the factories and raw material already owned by others. Such rights are negative easements that permit the holder to veto or prevent certain uses by the owner. Negative easements are legitimate when consented to, but in the case of IP the state grants these rights to the IP holder *without the consent* of the owner of the burdened property (the so-called "servient estate"). As I noted in *AIP*, "ownership of an idea, or ideal object, effectively gives the IP owners a property right in every physical embodiment of that work or invention."[46] Thus, IP rights amount to a taking or infringement of property rights otherwise established in accordance with the principles of original appropriation and contract.[47] This insight buttresses the argument in *AIP* that "a system of property rights in 'ideal objects' necessarily requires violation of other individual property rights,

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Libertarianism?: A Dissenting View," *StephanKinsella.com* (April 20, 2014); and the comments in the transcripts to these episodes of the *Kinsella on Liberty Podcast*: "KOL337 | Join the Wasabikas Ep. 15.0: You Don't Own Bitcoin—Property Rights, Praxeology and the Foundations of Private Law, with Max Hillebrand" (May 23, 2021); "KOL154 | 'The Social Theory of Hoppe: Lecture 2: Types of Socialism and the Origin of the State'" (Oct. 16, 2014); "KOL076 | IP Debate with Chris LeRoux" (Aug. 30, 2013); and "KOL038 | Debate with Robert Wenzel on Intellectual Property" (April 1, 2013).

[44] See Murray N. Rothbard, "'Human Rights' as Property Rights," in *The Ethics of Liberty* (New York: New York University Press, 1998, http://mises.org/rothbard/ethics/fifteen.asp).

[45] See Hoppe, *A Theory of Socialism and Capitalism*, chaps. 1–2 & 7.

[46] See *AIP*, the section "IP Rights and Relation to Tangible Property," p. 15. Rothbard recognizes this in a limited way, when he writes: "patents actually invade the property rights of those *independent* discoverers of an idea or invention who made the discovery after the patentee. Patents, therefore, *invade* rather than defend property rights." Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholar's ed., 2nd ed. (Auburn, Ala.: Mises Institute, 2009; https://mises.org/library/man-economy-and-state-power-and-market), chap. 10, §7, p. 749. Yet patents invade not only the rights of those who independently discover the same invention; they also invade the rights of competitors and copiers who have every right to use publicly available information to guide their actions and to manipulate their own resources. And as noted in "Law and Intellectual Property in a Stateless Society" (ch. 14), Part III.C, and Kinsella, *AIP*, the section "Contract vs. Reserved Rights," Rothbard does not really oppose parents. He defends what he erroneously calls copyright or "common law copyright," with a flawed contract-based argument that contradicts his own contract theory and his criticism of defamation law (another type of IP; see Kinsella, "Defamation as a Type of Intellectual Property," in Elvira Nica & Gheorghe H. Popescu, eds., *A Passion for Justice: Essays in Honor of Walter Block* (New York: Addleton Academic Publishers, forthcoming)). But the copyright Rothbard advocates is not like current, legislated copyright, and it also includes inventions, like Brown's mousetrap (which is the domain of patent law). (For Rothbard's mousetrap example, see Murray N. Rothbard, "Knowledge, True and False," in *The Ethics of Liberty* (New York: New York University Press, 1998; https://mises.org/library/knowledge-true-and-false), p. 123.) So what he really advocates is a contractual version of patent law (and presumably copyright law, if his argument extends not only to inventions but also to artistic works and things like books). And his contract-based IP/copyright idea is not "common law copyright"; that was doctrine in the common law that was similar to trade secrets and had nothing to do with this contractual IP argument Rothbard is making, or to actual copyright that was not at all rooted in contract. See Wikipedia, https://en.wikipedia.org/wiki/Common_law_copyright. Writes Rothbard: "Violation of (common law) copyright is an equivalent violation of contract and theft of property." Ibid. I criticize this view in *AIP*, the section "Contract vs. Reserved Rights." His reasoning here also makes some of the same mistakes as his view of "implicit theft" that I criticize in "A Libertarian Theory of Contract" (ch. 9), Part III.D.

[47] For further discussion of the principles of original appropriation, contractual title transfer, and the relation principle of transfer for purposes of rectification, see "What Libertarianism Is" (ch. 2), n.11 and accompanying text *et pass*.

e.g., to use one's own tangible property as one sees fit."[48]

C. Lockean Creationism[49]

In the "Creation vs. Scarcity" section of *AIP* I pointed out that one mistake made by many proponents of IP is the notion that *creation is a source of property rights*. But it is not. I have elaborated on this topic in subsequent writing, pointing out that creation—i.e., production, transformation, or rearrangement[50] of existing resources—is a source of *wealth* but not a source of property rights. After all, transforming a set of input resources into a more valuable output product requires that the input factors already be owned. The resulting product is thus owned according to standard property rights and contract principles.[51]

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[48] *AIP*, text at n.94; and Roderick T. Long, "The Libertarian Case Against Intellectual Property Rights," *Formulations* (Autumn 1995):

> It may be objected that the person who originated the information deserves ownership rights over it. But information is not a concrete thing an individual can control; it is a universal, existing in other people's minds and other people's property, and over these the originator has no legitimate sovereignty. *You cannot own information without owning other people*.

(Emphasis added) See also note 65, below, and Roderick T. Long, "Owning Ideas Means Owning People," *Cato Unbound* (Nov. 19, 2008; https://www.cato-unbound.org/2008/11/19/roderick-t-long/owning-ideas-means-owning-people); Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," p. 281 and *idem*, "Are Patents and Copyrights Morally Justified?", pp. 830–31, 862, 863, 865. *See also* John M. Kraft & Robert Hovden, "Natural Rights, Scarcity & Intellectual Property," *N.Y.U. J. L. & Liberty* 7, no. 2 (2013; https://www.nyujll.com/volume-7/blog-post-title-one-awmk7-6nbkh): 464–96, at 480: "What *is* clear is that the observance of such "rights" *does* interrupt and infringe on others' natural right to self-ownership" (citing Palmer, "Are Patents and Copyrights Morally Justified?", pp. 834, 862); also Wojciech Gamrot, "The type individuation problem," *Studia Philosophica Wratislaviensia* 16, no. 4 (2021; https://wuwr.pl/spwr/article/view/13718): 47–64, p. 49 ("*IP rights are about the control of matter*" (emphasis added), citing Justin Hughes, "The Philosophy of Intellectual Property," *Georgetown L.J.* 77, no. 2 (Dec. 1988; https://perma.cc/U4XX-5DZV): 287–366, at 330–50; Hugh Breakey, "Natural intellectual property rights and the public domain," *Modern L. Rev.* 73 (2010; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2856883): 208–39; and Radu Uszkai, "Are Copyrights Compatible with Human Rights?," *Romanian J. Analytic Phil.* 8 (2014; https://philarchive.org/rec/USZACC): 5–20)).

[49] See also the discussion of "rearrangement" in Part IV.F, below, and also Part III.B, "Libertarian Creationism," in "Law and Intellectual Property in a Stateless Society" (ch. 14).

[50] For more on this concept, see Kinsella, "Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and 'Rearranging'," *C4SIF Blog* (Sep. 29, 2010); also Kinsella, "KOL037 | Locke's Big Mistake: How the Labor Theory of Property Ruined Political Theory," *Kinsella on Liberty Podcast* (March 28, 2013).

[51] See also the section "Creation of Wealth versus Creation of Property" in Kinsella, "Intellectual Freedom and Learning Versus Patent and Copyright," *Economic Notes* No. 113 (Libertarian Alliance, Jan. 18, 2011) (also published as "Intellectual Freedom and Learning Versus Patent and Copyright," *The Libertarian Standard* (Jan. 19, 2011)); "Law and Intellectual Property in a Stateless Society" (ch. 14), Part III.B; and Kinsella, "KOL012 | 'The Intellectual Property Quagmire, or, The Perils of Libertarian Creationism,' Austrian Scholars Conference 2008," *Kinsella on Liberty Podcast* (Feb. 6, 2013). And see Gary Chartier, *Anarchy and Legal Order: Law and Politics for a Stateless Society* (Cambridge University Press, 2013), at 78 ("the ability to control a possession means that one can *transform it* as needed in a way that may *enhance its value* either *to the possessor*, *to others*, or to both"; emphasis added); and Israel M. Kirzner, "Producer, Entrepreneur, and the Right to Property," *Reason Papers* No. 1 (Fall 1974; https://reasonpapers.com/archives): 1–17, p.1 ("Precision in applying the term 'what a man has produced' seems to be of considerable importance."). See also Uszkai, "Are Copyrights Compatible with Human Rights?," p. 13, discussing my argument in *AIP* that creation

> is neither necessary nor sufficient to establish ownership. The focus on creation distracts from the crucial role of first occupation as a property rule for addressing the fundamental fact of scarcity. First occupation, not creation or labor, is both necessary and sufficient for the homesteading of unowned scarce resources.

Property rights in one's body are based in one's direct control over one's body.[52] Property rights in external, previously unowned scarce resources, come from original appropriation, or homesteading—first use and transformation or embordering—of an *unowned* scarce resource, or by contractual transfer from a previous owner.[53] Production or transformation of existing, already-owned resources may increase or create wealth, but is not a source of rights. This is a common confusion among libertarians, especially Randians and those influenced by the confused labor theory of property and the related labor theory of value, as can be seen in nonsensical sayings like "you have a right to the fruits of your labor."[54]

D. The Labor Metaphor

Overreliance on "labor" metaphors also leads to confusion about IP. Locke correctly argued that the first person to "mix his labor with" an unowned resource owns it, since he thereby establishes an objective link to the resource which gives him a better claim to it than latecomers.[55] However, Locke based his argument on the confused and unnecessary idea that a person "owns" his labor and "therefore" owns resources that he mixes it with. But labor is not owned—it is an *action*, something a person performs with his body, which he does own—and this assumption is not needed for the Lockean labor-mixture argument to work.[56] This mistaken notion leads some people to favor IP because they figure that if you own a scarce resource because you mix your labor with it, you also own useful ideas that are produced with your labor. The related Smith-Ricardo-Marx labor theory of value, which underlies Marxism and socialism, is also sometimes used to support IP, as when people argue that if you work or labor you "deserve" some kind of reward or profit. All this focus on labor must be rejected as overly metaphorical and confused, and, frankly, Marxian.[57]

E. The Separate Roles of Knowledge and Means in Action

The purpose of property rights is to permit conflict-free use of resources, the scarce means

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[52] "How We Come to Own Ourselves" (ch. 4).

[53] See note 47, above.

[54] See references in Part IV.D, below.

[55] See Hoppe, *A Theory of Socialism and Capitalism*, chaps. 1–2 & 7.

[56] As J.P. Day, in a critique of Locke's homesteading argument, correctly observes:

> one cannot talk significantly of *owning labour*$_1$. For labour$_1$, or labouring, is an activity, and although activities can be engaged in, performed or done, they cannot be owned.

J.P. Day, "Locke on Property," *Philosophical Quarterly* 16 (1966): 207–220, p. 212 (also reprinted in Gordon J. Schochet, ed. *Life, Liberty, And Property: Essays on Locke's Political Ideas* (Belmont, California: Wadsworth Publishing Company, 1971), p. 113). By "labour$_1$," Day is referring to the activity or action of working or labouring, as opposed to a task (labour$_2$), an achievement (labour$_3$), force times distance (labour$_4$), or workers themselves (labour$_5$) (see the Appendix, p. 220). Day's comments are briefly discussed in Kirzner, "Producer, Entrepreneur, and the Right to Property," p. 6. See also Kinsella, "Cordato and Kirzner on Intellectual Property," *C4SIF Blog* (April 21, 2011). See also the Hume quote in the following note.

In Kirzner's words, Day summarizes Locke's theory of property argument thusly: "(I) Every man has a (moral) right to own his person; therefore (2) every man has a (moral) right to own the labor of his person; therefore (3) every man has a (moral) right to own that which he has mixed the labor of his person with." Kirzner, *op. cit.*, p. 5, citing Day, *op. cit.*, p. 208 (and p. 109 of the Schochet book).

[57] See Kinsella, "Locke, Smith, Marx; the Labor Theory of Property and the Labor Theory of Value; and Rothbard, Gordon, and Intellectual Property," *StephanKinsella.com* (June 23, 2010); *idem*, "KOL 037 | Locke's Big

of action that humans employ to causally interfere with the course of events, in an attempt to achieve their ends. But this applies only to *conflictable* resources. Human action also implies the *possession of knowledge* by the actor—knowledge of what ends are possible and knowledge of what scarce means might be employed to *causally achieve* the desired end. Thus all successful human action requires *two separate components*: the availability of scarce means or resources, and knowledge to guide one's action.[58] Property rights apply *only* to the scarce means or conflictable resources that humans employ, but not to the knowledge or information people possess, which guides their behavior, since anyone can use the same or similar knowledge to guide their own actions without conflict. In fact, it is the accumulation of this technological knowledge over time that enables increasing material prosperity. Property rights are needed to permit conflict-free use of scarce resources, but imposing restrictions on the emulation, learning, and use of knowledge, which is what IP attempts to do, impoverishes the human race.[59] This is why I concluded one article with these words:

> It is obscene to undermine the glorious operation of the market in producing wealth and abundance by imposing artificial scarcity on human knowledge and learning …. Learning, emulation, and information are good. It is good that information can be reproduced, retained, spread, and taught and learned and communicated so easily. Granted, we cannot say that it is *bad* that the world of physical resources is one of

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Mistake: How the Labor Theory of Property Ruined Political Theory," *Kinsella on Liberty Podcast* (March 28, 2013); and *idem*, "Cordato and Kirzner on Intellectual Property." As Hume observes, "We cannot be said to join our labour to any thing but in a figurative sense." David Hume, *A Treatise of Human Nature*, Selby-Bigge, ed. (Oxford, 1968), Book III, Part II, Section III, n.16; discussed in "Law and Intellectual Property in a Stateless Society" (ch. 14), n.77. On the perils of metaphors see also note 83, below. See also Dan Sanchez, "The Fruit of Your Labor … is a good, not its form," *Medium* (Oct. 30, 2014; https://perma.cc/GD28-JS44).

[58] For elaboration, see Kinsella, "Intellectual Freedom and Learning Versus Patent and Copyright"; also *idem*, "The Death Throes of Pro-IP Libertarianism" and "Intellectual Property and the Structure of Human Action," *Mises Economics Blog* (Jan. 6, 2010). I also discuss these issues in "Law and Intellectual Property in a Stateless Society" (ch. 14), Part III.D.

As Hoppe explains, Carl Menger pointed out four requirements for objects to become goods:

> The first is the existence of a human need. The second requirement is such properties as render the thing capable of being brought into a causal connection with a satisfaction of this need. That is, this object must be capable, through our performing certain manipulations with it, to cause certain needs to be satisfied or at least relieved. The third condition is that there must be human knowledge about this connection, which explains, of course, why it is important for people to learn to distinguish between *goods* and *bads*. Thus, we have human knowledge about the object, our ability to control it, and the causal power of this object to lead to certain types of satisfactory results. And the fourth factor is, as I already indicated, that we must have command of the thing sufficient to direct it to the satisfaction of the need.

Hans-Hermann Hoppe, *Economy, Society, and History* (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/esh), p. 9; see also Carl Menger, *Principles of Economics* (Auburn, Ala.: Mises Institute, 2007 [1871]; https://mises.org/library/principles-economics), chap. I, §1, p. 52 *et pass*. The second requirement corresponds to the means being causally efficacious; the third to the actor's knowledge of causal laws; and the fourth to the availability of the means.

[59] For elaboration, see Kinsella, "Hayek's Views on Intellectual Property," *C4SIF Blog* (Aug. 2, 2013) and "Intellectual Property and the Structure of Human Action," discussing Hayek's comments about how the accumulation of a "fund of experience" helps aid human progress and the creation of wealth. See also Kinsella, "Tucker, 'Knowledge Is as Valuable as Physical Capital,'" *C4SIF Blog* (March 27, 2017). See also Julio H. Cole, "Patents and Copyrights: Do the Benefits Exceed the Costs?", *J. Libertarian Stud.* 15, no. 4 (Fall 2001; https://mises.org/library/patents-and-copyrights-do-benefits-exceed-costs-0): 79–105, p. 84 *et seq.*, discussing the importance of technical progress (not to be confused with patents) to economic growth. Cole cites several studies in n.12.

> scarcity—this is the way reality is, after all—but it is certainly a challenge, and it makes life a struggle. It is suicidal and foolish to try to hamper one of our most important tools—learning, emulation, knowledge—by imposing scarcity on it. Intellectual property is theft. Intellectual property is statism. Intellectual property is death. Give us *intellectual freedom* instead![60]

F. Resources, Properties, Features, and Universals[61]

As noted above (see note 31), confusion about the IP issue sometimes stems from identifying "property" with the owned resource. People then get bogged down in loaded or confused questions like "are ideas property?" If one keeps in mind that the question is not what is property, but rather, who is the owner of a conflictable resource, then the IP mistake is harder to make. A related mistake stems from the failure to understand that all human rights are property rights, and all property rights *just are* rights to the exclusive control of a given scarce (conflictable) resource.[62] But every property right is an ownership right held by a given particular person or owner, with respect to a particular conflictable resource. It is the actual resource itself which is owned, *not* its characteristics.

For example, if you own a red car, you own that car, but you do not own its color; you do not own red or redness. If owning a red car meant you owned its characteristics, you would own not only that particular car, but its age, weight, size, shape, color, and so on, and, thus, would thereby have an ownership claim over any other object that is red, and so on. This would amount to reassigning ownership rights in someone else's red car to the you, even though he owns that car and you did not homestead it or obtain it by contract. Likewise, information cannot be owned since it is not an *independently existing thing*; information is *always* the *impatterning* of an underlying medium or carrier or substrate, which is itself a scarce resource that has an owner.[63] If I own a copy of *Great Expectations*, I own that physical object: paper and glue and ink. It has various characteristics: an age, a size, a shape, and a certain arrangement of ink on its pages—the way the ink is impatterned so that it represents letters and words and meanings to someone who can read and who can observe the features of the book. But just as you don't own the color of your car, you

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[60] Kinsella, "The Death Throes of Pro-IP Libertarianism."

[61] See also Part IV.B, above.

[62] To be even more precise, I would say that a property right is not a *right to use* a resource, but a *right to exclude others* from using a resource. In practical terms this gives the owner the ability to use it as he sees fit so long as he is not using trespassing on others' property rights. This follows from the analysis in Kinsella, "The Non-Aggression Principle as a Limit on Action, Not on Property Rights," *StephanKinsella.com* (Jan. 22, 2010) and *idem*, "IP and Aggression as Limits on Property Rights: How They Differ," *StephanKinsella.com* (Jan. 22, 2010). However, this nuance need not concern us here. See also, on this, "A Libertarian Theory of Contract" (ch. 9), n.1; *Connell v. Sears, Roebuck Co.*, 722 F.2d 1542, 1547 (Fed. Cir. 1983; https://casetext.com/case/connell-v-sears-roebuck-co) ("the right to exclude recognized in a patent is but the essence of the concept of property"), citing *Schenck v. Nortron Corp.*, 713 F.2d 782 (Fed. Cir. 1983; https://casetext.com/case/carl-schenck-ag-v-nortron-corp). Further, property rights are rights *as between human actors*, but *with respect to particular resources*. See "A Libertarian Theory of Contract" (ch. 9), n.1.

[63] J. Neil Schulman argued for years for a form of IP known as "logorights." Oddly, perhaps partially in response to my relentless criticism of his flawed argument, he eventually changed his argument to argue for "media-carried property," thus implicitly acknowledging that he was in favor of property rights in characteristics, or features, of owned objects, i.e. universals. See "Introduction to Origitent" (ch. 16) and "Conversation with Schulman about Logorights and Media-Carried Property" (ch. 17).

don't own the way an object is arranged or shaped.[64]

As Roderick Long explains,

> It may be objected that the person who originated the information deserves ownership rights over it. But information is not a concrete thing an individual can control; it is a *universal*, existing in other people's minds and other people's property, and over these the originator has no legitimate sovereignty. You cannot own information without owning other people.[65]

G. Selling Does Not Imply Ownership[66]

As noted in Part IV.B, above, it is literally impossible to own or have property rights in information or knowledge. People only manipulate and have conflict over scarce resources (they are means of action, after all), so that IP rights are just disguised reassignments of property rights in existing conflictable or scarce resources. And as noted in Part IV.F, above, information cannot be owned since it is not an *independently existing thing*; information is *always* the *impatterning* of an underlying medium or carrier or substrate, which is itself a scarce resource that already has an owner, in accordance with principles of original appropriation, contract, and rectification.

Yet IP proponents sometimes point out that information, ideas, know-how, and so on (as well as labor), can be *sold*. And so, the reasoning goes, something that can be *sold* must have been *owned* by the seller. Therefore, information can in fact be owned. As I have explained elsewhere, this reasoning is fallacious and based on conflation of two senses of the word "sell."[67] When *A* and *B* exchange two owned objects, such as an apple for an orange, then there are two title transfers. *A*

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[64] Even the pro-IP Ayn Rand implicitly acknowledged this. As she wrote:

> The power to rearrange the combinations of natural elements is the only creative power man possesses. It is an enormous and glorious power—and it is the only meaning of the concept "creative." "Creation" does not (and metaphysically cannot) mean the power to bring something into existence out of nothing. "Creation" means the power to bring into existence an arrangement (or combination or integration) of natural elements that had not existed before.

See Kinsella, "Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and 'Rearranging,'" quoting Ayn Rand, "The Metaphysical and the Man-Made," in *Philosophy: Who Needs It* (New American Library, 1984), p. 25. See similar quotes by Rothbard, J.S. Mill, and Mises in ibid.

Neil Schulman and I bat these ideas around in "Conversation with Schulman about Logorights and Media-Carried Property" (ch. 17).

[65] Long, "The Libertarian Case Against Intellectual Property Rights" (emphasis added). See also *idem*, "Owning Ideas Means Owning People" and *idem*, "Bye-Bye for IP," *Austro-Athenian Empire Blog* (May 20, 2010; https://perma.cc/HD5A-TTX8), and Part IV.B, above, and Kinsella, "Mr. IP Answer Man Time: On Steel and Swords," *C4SIF Blog* (Feb. 4, 2022); *idem,* "How To Think About Property," *StephanKinsella.com* (April 25, 2021); *idem,* "Libertarian Answer Man: Mind-Body Dualism, Self-Ownership, and Property Rights," *StephanKinsella.com* (Jan. 29, 2022); *idem,* "KOL337 | Join the Wasabikas Ep. 15.0: You Don't Own Bitcoin—Property Rights, Praxeology and the Foundations of Private Law, with Max Hillebrand"; *idem,* "KOL219 | Property: What It Is and Isn't: Houston Property Rights Association," Kinsella on Liberty Podcast," *Kinsella on Liberty Podcast* (April 28, 2017); and *idem,* "Nobody Owns Bitcoin," *StephanKinsella.com* (April 21, 2021). See also *idem*, "Patrick Smith, Un-Intellectual Property," *C4SIF Blog* (March 4, 2016).

[66] The ideas in this section are developed more fully in "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11).

[67] See ibid.; also Kinsella, "The 'If you own something, that implies that you can sell it; if you sell something, that implies you must own it first' Fallacies," *StephanKinsella.com* (June 1, 2018); "A Libertarian Theory of Contract" (ch. 9).

sells his apple to *B* and *B* sells his orange to *A*.

But other contracts only involve one title-transfer. Suppose *B* pays *A* to perform some action (labor, a service, providing information, etc.). In this case, *B*'s owned resource (money or something else) transfers to *A* but nothing that *A* owns transfers to *B*. It is simply that *A* performed some action that *B* desired, and was induced to do so by *B*'s payment. In this case, the end of *B*'s act of agreeing to pay *A* was not the attainment of a property right or title transfer, but the achievement of a new state of affairs in which *A* performed some action desired by *B*.[68] *A* is sometimes said to "sell" his labor or information to *B* because of the analogy to a normal exchange of title, but here the word "sell" is used in the economic sense to simply explain *A*'s motivations and to properly characterize his actions: to understand his ends or goals. In order to get *B*'s payment, *A* performed the action desired by *B*. *A* does not "sell" his labor or knowledge in a juristic or legal sense, and thus did not "own" it in a legal sense. Thus, "selling" in the economic sense does not imply owning. Information is unownable.[69]

H. All Property Rights Are Limited

One final argument may be addressed, which is touched on in some of the above sections.[70] When explaining why IP rights violate property rights, we IP opponents explain that the grant of an IP right is tantamount to a nonconsensual negative easement on someone else's property—it limits what the owner of a resource may do with the resource.[71] Or, as Roderick Long would say, "Owning Ideas Means Owning People."[72]

A common response runs something like this:

> Yes, IP rights limit what you can do with your own property. But this is true of all property rights. My ownership of a home, or my body, means you can't shoot your gun at it. So my property rights limit your property rights. Therefore, just because intellectual property rights limits your property rights doesn't mean they are illegitimate any more than my self-ownership limits your property rights in your gun.

There are many problems with this argument, as I have detailed elsewhere.[73] First, even if we grant that in some cases property rights can be limited, it does not imply that just *any* limit is legitimate. If a woman objects to being raped, it will not do to say "stop complaining that we are violating your property right in your own body; after all, all property rights are limited." You would need to articulate why it's justified to limit property rights. In the examples given by pro-IP opponents, someone's property rights are limited as needed to keep them from exercising those rights to commit aggression against others' property rights. But IP rights limit the owner's property rights (again, in the form of a negative servitude) even though the owner, in rearranging *his own*

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[68] See also Kinsella, "Human Action and Universe Creation," *StephanKinsella.com* (June 28, 2022).

[69] As is bitcoin. Bitcoins are just abstract informational entries on a distributed ledger, that is, the impatternings of the memory devices of many people's computers; but they own those computers; nobody owns "how they are arranged." See Kinsella, "Nobody Owns Bitcoin."

[70] See, e.g., the discussion in Part IV.F, above.

[71] See Part IV.B, above.

[72] See Long, "Owning Ideas Means Owning People."

[73] See Kinsella, "The Non-Aggression Principle as a Limit on Action, Not on Property Rights"; *idem*, "IP and Aggression as Limits on Property Rights: How They Differ"; and "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11), n.11 and accompanying text.

resources in a certain way, does not invade the borders of the inventor's or author's property. In response to this, the IP proponent will say, "yes, by making a copy of the author/inventor's creation, the copier is infringing the author/inventor's property rights." But this is question-begging. It presupposes that there *are* rights to universals, when this is the issue under dispute.

Second, it is simply not true that property rights limit other property rights. Rather, property rights limit *actions*. If A owns his body, then B may not shoot it with a gun, *whether he owns the gun or not*. The point is that B may not use or invade the borders of A's body—his owned resource—with *any* means at all, whether it be the use of B's hands, or some other means such as a gun, even if he stole the gun from C and is not its owner. People are responsible for their *actions*, and actions always employ some means to achieve the end. The means may be simply the actor's own body, or it may be some external object, one that may be owned by the actor, or not.[74]

Therefore, it *is* a valid criticism of IP that it unjustly limits others' use of their own resources.

I. The Structural Unity of Real and Intellectual Property

Another argument made in support of IP is that it is, legally, structurally similar to normal property rights in scarce resources, such as property rights in realty (land or immovables) or personalty (corporeal movables).[75] This is an odd argument. It is true that the state, via legislation,

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[74] Likewise, many libertarians, having in mind some form of "strict liability," advance the confused idea that we are responsible for harms done with property (resources) that we own. This is incorrect. We are responsible only for our actions, not for uses to which inanimate objects are put. If I possess a stolen knife, I am liable if I stab an innocent person with it, even though I don't own the knife, since it is my *actions* that I am responsible for. And if some thief steals a knife and uses it to harm an innocent victim, it is the thief that is responsible, not the owner of the knife. One common confusion held even by many libertarians is the idea (which underlies many assertions about "strict liability") is the idea that ownership implies responsibility (some have even confusingly said that you "own your actions," which is incoherent). It does not. Ownership means the *right to control* (or, more precisely: the right to exclude others from controlling) a given resource; it does *not* imply responsibility. We are responsibly only for our actions, regardless of whatever means are employed by the actor to achieve the illicit end. It is misleading and confusing for libertarians to carelessly use expressions such as "I own that action" to mean "I am responsible for harm I cause." The term ownership should be restricted to property rights in conflictable resources—and should be used as a synonym for possession, either, as I point out in "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11), the sections "External Resources" and "Economic vs. Normative Realms of Analysis: Ownership vs. Possession."

On negligence and strict liability, see Kinsella, "The Libertarian Approach to Negligence, Tort, and Strict Liability: Wergeld and Partial Wergeld," *Mises Economics Blog* (Sep. 1, 2009); "A Libertarian Theory of Punishment and Rights" (ch. 5), at n.78; "Causation and Aggression" (ch. 8), at n.60; and "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability" (ch. 9), n.6.

[75] See, e.g., Richard A. Epstein, *The Structural Unity of Real and Intellectual Property* (The Progress and Freedom Foundation, 2006; archived version at https://perma.cc/B8JP-4MWQ); *idem*, "The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary," *Stanford L. Rev.* 62, no. 2 (2010; https://perma.cc/79X2-9CS8): 455–523; Wendy J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory," *Stan. L. Rev.* 41 (1989; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581843), Part I; Adam Mossoff, "Commercializing Property Rights in Inventions: Lessons for Modern Patent Theory from Classic Patent Doctrine," in Geoffrey A. Manne & Joshua D. Wright, eds., *Competition Policy and Patent Law Under Uncertainty: Regulating Innovation* (Cambridge University Press, 2011; https://perma.cc/SD7Q-F7U9); *idem*, "The Trespass Fallacy in Patent Law Florida Law Review," *Florida L. Rev.* 65, no. 6 (2013; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126595): 1687–1711. Many other proponents of IP argue for parallels between IP rights and normal property rights. See, e.g., "Conversation

is able to set up positive rights that, in modern legal systems, are treated similarly to property rights in scarce resources (land and personalty). But so what? In antebellum America, under chattel slavery, slaves—innocent human beings—were legally ownable and thus subject to the various legal incidents of property, such as sale, mortgages, and so on. The fact that the state, by artificial legislation, can make inventions and artistic creations the subject of contracts, sales, and so on does not show that the law is just. This is just a facile argument.[76]

First, patent and copyright were not originally called property rights. They were referred to accurately as state-granted privileges or monopolies.[77] Referring to patent and copyright as "property rights" was a latter innovation, engaged in for propaganda purposes. This was observed by Fritz Machlup and Edith Penrose in a seminal study in 1950:

> There are many writers who habitually call all sorts of rights by the name of property. This may be a harmless waste of words, or it may have a purpose. It happens that *those who started using the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, "property," for a word that had an unpleasant ring, "privilege."*[78]

And as Machlup wrote in a later study commissioned by the US Congress:

> While some economists before 1873 were anxious to deny that patents conferred "monopolies"—and, indeed, had talked of "property in inventions" chiefly in order to avoid using the unpopular word "monopoly"—most of this squeamishness has disappeared. But most writers want to make it understood that these are not "odious" monopolies but rather "social monopolies", "general welfare monopolies", or "socially earned" monopolies. Most writers also point out with great emphasis that the

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with Schulman about Logorights and Media-Carried Property" (ch. 17). I've debated Epstein on IP: see Kinsella, "KOL364 | Soho Forum Debate vs. Richard Epstein."

Yet elsewhere, Epstein concedes there are some significant differences between IP and real property. As he writes, "There are in fact no 'natural' boundaries here [in patent and copyright law], similar to the metes and bounds of land." Richard A. Epstein, "Why Libertarians Shouldn't Be (Too) Skeptical about Intellectual Property," Progress & Freedom Foundation, *Progress on Point*, Paper No. 13.4 (February 2006; https://perma.cc/6F5S-7KNS), p. 8. So much for the "structural unity."

[76] See my posts "Yet more disanalogies between copyright and real property," *C4SIF Blog* (Feb. 4, 2013); "Mossoff: Patent Law Really Is as Straightforward as Real Estate Law," *C4SIF Blog* (Aug. 17, 2012); "Classifying Patent and Copyright Law as 'Property': So What?", *Mises Economics Blog* (Oct. 4, 2011); and "Richard Epstein on 'The Structural Unity of Real and Intellectual Property,'" *Mises Economics Blog* (Oct. 4, 2006).

[77] See Kinsella, "Intellectual Properganda," *Mises Economics Blog* (Dec. 6, 2010).

[78] Fritz Machlup & Edith Penrose, "The Patent Controversy in the Nineteenth Century," *J. Econ. History* 10, no. 1 (May 1950): 1–29, p. 16 (footnotes omitted; emphasis added). They go on (ibid.; footnotes omitted):

> This was a very deliberate choice on the part of politicians working for the adoption of a patent law in the French Constitutional Assembly. De Bouffler, reporting the bill to the Assembly, knew that "the spirit of the time was so much for liberty and equality, and against privileges and monopolies of any sort" that there was no hope of saving the institution of patent privileges except under an acceptable theory. Thus, according to Rentzsch, De Bouffler and his friends in deliberate insincerity "construed the artificial theory of the property rights of the inventor" as a part of the rights of man. De Bouffler obviously knew "what's in a name." As monopoly privileges, the patents for inventions would be rejected by the Assembly or, if accepted, would be disdained by the people; as natural property rights, they would be accepted and respected.

monopoly grant is limited and conditional.[79]

Professor Michael Davis also explores the strategy of those who insist on erroneously classifying patents as property rights. He calls this tactic "the trump of property," which is

> a strategy of defining patents according to property law concepts far removed from debates over the public interest in the issuance of patents …. [T]he foregoing description of patent law as a form of competition regulation, let alone as a form of national industrial policy, is obviously not the conventional one. Organized patent interests (the patent bar, patent proprietors, and their sponsors) do not espouse that view, but instead habitually offer a more cramped description of patent law. One might call that description the trump of property—a strategy to secure the claim that proprietors can exclusively own patents, and to eliminate any argument that the public has a continuing interest in issued patents. That description promotes patents as just another kind of property, but firmly rejects any suggestion that patent law represents either a form of competition regulation or a national industrial policy. With a firm foundation in free market theories, the strong claim that patents are just another form of property implicitly rejects the idea that patent law serves any regulatory function ….[80]

Davis also notes, of the attempt to defenders of patents to deny that they are monopolies:

> This "debate" seemingly has only one point: to sanitize the patent monopoly so that it more closely resembles simple property. A monopoly, of course, virtually compels the public interest. Thus, the trump of property depends on asserting not only that a patent is simple property, but also that it does not constitute an economic phenomenon, like a monopoly, in which the public has a particular interest.[81]

It is clear that, despite the assertions of defenders of IP, these rights are *not* like normal property rights in scarce resources. First, unlike property rights in scarce resources like personalty (movables) and real estate or land (immovables), IP rights in inventions (patents) and creative

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[79] Fritz Machlup, U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, *An Economic Review of the Patent System* (85th Cong., 2nd Session, 1958, Study No. 15; https://mises.org/library/economic-review-patent-system), p. 26 (footnotes omitted).

[80] Michael H. Davis, "Patent Politics," *S. Carolina L. Rev.* 56, no. 2 (Winter 2004; https://scholarcommons.sc.edu/sclr/vol56/iss2/6): 337–86, pp. 338–39 & 373–74 (footnote omitted); discussed in Kinsella, "Patent Lawyers Who Don't Toe the Line Should Be Punished!" *C4SIF Blog* (April 12, 2012). Amusingly, the left-leaning Davis, somewhat perplexed, writes "Many libertarians, practically wedded to the free market system, surprisingly oppose patent rights," citing my *AIP*. Ibid., p. 374, n.142.

[81] Ibid., p. 374, n.141. See also Kinsella, "Are Patents and Copyrights 'Monopolies'?", *C4SIF Blog* (Aug. 13, 2013). As Hayek wrote:

> Perhaps it is not a waste of your time if I illustrate what I have in mind by quoting a rather well-known decision in which an American judge argued that "as to the suggestion that competitors were excluded from the use of the patent we answer that such exclusion may be said to have been the very essence of the right conferred by the patent" and adds "as it is the privilege of any owner of property to use it or not to use it without any question of motive." It is this last statement which seems to me to be significant for *the way in which a mechanical extension of the property concept by lawyers has done so much to create undesirable and harmful privilege*.

F.A. Hayek, "'Free' Enterprise and Competitive Order," in *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948; https://mises.org/library/individualism-and-economic-order), p. 114 (emphasis added; citation omitted). See also *idem*, *The Fatal Conceit* (Chicago: University of Chicago Press, 1988), pp. 36–37; and Cole, "Patents and Copyrights: Do the Benefits Exceed the Costs?", at 82–83.

works (copyright) expire after a finite term—about 17 or so years for patents, and life of the author plus 70 years for copyright (say, about 120 years for a 40 year old author who lives to age 90). Second, the "borders" or boundaries defined by copyright law in "works" and by patent law for "inventions" is inherently murky, vague, arbitrary, and non-objective.

Scholars have noted other differences differences between IP and normal property rights. Writes Professor Tom Bell:

> Copyrights and patents differ from tangible property in fundamental ways. Economically speaking, copyrights and patents are not rivalrous in consumption; whereas all the world can sing the same beautiful song, for instance, only one person can swallow a cool gulp of iced tea. Legally speaking, copyrights and patents exist only thanks to the express terms of the U.S. Constitution and various statutory enactments. In contrast, we enjoy tangible property thanks to common law, customary practices, and nature itself. Even birds recognize property rights in nests. They do not, however, copyright their songs.
>
> Those represent but some of the reasons I have argued that we should call copyright an *intellectual privilege*, reserving *property* for things that deserve the label. Another, related reason: Calling copyright *property* risks eroding that valuable service mark.[82]

Regarding Epstein's contentions about the "structural unity" between IP and real property rights, Professor Peter Menell concludes that:

> the Property Rights Movement is too limited and grounded in absolutist ideology to support the needs of a dynamic, resource-sensitive intellectual property system. Professor Epstein's simplistic equation of real and intellectual property generates more heat than light. It is not particularly helpful to think of real and intellectual property as structurally unified. The differences matter significantly and resorting to rhetorical metaphors distracts attention from critical issues. As Judge (later Justice) Cardozo cautioned in 1926, "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[83]

There are even further dissimilarities between IP rights and normal property rights. For

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[82] Tom Bell, "Copyright Erodes Property℠," *Agoraphilia* (July 14, 2011; https://perma.cc/L25V-A8X8). See also *idem*, "Copyright as Intellectual ~~Property~~ Privilege," *Syracuse L. Rev.* 58 (2007; https://perma.cc/7ZLM-CDWA): 523–46. Bell also writes elsewhere: "to call copyright 'property' risks vesting copyright holders with more powers than they deserve. To call it 'privilege' offers a rhetorical counterbalance, reminding copyright holders of what they owe to the public and recalling lawmakers to their duties." Bell, *Intellectual Privilege*, p. 98 (footnote omitted).

[83] Peter S. Menell, "The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?", UC Berkeley Public Law Research Paper No. 965083 (Feb. 26, 2007; https://perma.cc/F6X9-5L9D), quoting *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926; https://casetext.com/case/berkey-v-third-avenue-railway-co). See also *idem*, "Intellectual Property and the Property Rights Movement," *Regulation* 30, no. 3 (Fall 2007; https://perma.cc/F6X9-5L9D): 36–42, at 42 ("Suggesting that 'intellectual property' must be treated as part of a monolithic "property" edifice masks fundamental differences and distracts attention from critical issues"); and Christina Mulligan & Brian Patrick Quinn, "Who are You Calling a Pirate?: Shaping Public Discourse in the Intellectual Property Debates," Brandeis University Department of English Eighth Annual Graduate Conference (2010; https://perma.cc/7SCS-8P3J), pp. 7–8 (regarding overuse of the "piracy" metaphor for copyright infringement).

On the perils of misused metaphors, see Kinsella, "On the Danger of Metaphors in Scientific Discourse," *StephanKinsella.com* (June 12, 2011) and *idem*, "Objectivist Law Prof Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors," *Mises Economics Blog* (Jan. 3, 2008).

example, as Professors Dorfman and Jacob write:

> In these pages we seek to integrate two claims. First, we argue that, taken to their logical conclusions, the considerations that support a strict form of protection for tangible property rights do not call for a similar form of protection when applied to the case of copyright. More dramatically, these considerations *demand*, on pain of glaring inconsistency, a substantially weaker protection for copyright. In pursuing this claim, we show that the form of protecting property rights (including rights in tangibles) is, to an important extent, a feature of certain normal, though contingent, facts about the human world. Second, the normative question concerning the selection of a desirable protection for creative works is most naturally pursued from a tort law perspective, in part because the normative structure of copyright law simply is that of tort law.[84]

Thus, as Wendy Gordon writes,

> The "property" portion of the "intellectual property" label has caused practical as well as conceptual difficulties. Too many courts have assumed that all things called "property" should be treated similarly, ignoring the important physical, institutional, and statutory differences that distinguish intellectual "property" from the tangible kind.[85]

Incidentally, I should note that, to my knowledge, none of the above-quoted scholars is an IP or patent abolitionist, except perhaps for Davis re patents. But they are honest scholars who recognize IP as being an unnatural legal regime distinct from natural, common law property rights.

In sum, IP rights, especially patent and copyright, are not like property rights in scarce resources. And even if they were, this would not make them just, any more than the ability to make human slaves property justifies this institution.

J. Locke and the Founders on IP as a Natural Right

In what seems to be nothing more than an appeal to authority, some defenders of IP argue that IP rights are not artificial state-granted monopoly privileges, but rather natural property

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[84] Avihay Dorfman & Assaf Jacob, "Copyright as Tort," *Theoretical Inquiries in Law* 12, no. 1 (Jan. 2011; https://perma.cc/4HZM-QPHU): 59–97, p. 96–97.

[85] Wendy J. Gordon, "Intellectual Property," in *Oxford Handbook of Legal Studies* (Peter Cane & Mark Tushnet ed., 2003; https://perma.cc/59GP-HRD8), § 1.1.3. *But see idem*, "An Inquiry into the Merits of Copyright," at 1353, 1354, 1378 ("The noncontractual restraints imposed by copyright are of the same nature as those imposed by other areas of the law …. [T]he commonalities in structure predominate over the differences. … [I]ntellectual and tangible property serve similar economic roles. … [T]he tangible and intangible property structures are quite similar …. [C]opyright is functionally as well as structurally consistent with tangible property."). Perhaps the apparent difference in Gordon's views is due to some evolution of views, as they were published fourteen years apart. See also Adam Mossoff, "Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause," *Boston U. L. Rev.* 87 (2007; https://perma.cc/G7JW-NZNE): 689–724, at pp. 698–99 (mentioning some scholars who, accepting the "claim that patents and copyrights were special, limited monopoly grants in the early American Republic … today condemn recent expansions in intellectual property rights, which they refer to as 'propertizing' intellectual property. They also criticize the use of 'property rhetoric' in intellectual property doctrines today, which they consider both a novel practice and a contributing factor in the 'propertization' of intellectual property doctrines"; footnotes omitted); and Mulligan & Quinn, "Who are You Calling a Pirate?," p. 1 (arguing that the "analogy between physical property and intellectual property is troubled for a number of reasons").

rights, and that this was recognized by Locke and the Founders of the US Constitution and various constitutional interpretations of patent and copyright.[86]

First, it must be said that it is irrelevant whether Locke and some Founding Fathers thought of IP as a natural right or not. If they did, they were just wrong.

It is clear that Jefferson did not.[87] He was not opposed to patent and copyright, but clearly viewed them as grants of monopoly privilege, a policy tool. After all, during the drafting of the Bill of Rights, Jefferson, in a Letter to James Madison, proposed an amendment to the draft Bill of Rights to limit the terms of "monopolies" (patent and copyright) to a fixed number of years, to-wit:

> Art. 9. **Monopolies** may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding — years but for no longer term and no other purpose.[88]

In another letter, to Isaac McPherson, he wrote:

> Accordingly, it is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that *these monopolies produce more embarrassment than advantage to society*; and it may be observed that the *nations which refuse monopolies of invention, are as fruitful as England in new and useful devices*.[89]

As for Locke, he did favor copyright for authors, but only as a policy tool. He did not view IP rights as natural property rights. As Professor Tom Bell explains, Locke's:

> labor-desert justification of property gives authors clear title to the particular tangible copy in which they fix their expression. If an author has already acquired property rights in paper and ink by dint of creating them or, more likely, consensual exchange, and then mixes those two forms of chattel

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[86] See, e.g., Adam Mossoff, "Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent 'Privilege' in Historical Context," *Cornell L. Rev.* 92 (2007; https://perma.cc/UZ9H-RK77): 953–1012; *idem*, "Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory," *Social Philosophy and Policy* 29, no. 2 (2012; https://perma.cc/QG87-BAMY): 283–317; *idem*, "The Constitutional Protection of Intellectual Property," Heritage Foundation (March 8, 2021; https://perma.cc/8ZUN-L4XZ); *idem*, "Life, Liberty and Intellectual Property by Adam Mossoff," Ayn Rand Institute, YouTube (Sep. 21, 2021; https://youtu.be/CfMd1fHc2mE); Randolph J. May & Seth L. Cooper, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (Carolina Academic Press, 2015).

As can be seen, there are a variety of arguments in favor of IP: the utilitarian or consequentialist or incentive-based argument implied by the Constitution's authorization for IP law ("to promote the progress…") (see ch. 16, the section "IP in the Industrial Age"; ch. 14, Part III.A); natural rights, and "creationism" (Part IV.C, above; ch. 14, Part III.b); and others, such as theories related to personality or personhood, fairness, welfare, and culture. See references in "Law and Intellectual Property in a Stateless Society" (ch. 14), n.72.

[87] See, e.g., Mossoff, "Who Cares What Thomas Jefferson Thought About Patents?"

[88] See "Letter From Thomas Jefferson to James Madison, 28 August 1789," *Founders Online* (https://founders.archives.gov/documents/Jefferson/01-15-02-0354); also Kinsella, "Thomas Jefferson's Proposal to Limit the Length of Patent and Copyright in the Bill of Rights," *C4SIF Blog* (Dec. 1, 2011).

[89] See "Thomas Jefferson to Isaac McPherson 13 Aug. 1813" *Founders Online* (text formatted; emphasis added; https://founders.archives.gov/documents/Jefferson/03-06-02-0322).

> property, tracing ink words on cellulose paper, then the author enjoys natural and common-law rights in the newly arranged physical property. But it remains a separate—and contestable—question whether that argument establishing rights in *atoms* also justifies giving an author property rights to a parcel in the imaginary realm of ideas. Locke himself did not try to justify intangible property. He appears, in fact, to have viewed copyright as merely a policy tool for promoting the public good. Modern commentators who would venture so far beyond the boundaries of Locke's thought, into the abstractions of intellectual property, thus go further than Locke ever dared and further than they should in his name. …
>
> Unlike Epstein, I find that natural property rights theory can help fully explain a broad range of human behavior and offers a useful tool for assessing the justifiability of social institutions. Like him, however, I doubt that Locke's theory can justify copyright. To Epstein's trenchant critiques, I add one targeted at any supposed natural property right in expressive works: copyright contradicts Locke's own justification of property. Locke described legislation authorizing the Stationers' Company monopoly on printing—the nearest thing to a Copyright Act in his day—as a "manifest ... invasion of the trade, liberty, and property of the subject." Today, by invoking government power a copyright holder can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of tangible property. Copyright law violates the very rights—the tangible property rights—that Locke set out to defend. …
>
> As our careful review of the historical record has showed … the Founders probably did not regard copyright as a natural right.[90]

In support of his contentions here, Bell cites Ronan Deazley, who "reads Locke's correspondence to indicate that 'Locke himself did not consider [that] his theory of property extended to intellectual properties such as copyrights and patents,' and instead recognized that it could exist only grace of parliamentary action."[91]

In sum, IP rights, especially patent and copyright, have always been viewed as mere policy tools, not as natural property rights. These laws cannot be justified by appeals to authority.

V. Conclusion

I may someday provide such an updated treatment, tentatively to be entitled *Copy This*

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[90] Bell, *Intellectual Privilege*, pp. 69–71 (footnotes omitted).

[91] Ibid., p. 192 n.52, quoting Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Cheltenham, UK: Edward Elgar, 2006)), at 144 n.32. See also Seana Valentine Shiffrin, "Lockean Arguments for Private Property," in Munzer, ed., *New Essays in the Legal and Political Theory of Property* (https://perma.cc/3TWB-4Z8A), p. 141:

> Despite the attractions of a Lockean approach and its apparent amenability to intellectual property, I side with Jefferson. I will challenge the claim that Lockean foundations straightforwardly support most strong natural rights over intellectual works—such things as articles, plays, books, songs, paintings, methods, processes, and other inventions. I will also challenge the related claim that Lockean foundations for strong property rights come easier for these forms of intellectual property than for real property. As Jefferson observed and as I hope to explain, the nature of intellectual works makes them less, rather than more, susceptible to Lockean justifications for private appropriation.

Book, building on *AIP* and taking into account more recent arguments, evidence, and examples.[92] In the meantime, those interested in this reading further on this topic may find useful the additional material suggested in "Law and Intellectual Property in a Stateless Society" (ch. 14), n.‡.

[92] *See* www.copythisbook.com.

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Goods, Scarce and Nonscarce

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Originally published in 2010, with co-author Jeffrey Tucker.[*] This emerged out of many discussions he and I had about intellectual property and our respective writings on this topic. I have revised and updated the original article,[†] which included this authors' note: "Special thanks to BK Marcus, Doug French, Jeffrey Herbener, Raymond Walter, David Gordon, Robert Murphy, and Joseph Salerno for comments."

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Everyone who is serious about ideas now has to deal with the issue of "intellectual property," especially given the advent of digital media and the state's war on the supposed violators of the intellectual rights of others. The situation has at once become very hopeful, with more sharing of ideas than ever before in history, and extremely grim, with the federal government pressuring every Internet-service provider to act as proxy enforcers of an unjust law—and twisting the arms of developing countries to adopt draconian, Western-style IP law.[1]

This debate, however, involves more than just IP issues. The discussion surrounding this topic has further clarified other issues, like the character of goods and property, the existence and centrality of nonscarce goods in economic life, and the role of learning in the evolution of society. This partially accounts for why the IP topic is so hot: it causes us to revisit fundamental issues over property, ownership, competition, and other areas we've mistakenly taken for granted. What follows is a summary of some fundamental ideas many of us batted around this summer.[2]

SCARCITY AND SCARCE GOODS

"Why are tangible goods property?" This is a central question of *Against Intellectual Property*. The reason for property is

> the fact that there can be conflict over these goods by multiple human actors. The very possibility of *conflict* over a resource renders it scarce, giving rise to the need for ethical rules to govern its use. Thus, the fundamental social and ethical function of property rights is to prevent interpersonal conflict over scarce resources.[3]

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[*] Jeffrey A. Tucker & Stephan Kinsella, "Goods, Scarce and Nonscarce," *Mises Daily* (Aug. 25, 2010).

[†] My co-author has reviewed the changes made in this chapter and fully agrees with them.

[1] See Kinsella, "Stop the ACTA (Anti-Counterfeiting Trade Agreement)," *StephanKinsella* (April 11, 2010). For other and more recent material on IP imperialism, see "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), at n.19.

[2] For some of these discussions, see the comment threads to the following *Mises Economics Blog* posts: Kinsella, "The Death Throes of Pro-IP Libertarianism" (July 28, 2010); "Kinsella: Ideas are Free: The Case Against Intellectual Property: or, How Libertarians Went Wrong" (Nov. 23, 2010); "The L. Neil Smith–FreeTalkLive Copyright Dispute" (June 14, 2010); "Replies to Neil Schulman and Neil Smith re IP)" (July 19, 2010); "Leveraging IP" (Aug. 1, 2010); "The Creator-Endorsed Mark as an Alternative to Copyright" (July 15, 2010); "Locke, Smith, Marx and the Labor Theory of Value" (June 23, 2010).

[3] Kinsella, *Against Intellectual Property* (Auburn, Ala.: Mises Institute, 2008), p. 29.

On this point, we can cite Hoppe's *Theory of Socialism and Capitalism*, where Hoppe writes with singular clarity: "only because scarcity exists is there even a problem of formulating moral laws; insofar as goods are superabundant ('free' goods), no conflict over the use of goods is possible and no action-coordination is needed."[4] The logic for this insight Hoppe draws from Rothbard, and the term "free goods" he takes from Mises.[5]

Hoppe writes:

> To develop the concept of property, it is necessary for goods to be scarce, so that conflicts over the use of these goods can possibly arise. It is the function of property rights to avoid such possible clashes over the use of scarce resources by assigning rights of exclusive ownership. Property is thus a normative concept: a concept designed to make a conflict-free interaction possible by stipulating mutually binding rules of conduct (norms) regarding scarce resources.[6]

Even in the case of the Garden of Eden, where superabundance would mean that all things we ever wanted were in our grasp, Hoppe explains that there would still be a need for property rights. This is because the human body itself is scarce: choices about who can use it and how it can be used necessarily exclude other choices. One cannot simultaneously eat an apple, smoke a cigarette, climb a tree, and build a house. Likewise, as Hoppe notes

> because of the scarcity of body and time, even in the Garden of Eden property regulations would have to be established. Without them, and assuming now that more than one person exists, that their range of action overlaps, and that there is no preestablished harmony and synchronization of interests among these persons, conflicts over the use of one's own body would be unavoidable. I might, for instance, want to use my body to enjoy drinking a cup of tea, while someone else might want to start a love affair with it, thus preventing me from having my tea and also reducing the time left to pursue my own goals by means of this body. In order to avoid such possible clashes, rules of exclusive ownership must be formulated. In fact, so long as there is action, there is a necessity for the establishment of property norms.[7]

A property right in one's scarce body is a precondition for action even in the face of

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[4] Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute 2010 [1989], www.hanshoppe.com/tsc), p. 158 n.120.

[5] Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar's ed. (Auburn, Ala.: Mises Institute, 1998; https://mises.org/library/human-action-0), chap. IV, § 1, p. 93, *et pass*. (discussing free goods and the general conditions of human welfare).

[6] Hoppe, *A Theory of Socialism and Capitalism*, p. 18. Note here the focus on the possibility of *conflict* and its connection to the concept of scarcity and the need for property rights. Thus, as noted elsewhere in this volume, in recent years I (Kinsella) sometimes use terms like rivalrous or "conflictable," instead of, or as an augment to, the concept of "scarce," to avoid equivocation from IP socialists. See "*Against Intellectual Property* After Twenty Years" (ch. 15), n.29 *et pass*.; Kinsella, "On Conflictability and Conflictable Resources," *StephanKinsella.com* (Jan. 31, 2022); "What Libertarianism Is" (ch. 2), n.5; "How We Come to Own Ourselves" (ch. 4), n.10. In this chapter I have retained our original use of the term "scarce" but it should be understood to mean "conflictable" in case of doubt.

[7] Hoppe, *A Theory of Socialism and Capitalism*, p. 20–21. Thus,

> This "ownership" of one's own body implies one's right to invite (agree to) another person's doing something with (to) one's own body: my right to do with my body whatever I want, that is, includes the right to ask and let someone else use my body, love it, examine it, inject medicines or drugs into it, change its physical appearance and even beat, damage, or kill it, if that should be what I like and agree to. [p. 22]

superabundance. Hoppe goes so far as to say that the body is the "prototype of a scarce good."[8] Here he agrees with Jefferson's teacher Count Destutt de Tracy: "property exists in nature: for it is impossible that every one should not be the proprietor of his individuality and of his faculties."[9]

As Hoppe writes:

> The answer to the question what makes my body "mine" lies in the obvious fact that this is not merely an assertion but that, for everyone to see, this *is* indeed the case. Why do we say "this is my body"? For this a twofold requirement exists. On the one hand it must be the case that the body called "mine" must indeed (in an intersubjectively ascertainable way) express or "objectify" my will. Proof of this, as far as my body is concerned, is easy enough to demonstrate: When I announce that I will now lift my arm, turn my head, relax in my chair (or whatever else) and these announcements then become true (are fulfilled), then this shows that the body which does this has been indeed appropriated by my will. If, to the contrary, my announcements showed no systematic relation to my body's actual behavior, then the proposition "this is my body" would have to be considered as an empty, objectively unfounded assertion; and likewise this proposition would be rejected as incorrect if following my announcement not my arm would rise but always that of Müller, Meier, or Schulze (in which case one would more likely be inclined to consider Müller's, Meier's, or Schulze's body "mine"). On the other hand, apart from demonstrating that my will has been "objectified" in the body called "mine," it must be demonstrated that my appropriation has *priority* as compared to the possible appropriation of the same body by another person.
>
> As far as bodies are concerned, it is also easy to prove this. We demonstrate it by showing that it is under my *direct* control, while every other person can objectify (express) itself in my body only *indirectly*, i.e., by means of their own bodies, and direct control must obviously have logical-temporal priority (precedence) as compared to any indirect control. The latter simply follows from the fact that any indirect control of a good by a person presupposes the direct control of this person regarding his own body; thus, in order for a scarce good to become justifiably appropriated, the appropriation of one's directly controlled "own" body must already be presupposed as justified. It thus follows: If the justice of an appropriation by means of direct control must be *presupposed* by any further-reaching indirect appropriation, and if only I have direct control of my body, then no one except me can ever justifiably own my body (or, put differently, then property in/of my body cannot be transferred onto another person), and every attempt of an indirect control of my body by another person must, unless I have explicitly agreed to it, be regarded as unjust(ified).[10]

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[8] See "What Libertarianism Is" (ch. 2), at n.9; "How We Come to Own Ourselves" (ch. 4), at n.2; "A Libertarian Theory of Punishment and Rights" (ch. 5), at n.60; "Dialogical Arguments for Libertarian Rights" (ch. 6), at n.6 *et pass*.

[9] The Count Destutt Tracy, *A Treatise on Political Economy*, Thomas Jefferson, trans. (Auburn, Ala.: Mises Institute, 2009 [1817]; https://mises.org/library/treatise-political-economy-0), p. 125. For further elaboration on Hoppe's views on body-ownership, see Kinsella, "How We Come to Own Ourselves" (ch. 4).

[10] Quoted in "How We Come to Own Ourselves" (ch. 4), text at n.17. See also *idem*, *Economy, Society, and History* (Auburn, Ala.: Mises Institute, 2021; https://www.hanshoppe.com/esh/), pp. 7–8 (discussing each human's unique connection to his own body). See also Emanuele Martinelli, "On Whether We Own What We Think" (draft, 2019; https://perma.cc/LQ98-HSAB), p. 3: regarding Locke's notion of self-ownership, "the basic intuition is that no one could metaphysically control another one's body and mind." See also John Locke, *Second Treatise on Civil Government*

But let's be clear what we do *not* mean by the term scarce in the sense that it applies to this discussion. Something can have zero price and still be scarce: a mud pie, soup with a fly in it, a computer that won't boot. So long as no one wants these things, they are not economic goods. And yet, in their physical nature, they are scarce because if someone did want them, and they thus became goods, there could be contests over their possession and use. They would have to be allocated by either violence or market exchange based on property rights.

Nor does scarcity necessarily refer to whether a good is in shortage or surplus, nor to whether there are only a few or whether there are many. There can be a single "owner" of a nonscarce good (a poem I just thought of, which I can share with you without your taking it away from me) or a billion owners of scarce goods (paperclips, which, despite their ubiquity, are still an economic good).

Nor does scarcity necessarily refer to tangibility only, to the ability to physically manipulate the thing, or to the ability to perceive something with the senses; airspace and radio airwaves[11] are intangible scarce goods and therefore potentially held as property and therefore priced, while fire is an example of a tangible good of potentially unlimited supply.

Instead, the term scarcity here refers to the possible existence of conflict over the possession of a finite thing. It means that a condition of contestable control exists for anything that cannot be simultaneously owned: my ownership and control excludes your control.

Replication and Nonscarce Goods

In contrast, there are nonscarce goods. A classic statement on them comes from Frank Fetter's *Economic Principles*:

> [S]ome things, even such as are indispensable to existence, may yet, because of their abundance, fail to be objects of desire and of choice. Such things are called *free goods*. They have no value in the sense in which the economist uses that term. Free goods are things which exist in superfluity; that is, in quantities sufficient not only to gratify but also to satisfy all the desires which may depend on them.[12]

An example of a necessarily nonscarce good is a thing in demand that can be replicated without limit, so that I can have one, you can have one, and we can all have one. This is a condition under which there can be no contest over ownership. As Hoppe says, under these conditions, there would be no need for property norms governing their ownership and use.

This nonscarce status might apply to many things but it always applies to nonfinite things, that is, goods that can be copied without limit, with no additional copy having displaced the previous copy and with no degradation in the quality of the copied good from the original good.

Jefferson himself made the lasting statement that clearly distinguishes the two types of

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(1690; https://www.johnlocke.net/2022/07/two-treatises-of-government.html), chap. 5, "Of Property."

[11] See B.K. Marcus, "The Spectrum Should Be Private Property: The Economics, History, and Future of Wireless Technology," *Mises Daily* (Oct. 29, 2004; https://perma.cc/9VMQ-5VE2); Kinsella, "Why Airwaves (Electromagnetic Spectra) Are (Arguably) Property," *Mises Blog* (Aug. 9, 2009).

[12] Frank A. Fetter, *Economics—Vol. 1: Economic Principles* (NY: The Century Co., 1915; https://mises.org/library/economic-principles), chap. 3, §2. See also the Mises citation in note 5, above.

goods:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.[13]

The idea is not just the spawn of Enlightenment thought. St. Augustine also took note of the peculiar goods quality of words.

> The words I am uttering penetrate your senses, so that every hearer holds them, yet withholds them from no other. … I have no worry that, by giving all to one, the others are deprived. I hope, instead, that everyone will consume everything; so that, denying no other ear or mind, you take all to yourselves, yet leave all to all others. But for individual failures of memory, everyone who came to hear what I say can take it all off, each on one's separate way.[14]

Imagine if Jefferson's and Augustine's descriptions of ideas applied to finite things. Let's say that someone owns a magic bagel. He could give a friend a bagel and another would magically appear in its place, allowing him to keep his bagel at the same time. The very act of giving it away would create an exact copy of it. A neighbor could do the same. Potentially, everyone in the world could have an identical bagel—all equally delicious.

This magic bagel would then constitute what has been traditionally called a free good or what we are now calling a nonscarce good—something that can be possessed unto infinity and by an unlimited number of people without displacing or degrading the original. With free goods, or nonscarce goods, there is no conflict over ownership.

You could say that you have a property right in the magic bagel, but it would be meaningless because anyone could "take it" by the act of replicating it. It cannot be owned in the traditional sense. I could of course keep my magic bagel under wraps and never let anyone know about it. But that changes nothing about its magic properties. It remains a good that can be copied without limit. And my ability to keep the secret is a result of my property right in—my ability to control—the scarce resource of my body.

Under these conditions, the status of the bagel as a free good is due to its *replicability*. If it could not be so replicated, if its magic went away, it would become a scarce good. Once it became

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[13] See "Thomas Jefferson to Isaac McPherson 13 Aug. 1813" *Founders Online* (text formatted; https://founders.archives.gov/documents/Jefferson/03-06-02-0322).

[14] Garry Wills, *St. Augustine: A Life* (Viking Penguin, 1999), p. 145.

public, there would be a contest over ownership of that bagel (if I have it, you can't have it).

So it is with all things: if there is a zero-sum contest over its possession, it is scarce; if there need not be rivalry over its ownership, and its capacity for copying and sharing is infinite, it is nonscarce.

Does that sound fanciful? With regard to bagels, it is. But what if something like the magic-bagel example becomes real? Yesterday we could replicate information with photocopiers and print any number of perfect copies with a laser printer; and now we can copy and reproduce documents and files digitally. What if so-called 3D printers become widespread? These are devices that can fabricate various material objects by using a "recipe." In principle one could see a bagel (or car) that he likes, find or create a blueprint or recipe for it, and have a copy printed using one's own 3D printer, energy, and raw materials.

One can only imagine the IP police stopping people from using their 3D printers to make useful tools and goods based on the idea that doing so is somehow "stealing" the property of others that is still sitting in their homes.[15]

In any case, for now the technology for 3D copying and printing is in its infancy. Not so for digitally encoded information. For example, consider a file on your hard drive. It can be packaged up and sent via email. The file does not disappear. A perfect copy of that file appears in someone else's email. That person could similarly forward (a copy of) the file to another person. This can happen billions and trillions of times without compromising the integrity of the first file. In effect, this file is like the magic bagel, a nonscarce good. If the file is on a server, it can be accessed by billions of people, each of whom could similarly host the file until it multiplies without limit.[16]

Consider the power of this nonscarce good. That file might contain a database with all the world's financial transactions for last month. The record of those transactions would be nonscarce. The file could contain images of all the paintings in the National Gallery of Art. These images would be nonscarce. It could contain videos of all college lectures given in the United States last semester. Again, nonscarce.

All of this is possible and practicable. We experience this every day. We do this every day. All the files on the World Wide Web, unless they have been specially coded to be otherwise, constitute free goods.

It seems clear that we are moving into a world in which we have to account for the existence of massive and growing numbers of goods that are not scarce, in the sense that they are potentially replicable into infinity. These goods fall outside the strict confines needed for rationing. There need be no conflict and hence no need for traditional property rights for them.

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[15] See "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), at n.27, for further discussion of this issue.

[16] For further discussion of why it is impossible to own information (or things like Bitcoin) precisely because it is replicable and always has to be stored on an underlying, already-owned medium, see "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability" (ch. 9), at n.31; "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11), at notes 3 and 5; "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), at n.69; and "Conversation with Schulman about Logorights and Media-Carried Property" (ch. 17).

GOODS, SCARCE AND NONSCARCE

One helpful way to understand this is to classify all goods as either finite and therefore normally scarce or nonfinite and therefore naturally nonscarce. This distinction appears from time to time in the history of thought.[17] Property rights are essential for scarce goods. It is these scarce goods that serve as means for action, while nonscarce goods that can be copied without displacing the original are not *means* but *guides* for action.[18] It would be ridiculous to speak of some kind of "social ownership" over scarce goods.[19] Scarce goods can only be owned by one person at a time. Sure, you can share them, but that is just a means of allocating a scarce good that changes nothing about the intrinsic nature of the good. In the end, all attempts at socializing scarce resources lead to state ownership and the well-known chaos associated with it.

But let us return to the bagel, this time one without magic properties. What about the recipe and skills that made it? The recipe and skills can be copied by anyone. Anyone can watch and learn. The recipe can be shared unto infinity. Once the information in the recipe and the techniques of making it are released, they are free goods, nonscarce goods, or nonfinite goods.

What are some more examples of such naturally nonscarce goods? One person can share an idea and it can spread unto infinity, never reducing or degrading the quality of the original. Fire might be considered another example (as Thomas Jefferson said). A match can light a log without displacing the fire from the match. The times tables are another example: the grade-school teacher doesn't "give up" this knowledge when drilling it into the students. An image of anything qualifies too. One person can look at another and memorize what he or she sees, without somehow taking or replacing the original. A tune is the same way. It can be shared and replicated without limit. I can sing a song, and you can sing the same song without taking the song from me.

These goods are all nonscarce and thereby require no economization, and no property rights, as no conflict is possible. Once they are released, they need not be priced. There is no "structure of production" attached to their reproduction or allocation (hence there is no "structure of production" for the dissemination of ideas).

To be sure, nonscarce goods *can* be economized and thereby commercialized by rationing the scarce means of their distribution. For example, a professor, whose time and body are scarce, is paid to share nonscarce ideas. This is a service, but once the professor's ideas are shared, they enter into the realm of all nonscarce goods. What is paid for in fact is not the idea itself but the presentation, the time required to share, the labor services of teaching, all of which are scarce

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[17] An example is Armen Alchian and William Allen, who write: "A *good* is anything desired by at least one person. Goods may be either *free* goods or *economic* (that is, scarce) goods." Armen Alchian & William R. Allen, *Exchange and Production: Competition, Coordination, & Control*, 3rd ed. (Belmont, California: Wadsworth, 1983), p. 14. See also the Mises reference in note 5, above.

[18] For further discussion of why property rights apply to scarce resources or means of action but not to the knowledge that guides action, see "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), Part IV.E, "The Separate Roles of Knowledge and Means in Action," at notes 58–59 *et pass*.; "Law and Intellectual Property in a Stateless Society" (ch. 14), Part III.D. See also the Mises and Rothbard quotes at notes 31 and 32, below.

[19] On Rothbard's critique of the "communist" approach to property rights assignment, see "How We Come to Own Ourselves" (ch. 4), at n.14 and "Law and Intellectual Property in a Stateless Society" (ch. 14), at n.27; also "Defending Argumentation Ethics" (ch. 7), n.31.

goods.[20]

It is the same with a book or article. What is scarce is the medium through which the idea is expressed, which is why books, articles, and web access cost money. The ideas conveyed in them, however, are copyable without limit.

This is not an insight that applies to digital media alone. This is true regardless of the technology involved. Whether we are talking about a scribe working on velum in the 8th century or a writer working on a web-based document in the 21st century, the ideas conveyed in the words, and the image of the words themselves, are nonscarce goods, while the medium through which they are conveyed is scarce. The range and importance of nonscarce goods has been vastly expanded by the existence of digital media.

As to whether a good is naturally scarce or nonscarce, the test here is simple. If the good can be taken (shared) without displacing the original, it is always nonscarce. If taking the original means that it can no longer exist in the possession of the original owner or possessor, it is a scarce good. All goods fall into one or the other category. All nongoods (unwanted things, necessarily a contingent category)[21] can of course be similarly classified. See Table 1, below.

	Scarce[22]	**Nonscarce**
Good	Bagel, Factory, Shoes, People, Desk	Recipe, Idea, Tune, Image, Skill, Fire
Nongood	Mud Pie, Poison Soup, Slug, Road Kill	Bad Idea, Awful Sound, Gibberish Text

Table 1: Scarce and Nonscarce Goods and Nongoods

At the same time, it is also true that most things are bundles of scarce and nonscarce goods. A book is a nonscarce text conveying nonscarce ideas on scarce paper and taking up scarce space

[20] Technically speaking, a service is a type of labor, which is just a type of action; and actions and services are not ownable things. For discussion of the proper classification of contracts for the "sale" of labor services, see "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability" (ch. 9), Part II.C; also "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11).

[21] As Hoppe writes:

> … man learns that some of the [scarce] means, some of the things that he can control, that he can move, that he can manipulate, can be referred to as "goods" and others can be referred to as "bads." *Goods* would obviously be those means that are suitable in order to satisfy some needs that we have, and *bads* would be objects that we can control, but that would have negative repercussions on us, that would not satisfy any needs but, to the contrary, may harm us or even kill us.

Hoppe, "Lecture 1: The Nature of Man and the Human Condition: Language, Property, and Production," in *Economy, Society, and History* (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/esh), p. 9. See also ibid., p. 143; *idem*, *The Great Fiction: Property, Economy, Society, and the Politics of Decline* (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf), pp. x, 107, 191; *idem*, *The Economics and Ethics of Private Property*, p. 309 (mentioning "bads").

[22] The matrix in Table 1 is presented as a tool for mental experiment only—if anything is a nongood (necessarily a subjective idea), it is also by definition nonscarce, since all (nonexistent) demand for it is satisfied. Nonetheless, the typology illustrated in the matrix helps in categorizing the attributes of goods discussed in this article.

on a shelf. A key that unlocks a door is made of scarce metal but its functioning is due to the nonscarce shape of the cut of the key, a shape that is infinitely copyable. A concert by Lady Gaga is a scarce human body backed by scarce instruments and microphones producing music and sound, which immediately become nonscarce in the performing and hearing. Tying a shoe employs scarce laces with scarce hands guided by replicable (nonscarce) skills and techniques.

REPLICATION AND CIVILIZATION

Nonscarce goods do not need the assistance of prices to ration their availability. They are free gifts that can be shared the world over. How important are these goods? Given that they are inclusive of all information, art, know-how, and anything else that can be possessed and copied without displacement, they are hugely important. Without these gifts, the whole of learning, imitation, and world culture would come crashing down.[23]

We are not truly human without being part of human civilization; and there can be no civilization and progress without the spread, dissemination, and accumulation of knowledge. To be human is to be part of a learning society, a communicating society, an information-sharing society. Society is emulation-based.

As it stands, the existence of the nonscarce good is the basis of all intellectual progress, the foundation of technological and artistic progress, and thereby a boon to civilization. It is also at the core of enterprise. Entrepreneurs succeed by imitating others who have succeeded. Their nonscarce experience and ideas are first copied and then improved, with the goal of profit. The example of success that entrepreneurs follow is itself a nonscarce good. Anyone with the means to do so is free to copy the successful idea and replicate it. The nonscarce good is the fuel of the competitive process.

In contrast, a scarce good cannot be shared without limit. It is necessarily owned and controlled by only one person at a time; even the attempt to share implies *displacement* (while I have it, you do not). To acquire it requires either homesteading unowned resources or stealing, transforming, or contractually acquiring (trading for) already-existing resources.[24] Trading is what gives rise to rationing and allocating by the price system.

Again, it would be preposterous to speak of socialism in scarce goods, because it is physically impossible to imagine two simultaneous owners of the same scarce good.[25] However, it

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[23] See the citations to Hayek's comments about how the accumulation of a "fund of experience" helps aid human progress and the creation of wealth in "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), at n.59.

[24] As Hoppe has explained, "One can acquire and increase wealth either through homesteading, production and contractual exchange, or by expropriating and exploiting homesteaders, producers, or contractual exchangers. There are no other ways." Hans-Hermann Hoppe, "Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order," in *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute 2006 [1993], www.hanshoppe.com/eepp), p. 50. See also related discussion in "Law and Intellectual Property in a Stateless Society" (ch. 14), at n.78. But production presupposes the producer already owns the property that he transforms into something more desirable or useful. The only ways to *acquire* a particular scarce resource is to either homestead it, acquire it contractually, or steal it. (One may also transform already-owned property into the desired configuration.)

[25] As Hoppe observes, "Two individuals *cannot* be the exclusive owner of one and the same thing at the same time." Hoppe, "How is Fiat Money Possible?," in *The Economics and Ethics of Private Property*, p. 197. See also Hans-

is possible to speak of something like "socialism" for a good that is nonscarce by its nature, precisely because it can be infinitely copied.

The nonscarce good is private so long as it is never revealed; so long as it remains a secret. Once the secret is out, the good becomes part of the commons (or socially shared, if you will) because everyone who encounters it can use it. Technology has worked to create ever more goods that have become part of the nonscarce category, and this might be seen as a major feature of technological development for all time.

AUSTRIANS ON "FREE GOODS"

Austrians have always, if sometimes only implicitly, recognized the existence of the nonscarce good, which is precisely the good in question with regard to intellectual property. Menger's 1871 book, *Principles of Economics*,[26] begins with the definition of a good that excludes the concern over scarcity. Something is a good, in Menger's view, when it is causally capable of satisfying a human need. This is a very broad definition.

Hoppe summarizes Menger's four requirements for objects to become goods:

> The first is the existence of a human need. The second requirement is such properties as render the thing capable of being brought into a causal connection with a satisfaction of this need. That is, this object must be capable, through our performing certain manipulations with it, to cause certain needs to be satisfied or at least relieved. The third condition is that there must be human knowledge about this connection, which explains, of course, why it is important for people to learn to distinguish between *goods* and *bads*. Thus, we have human knowledge about the object, our ability to control it, and the causal power of this object to lead to certain types of satisfactory results. And the fourth factor is, as I already indicated, that we must have command of the thing sufficient to direct it to the satisfaction of the need.[27]

Thus, for Menger, for something to be a good, there must be human knowledge of this cause-and-effect connection, along with command over the thing so that the relationship between cause and effect can be realized. Among these goods he includes goodwill, family connections, friendship, love, religious and scientific fellowships—all of which fall into the class of things that can be replicated without displacement. Only later in the opening chapter, when discussing the issue of property, does Menger introduce the notion of scarcity and hence the need for economizing.

Hermann Hoppe, Jörg Guido Hülsmann & Walter Block, "Against Fiduciary Media," in *The Economics and Ethics of Private Property*, p. 210 n.8:

> Even partners cannot simultaneously own the *same* thing. A and B can each own half of a household, or half the shares in it, but they each own a *different* 50 percent. It is as logically impossible for them to own the same half as for two people to occupy the same space. Yes, A and B can both be in New York City at the same time, but only in different parts of it.

See also note 19, above.

[26] Carl Menger, *Principles of Economics* (Auburn, Ala.: Mises Institute 2007 [1871]; https://mises.org/library/principles-economics).

[27] Hoppe, *Economy, Society, and History*, p. 9; see also Menger, *Principles of Economics*, chap. I, §1, p. 52 *et pass.* The second requirement corresponds to the means being causally efficacious; the third to the actor's knowledge of causal laws; and the fourth to the availability of the means.

Seeing property as a subclass under the larger division of goods implies the existence of what Ludwig von Mises called a "free good"—something that is "available in superfluous abundance which man does not need to economize."[28] Mises says that though they are "not the object of any action" they are useful and even essential for production.[29] Giving the example of a recipe, he writes that these free goods, or nonscarce goods, render "unlimited services." A free good "does not lose anything from its capacity to produce however often it is used; its productive power is inexhaustible; it is therefore not an economic good."

But it is no less important: "These designs—the recipes, the formulas, the ideologies—are the primary thing; they transform the original factors—both human and nonhuman—into means."[30] Ideas and information are nonscarce goods but they serve as *guides to action* in the use of scarce means, to transform scarce things in the world to achieve the actor's desired end. As Mises wrote, "Action is purposive conduct. It is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and *guided by ideas concerning the suitability or unsuitability of definite means*."[31]

Murray Rothbard elaborated:

> There is another unique type of factor of production that is indispensable in every stage of every production process. This is the "technological idea" of how to proceed from one stage to another and finally to arrive at the desired consumers' good. This is but an application of the analysis above, namely, that for any action, there must be some *plan* or idea of the actor about how to use things as means, as definite pathways, to desired ends. Without such plans or ideas, there would be no action. These plans may be called *recipes*; they are ideas of recipes that the actor uses to arrive at his goal. A *recipe* must be present at each stage of each production process from which the actor proceeds to a later stage. The actor must have a recipe for transforming iron into steel, wheat into flour, bread and ham into sandwiches, etc.[32]

As Rothbard (and Mises) recognize, once the idea comes about, it no longer has to be produced, or economized. It is an "unlimited factor of production that never wears out or needs to be economized by human action." This is precisely what a nonfinite, nonscarce good is: an unlimited factor of production.

Fetter also glimpses that ideas themselves are nonscarce goods:

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[28] Mises, *Human Action*, p. 93

[29] Ibid., p. 93; see also p. 128, re formulas and recipes.

[30] Ibid., p. 142.

[31] Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; https://mises.org/library/ultimate-foundation-economic-science), p. 34 (emphasis added). See also Guido Hülsmann, "Knowledge, Judgment, and the Use of Property," *Rev. Austrian Econ.* 10, no. 1 (1997; https://perma.cc/DKQ8-JX45): 23–48, p. 44 ("The quantities of means we can dispose of—our property—are always limited. Thus, choice implies that some of our ends must remain unfulfilled. We steadily run the danger of pursuing ends that are less important than the ends that could have been pursued. We have to choose the supposedly most important action, though what we choose is how we use our property Action means to employ our property in the pursuit of what appears to be the most important ends. … *In choosing the most important action we implicitly select some parts of our technological knowledge for application*."; emphasis added).

[32] Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholars ed., second ed. (Auburn, Ala.: Mises Institute, 2009; https://mises.org/library/man-economy-and-state-power-and-market), p. 11.

> The gain to the general welfare, however, can result only when the new inventions are actually embodied in machines. An invention is only an immaterial idea, and the machines in which inventions are incorporated are wealth which has a capital value. Further, a gain can result only when the usance of the machines is not so high as to absorb the larger part of the gain in efficiency. Not all labor-saving inventions call for more elaborate or more costly machines. Some are merely better methods, and require no more equipment—or even less. Some of them are simpler and less costly than the forms they displace. These (unless patented) are free goods, uplifting the efficiency of production "without money and without price."[33]

Although Fetter assumes the existence of patent rights and does not question their legitimacy, he recognizes that methods—which are merely recipes, a type of information—are nonscarce goods (he calls them "free goods") that are freely available and increase efficiency and productivity—that is, unless they are patented, thus making them *artificially* scarce.

One of the longest and most searching essays on this topic is by Eugen von Böhm-Bawerk, in his article "Whether Legal Rights and Relationships are Economic Goods."[34] In this piece, Böhm-Bawerk points to several features of things that make them economic goods, among them physical possession and "the power of disposal and control." The notion of scarcity as a precondition for calling something an "economic good" is presumed but never stated outright. However, Böhm-Bawerk added critical elements to the idea of the good, noting that personal services must also be included in this category. Whether such are truly goods is not inherent in the service itself but depends on the subjective response to that service, thus introducing to the idea of a good a subjective component.[35] Here Böhm-Bawerk keenly observes the interplay between materially scarce and subjectively nonscarce goods:

> Be it granted that the poet's soul must have originated thought and emotion, and be it further granted that only in another soul and through intellectual powers can those thoughts and emotions be reproduced, but the path from soul to soul leads through the physical world for one stretch of the journey and on that stretch the intellectual element must make use of the physical vehicle, that is to say, of the forces or powers of nature.

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[33] Fetter, *Economic Principles*, 465.

[34] Eugen von Böhm-Bawerk, "Whether Legal Rights and Relationships Are Economic Goods," George D. Huncke, trans., in Eugen von Böhm-Bawerk, *Shorter Classics of Eugen von Böhm-Bawerk* (South Holland, Ill.: Libertarian Press, 1962 [1881]), discussed in Gael J. Campan, "Does Justice Qualify as an Economic Good?: A Böhm-Bawerkian Perspective," *Q. J. Austrian Econ.* 2, no. 1 (Spring 1999; https://perma.cc/G3CK-B8WB): 21–33.

[35] See also Hoppe, "Fallacies of the Public Goods Theory and the Production of Security," in *The Economics and Ethics of Private Property*, at 8–9:

> … looking into the distinction between private and public goods more thoroughly, we discover that the distinction turns out to be completely illusory. A clear-cut dichotomy between private and public goods does not exist, and this is essentially why there can be so many disagreements on how to classify a given good. All goods are more or less private or public and can—and constantly do—change with respect to their degree of privateness/publicness as people's values and evaluations change, and as changes occur in the composition of the population. In order to recognize that they never fall, once and for all, into either one or the other category, one must only recall what makes something a good. For something to be a good it must be recognized and treated as scarce by someone. Something is not a good as such, that is to say; goods are goods only in the eyes of the beholder. Nothing is a good unless at least one person subjectively evaluates it as such.

The book is that physical material vehicle.[36]

As Joseph Salerno notes, "Böhm-Bawerk employed the example of the production and consumption of a poem to illustrate that the good is inextricably bound up with the want-satisfaction process that traverses and links the objective and subjective realms."[37]

SCARCE GOODS, NONSCARCE GOODS, PROGRESS, AND INTERVENTION

Why does all of this matter? It is interesting on the level of theory but it is also critically important as a practical matter. Enterprise in our time is increasingly dependent on a clear understanding of the difference between scarce and nonscarce goods. In the current recession, for example, the bust hit scarce goods, and it is the scarce-goods sector that the government is attempting to stimulate.[38] But the nonscarce sector, which is not subject to the structure of production, and therefore is resistant to business-cycle effects, continues to thrive and has been unaffected by the machinations of bad macroeconomic policy. (But it is affected by "intellectual property" regulation which impose artificial scarcity where there is none naturally present.)

Institutions such as Google and the Mises Institute have discovered the secret of giving away nonscarce goods (search services and digital books) and restricting commercial operations to allocating only scarce goods (teacher services, physical books, and advertising space on screens).[39] This combination of giving away the nonscarce good and selling the scarce good has permitted both institutions to grow through service.

But this distinction is also exceedingly helpful for understanding economic theory. It clarifies the absolute necessity of property rights and free movement of prices for all scarce goods—exactly as classical economists have said. It also illustrates the need to completely de-control access to nonscarce goods and to permit the voluntary learning and sharing process to take its own course.[40]

Nonscarce goods are a great gift courtesy of the structure of reality, a boon to humankind, a vast treasure of resources—tools for making the world a relentlessly better place.[41]

The failure to understand the distinction between scarce and intrinsically nonscarce goods might also help to explain the persistence of socialist ideology. For example, one possible explanation of the predictable socialist impulse of religious leaders, intellectuals, and artists is that

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[36] Böhm-Bawerk, "Whether Legal Rights and Relationships Are Economic Goods," p. 91.

[37] Joseph T. Salerno, "Böhm-Bawerk's Vision of the Capitalist Economic Process: Intellectual Influences and Conceptual Foundations," *New Perspectives on Political Economy* 4, no. 2 (2008; https://perma.cc/7XV4-2KQA): 87–112, at 101.

[38] This was written in 2010, in the aftermath of the Great Recession from 2007–2009.

[39] See Doug French, "The Intellectual Revolution Is in Process," *Mises Daily* (Dec. 12, 2009; https://mises.org/library/intellectual-revolution-process); Jeffrey Tucker, "A Theory of Open," *Mises Economics Blog* (Jan. 7, 2010; https://mises.org/wire/theory-open); and Gary North, "A Free Week-Long Economics Seminar," *LewRockwell.com* (July 24, 2010; https://www.lewrockwell.com/2010/07/gary-north/mises-u/).

[40] The distinction between scarce and nonscarce goods is crucial. A signal example of the importance of making careful distinctions in fundamental economic concepts is Menger's clarification of price and value theory, which has profound implications with respect to other aspects of economics.

[41] For elaboration, see the last three paragraphs of Kinsella, "The Death Throes of Pro-IP Libertarianism"; see also note 23, above.

their primary work consists in the production and distribution of nonscarce goods (salvation, ideas, and art) and that this accounts for the failure of the people in these professions to come to terms with the relentless reality of scarcity.

In summary, the world has given us two types of goods, one type that demands allocation through property and prices and one type that can be infinitely copied. In the production and distribution of scarce goods, there is no substitute for the commercial marketplace. And the notion that government should ever restrict replicable nonscarce goods or grant protection to a single monopolistic producer of nonscarce goods is contrary to freedom, material advancement, and social peace.

9

Selling Does Not Imply Ownership, and Vice-Versa: A Dissection

✣

I delivered a speech with the same name as this chapter at the Property and Freedom Society's 16th Annual Meeting, in Bodrum, Turkey, in 2022.[*] It takes aim, in part, at some of my friend Walter Block's views on voluntary slavery and body-alienability, a topic we've disagreed about for a long time.[†] Since Walter likes to respond to articles in print, he persuaded me to turn the transcript of this speech into an article. The transcript was lightly edited for clarity and to add some references and links, but the colloquial and informal tone has largely been preserved, and some headings added. I published it on my old, mostly defunct site *The Libertarian Standard*, to which Walter responded in due course.[‡] This chapter is a lightly-edited version of that article.[§]

✣

Two Related Fallacies

I want to explore two related beliefs, which I think are fallacious, and they stem from confusions about core libertarian principles and confusions introduced by the sloppy use of language and overuse of metaphorical thinking. And, by the way, I did touch on this topic in less detail at the PFS [Property and Freedom Society] here in 2011 when I talked about a bunch of libertarian misconceptions, and also in a "Libertarian Controversies" lecture from Mises Academy about 10 years ago.[1]

So, the first one: *Ownership implies selling*. Walter Block uses this a lot. In fact, I heard him say it explicitly last week again in Nashville at the Libertarian Scholars Conference. So the idea is this. If you own yourself—that is, you own your body—you should be able to sell it. So, a voluntary slavery contract should be enforceable. And if the legal system does not permit voluntary slavery,

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[*] Kinsella, "KOL395 | Selling Does Not Imply Ownership, and Vice-Versa: A Dissection (PFS 2022)," *Kinsella on Liberty Podcast* (Sept. 17, 2022).

[†] See Kinsella, "KOL004 | Interview with Walter Block on Voluntary Slavery and Inalienability," *Kinsella on Liberty Podcast* (Jan. 27, 2013).

[‡] Kinsella, "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection," *The Libertarian Standard* (Oct. 25, 2022). Walter's response: "Rejoinder to Kinsella on Ownership and the Voluntary Slave Contract," *Management Education Science Technology Journal* (MESTE) 11, no. 1 (Jan. 2023; https://perma.cc/H3AL-WBQJ): 1-8. See also *idem*, "Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Kinsella and Epstein," *J. Libertarian Stud.* 17, no. 2 (Spring 2003; https://perma.cc/79AC-34BZ): 39–85.

[§] Some of this material is also discussed in "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), Part IV.G.

[1] See Kinsella, "KOL044 | "Correcting some Common Libertarian Misconceptions" (PFS 2011)," *Kinsella on Liberty Podcast* (May 2, 2013), at slide 7 and *idem*, "KOL049 | "Libertarian Controversies Lecture 5" (Mises Academy, 2011)," *Kinsella on Liberty Podcast* (May 4, 2013), at slide 15. See also *idem*, "KOL092 | Triple-V: Voluntary Virtues Vodcast, with Michael Shanklin: Can You Trade Something You Don't Own?," *Kinsella on Liberty Podcast* (Oct. 30, 2013); *idem*, "The "If you own something, that implies that you can sell it; if you sell something, that implies you must own it first" Fallacies," *StephanKinsella.com* (June 1, 2018); *idem*, "On the Danger of Metaphors in Scientific Discourse," *StephanKinsella.com* (June 12, 2011).

then it means you really don't own yourself. So the implicit assumption behind this argument is that one inherent aspect of ownership is the right or ability to sell.[2] In other words, it is assumed that "ownership" necessarily includes the ancillary "right to sell." It's taken for granted that "if you own something, you can sell it." This is a mistaken assumption, as I shall explain presently.

Fallacy two: *Selling implies ownership*. So, some contracts that we're used to are exchanges of *owned things*. Consider some simple ones: an apple for an orange, 10 chickens for a pig, 1 ounce of gold for a horse, or $3 for a cup of coffee. Now, we also have labor contracts where it's considered to be a sale of a service, which implies that you "own your labor" because, after all, you "sold" it. And also there's the sale of knowledge, information, or know-how—like teachers who get paid to give information, publishers, speakers, contracts for transfer of know-how, and so on. And this argument is also used to argue for intellectual property. People say, "well, if you can sell your idea, you must have owned it, so intellectual property is a legitimate concept." Similarly with Bitcoin: people say that Bitcoin can be possessed, and sold, so Bitcoins must be owned and ownable things.[3]

SCARCITY AND PROPERTY RIGHTS

Now, let's revisit some elementary categories of libertarian thought. So first of all, action is when humans in the world employ means or scarce resources as tools to help achieve their ends or goals. When there's society—other human actors—there's a possibility of conflict in the use of these resources. Now, it's good that we live in society because we have the division and specialization of labor, trade, and intercourse with other people. But there can also be conflict among human actors in the use of these scarce resources, including our bodies, because of the nature of these resources.

So what this means is the scarce resources, which we employ as human actors, in a purely economic sense, are precisely *things over which there can be conflicts*. So sometimes, to avoid confusion, I will refer to these things as rivalrous, or *contestable* or *conflictable* resources.[4] They are the types of things over which there can be conflict. I find I sometimes need to emphasize this aspect and avoid the term "scarce resources" because, quite often, an intellectual property proponent will say something like, well, "I don't know about you, but good ideas is pretty scarce." They can't easily say that good ideas are *conflictable* (or rivalrous), though. The point is information is not the type of thing that can be subject to property rights or ownership.[5]

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[2] See Kinsella, "KOL004 | Interview with Walter Block on Voluntary Slavery and Inalienability" and *idem*, "Thoughts on Walter Block on Voluntary Slavery, Alienability vs. Inalienability, Property and Contract, Rothbard and Evers," *StephanKinsella.com* (Jan. 9, 2022).

[3] See Kinsella, "KOL274 | Nobody Owns Bitcoin (PFS 2019)," *Kinsella on Liberty Podcast* (Sept. 19, 2019).

[4] See "*Against Intellectual Property* After Twenty Years" (ch. 15), Part III. On the term "conflictable," see Kinsella, "On Conflictability and Conflictable Resources," *StephanKinsella.com* (Jan. 31, 2022); see also "How We Come to Own Ourselves" (ch. 4), text at n.10; "A Libertarian Theory of Punishment and Rights" (ch. 5), at n.62 and accompanying text; "Dialogical Arguments for Libertarian Rights" (ch. 6), at n.6 and accompanying text; "Causation and Aggression" (ch. 8), n.19 and accompanying text.

[5] See Kinsella, *Against Intellectual Property* (Auburn, Ala.: Mises Institute, 2008); "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15). To avoid any doubt: I think patent and copyright law should be abolished. In about 20 years. Daddy's got to put food on the table. Just kidding. "Do it now." I don't think they are listening to me anyway.

Property Rights

Now, in civilized society, property or ownership rights are assigned to reduce this conflict.[6] So what are property rights? All rights are human rights, and all human rights just are property rights,[7] because the very purpose of property rights is to avoid conflict over scarce (rivalrous, conflictable) resources. So ownership means property rights. To own a thing is to have a property right in the thing. So it's actually better to refer to property as the *relationship between* a person and a thing, although, over time, we sometimes are careless with language, and we will refer to the thing itself as property. Like we'll say "that car is my property." But precise language would be, "I have a property right in that thing, in that car," or "I own that car."[8]

All right: so, ownership and property rights. A property right in a thing gives the owner the right to use it. This is what property rights are. Now, to be more precise, which is—this precision is not necessary for today's discussion, but—owning a thing actually does not literally give you the *right to use it*, but it gives you the *right to prevent others from using it*. It's an exclusionary right.[9] As a practical matter, that *usually* gives you the *ability* to use the thing. So, for example, if you own a gun, that means you can prevent anyone else from using the gun. But it doesn't mean you have the unlimited right to use the gun because other people have property rights, and their property rights proscribe your actions. So I can't use the gun to shoot someone.

Property Rights as Limits on Action

Now, most people make the mistake of saying, well, this shows that property rights are limited. But this is actually incorrect. The reason I can't shoot the gun at my neighbor is *because* he has a property right in his own body. His property rights are a limitation on what *actions* I can perform. They are *not* a limitation on my property rights in my gun. In fact, if I had a stolen gun, which I didn't own, I still couldn't shoot my neighbor. Ownership of the gun—the means employed—has nothing to do with why am prohibited from shooting him. So the ownership of the gun is not limited by property rights. I can't shoot an innocent person with a gun that I own, *or* with a stolen gun. The innocent person's *property rights in his body* limit what *actions* I can perform, with whatever causally efficacious scarce means, whether it's a resource I own or not. It's a limit on my actions, not on property rights. Because the essence of a property right is the right to exclude others, not the right to use.

This mistake is used also to argue for intellectual property because people will say—well, I'll point out that intellectual property rights restrict other property rights, so they're actually an

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[6] See Hoppe, "Of Common, Public, and Private Property and the Rationale for Total Privatization," in *The Great Fiction: Property, Economy, Society, and the Politics of Decline* (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf).

[7] See Rothbard, "'Human Rights' as Property Rights," in *The Ethics of Liberty* (New York: New York University Press, 1998, http://mises.org/rothbard/ethics/fifteen.asp); see also Kinsella, "KOL259 | "How To Think About Property", New Hampshire Liberty Forum 2019," *Kinsella on Liberty Podcast* (Feb. 9, 2019).

[8] See "What Libertarianism Is" (ch. 2), n.5; and text accompanying note 39, below.

[9] See "*Against Intellectual Property* After Twenty Years" (ch. 15), n.62 and Part IV.H n.74. Ironically, this is how the patent system works (having a patent on an invention doesn't give you the right to make, use, sell, or practice it, but only to stop others), although almost no one except patent specialists really grok this. We patent lawyers like that it's arcane and no one but us gets it. Keeps us employed.

infringement of property rights because they're effectively a nonconsensual negative servitude because, if I have a patent, I can prevent you from using your factory to make iPhones. So that's a limitation on your use of your property.[10]

And the response will be, "well, all property rights limit other people's property rights." The implicit argument here is that just because patents limit property rights, that's no problem to patents being genuine property rights, because all property rights limit other property rights.[11] But that's not true. Property rights limit only actions. And the owner of a factory making iPhones is not committing any action that invades the borders of anyone else's property. So that's why that's another fallacy. It's a related fallacy but not the one I'm addressing directly today.

So: libertarianism and property rights. The purpose of property rights is to permit conflicts over the use of scarce resources to be avoided. So they assign these exclusive rights so that others can avoid the conflict.

Property Rights and Objective Link

So how does this work? The property rights are assigned in accordance with whichever actor has the *best link* or connection to the resource.[12] This is the only way you can have a workable system of property rights because any system of property rights has to be voluntarily respected, and for it to be voluntarily respected, it has to be seen as objectively fair, which means it can't be based upon arbitrary differences like "I have the right to rule you, and you don't have the right to rule me because I'm me, and you're you." That's a *particularistic* rule.[13] Or "I have the right to your land because I'm stronger."

Those types of arguments and reasons are not justifications. There has to be an objective best link.[14] So how does that work out? In Western private law and in libertarianism, which is a

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[10] See "*Against Intellectual Property* After Twenty Years" (ch. 15), Part IV.B and note 39, below.

[11] Imagine a woman being assaulted and complaining that this violates her property rights in her body. "Don't complain," the aggressor says, "after all, all property rights are limited by others' property rights, and I'm asserting an ownership claim in your body." See also "*Against Intellectual Property* After Twenty Years" (ch. 15), Part IV.H.

[12] In this sense, all property rules are relative: the owner is the person who has a better claim than all other possible claimants. See, on this, "What Libertarianism Is" (ch. 2), at notes 33, 36; and "Law and Intellectual Property in a Stateless Society" (ch. 14), at n.41 *et pass*. This is why "taints" or original sin in the history of land in the distant past do not render current property rights insecure. See also "Libertarianism After Fifty Years: What Have We Learned?" (ch. 25); and "What Libertarianism Is" (ch. 2), at n.36.

In a recent talk, one legal scholar claims that Rothbard, in *Ethics of Liberty*, propounded a view of "absolute" property titles, as contrasted with the "relative" property titles of the common law. See Wanjiru Njoya, "Defending Private Property: Principles of Justice" (YouTube, March 27, 2023; https://youtu.be/jzamN_8l77k). However, I believe the best reading of Rothbard is that the position he supports is basically the relative property title system indicated above. See Kinsella, "Rothbard on the 'Original Sin' in Land Titles: 1969 vs. 1974," *StephanKinsella.com* (Nov. 5, 2014); *idem*, "Mises, Rothbard, and Hoppe on the 'Original Sin' in the Distribution of Property Rights," *StephanKinsella.com* (Oct. 7, 2014). See also Jeff Deist's breakdown of Rothbard's approach to such property issues in "A Libertarian Approach to Disputed Land Titles," *Mises Wire* (June 3, 2021; https://mises.org/wire/libertarian-approach-disputed-land-titles).

[13] See, on this, "What Libertarianism Is" (ch. 2), n.23 and accompanying text; "How We Come to Own Ourselves" (ch. 4), n.15; "A Libertarian Theory of Punishment and Rights" (ch. 5), n.45 and accompanying text; and "Dialogical Arguments for Libertarian Rights" (ch. 6), n.43 and accompanying text.

[14] See "How We Come to Own Ourselves" (ch. 4).

far more consistent working out of this, there are basically two types of links—the type of link applied to your body, which is a unique scarce resource; and the type of link applied to external resources in the world, which were *previously unowned* scarce resources. For the body, the link is a self-ownership link. You own your body, and the reason is because of your direct control over it, which I will get to in a minute.

And then for scarce resources in the world, they're always owned first by someone first using them from their unowned state. That's called *homesteading* or *original appropriation*. And then ownership can be *transferred* for two reasons: *contractually*—that's a voluntary transfer of title of the resource to someone else of your ownership title, either by sale or by gift; or for purposes of *rectification*, which can be seen as a subset of contract because it's also a transfer of title from an owner to someone, but it's because the owner committed a tort against the victim and thus gave him a right to recover some of the aggressor's property as damages.

So *original appropriation*, *contract*, and *rectification* are the—basically the only three principles to determine ownership of external resources in case of a dispute. So these four principles—body-ownership due to direct control, with an exception made for forfeiture of this right due to committing aggression;[15] plus the three principles for external resources—are how we determine the best link, and this is the core of all property rights, and of all just law. A developed body of private law, to be just, has to be based on these core principles, and is just working out the details as the law develops.[16] And in every socialist system, and every law that deviates from this, they always end up deviating from this in one way or the other, including intellectual property.

Self-Ownership

Now, so we commonly use the term "self-ownership." This is another phrase that can be misleading because you can have people object to it and say, well, how can you own yourself because that's a religious view because it implies that your "self" is different than your body or something like that, and they'll criticize it that way.[17]

So to be precise, self-ownership is just a shorthand for body ownership because your body

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[15] See "Inalienability and Punishment: A Reply to George Smith" (ch. 10) and note 18, below. See also the Libertarian Party Platform language quoted in note 27, below.

[16] See "Legislation and the Discovery of Law in a Free Society" (ch. 13), in general, and "Knowledge, Calculation, Conflict, and Law" (ch. 19), the section "Abstract Rights and Legal Precepts." See also Hoppe's pithy summary of these basic rules, in "A Realistic Libertarianism," *LewRockwell.com* (Sept. 30, 2013; https://www.hanshoppe.com/2014/10/a-realistic-libertarianism/) and in "Of Common, Public, and Private Property and the Rationale for Total Privatization," at pp. 85–87, and the LP Platform language mentioned in note 27, below. As Hoppe writes in "A Realistic Libertarianism":

> But who owns what scarce resource as his private property and who does not? First: Each person owns his physical body that only he and no one else controls *directly* (I can control your body only in-directly, by first directly controlling my body, and vice versa) and that only he directly controls also in particular when *discussing and arguing* the question at hand. … [A]s for scarce resources that can be controlled *only* indirectly (that must be appropriated with our own nature-given, i.e., un-appropriated, body): Exclusive control (property) is acquired by and assigned to that person, who appropriated the resource in question *first* or who acquired it through voluntary (conflict-free) exchange from its *previous* owner. For only the *first* appropriator of a resource (and all later owners connected to him through a chain of voluntary exchanges) can possibly acquire and gain control over it without conflict, i.e., peacefully.

[17] See "How We Come to Own Ourselves" (ch. 4), n.1.

is a scarce resource. Your "self" is not a scarce resource. The notion of "self" is bound up with the concept of personality and the person that you are, your identity as a person in the world, as an actor, as an agent. So *every person is the presumptive owner of his body*. That's the basic libertarian rule. We don't need to get into controversial metaphysics to understand this basic norm or rule.

Now, by the way, I say "presumptive" because it's not absolute; it's defeasible. The self-ownership right can be lost by committing aggression because the victim has the right to defend himself during a crime or to retaliate after.[18] And when they do that, they're using the body of the aggressor without his consent.[19] So he's, in a sense, lost ownership of his body to the extent that the victim needs to be able to use force against him to obtain justice.

So the basis here of self-ownership, or body-ownership, is not homesteading, but it's the direct control over your body. This is the *best link* between the given actor and the resource of his human body. And actually, I think the first person who was explicit in—explicitly recognizing this was Professor Hoppe in a German publication in 1987.[20] You actually weren't explicit about this in your later English book, but it's implicit in there.[21] And if you remember, you told me about that passage, and you translated it for me for my article.

And so Hoppe's argument is that you own your body because you directly control it. So this gives each person or actor logical-temporal priority or precedence as compared to anyone's indirect control. What that means is, if you were to enslave someone or claim to own their body, the only way to control that body is by coercion, by directing threats of force to get them to act the way you want them to act. But in that case, they're the ones still directly controlling it, and that always has precedence, and it's a better link than the indirect control I can exert over you by coercion. Not to mention that the coercer himself would be in contradiction because he claims ownership of his body for the purpose of being the one who can punish you or threaten you.

So this is what the best link means here. It's not homesteading, although people think it's homesteading. It can't be homesteading because to homestead means you're an actor in the world, already a self-owner, or body-owner, and you find an unowned resource, and you appropriate it to yourself. But this presupposes there's already a person with a body, so it's impossible to imagine that you homestead your body unless you have some religious view where the soul goes down there and grabs it. But that's not the domain of science as I think Guido [Hülsmann] and Mises would agree.[22] We could make an analogy. We could say that when a child "wakes up" at the right moment when he becomes sapient enough to be said to have rights, he homesteads himself. But it's really a loose analogy. It just means that's the point in time in which he's a person with rights.

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[18] See "Inalienability and Punishment: A Reply to George Smith" (ch. 10), n. 11 *et pass*.

[19] Alternatively, it could be said that his prior act of aggression was an irrevocable grant of consent to the victim to retaliate; the aggression is a substitute for manifested consent later.

[20] See "How We Come to Own Ourselves" (ch. 4).

[21] Professor Hoppe was in the audience and I briefly addressed my comments to him, so have left the text unchanged here.

[22] Here I am referring to the talk given earlier on the day of my talk, Jörg Guido Hülsmann, "The Ultimate Foundation of Economic Science," *YouTube* (Sept. 17, 2022; https://youtu.be/C3Oglpv47Fg) which itself discussed the book by Mises of the same title (Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; https://mises.org/library/ultimate-foundation-economic-science)), which happens to also be my own favorite book by Mises.

It's not like his body was unowned, and he just homesteaded it.

External Resources

Now, as for external resources, these are things that were *previously unowned*. This is a key point, and they're external to the human body, so they're not part of people's bodies. So in this case, as I said earlier, the best link is determined by the three principles. First, we have original appropriation or homesteading. What this means is you *possess* something, which is an *economic category*. It means to be able to use or manipulate. Mises—I'll get to this later, but Mises calls it catallactic or sociological ownership, but what he really means is *possession,* which is—and this is important—an *economic* category. So mere possession, like Crusoe on an island—in a Robinsonade—he can never "own" anything because there's no society to have norms with respect to. He controls, and he uses things. He *possesses* these things as means, he exercises "factual authority" over these things—but he doesn't own them.[23]

In society, where there are property rights norms, you can also do the same thing. You can just possess something and not intend to own it—you pick up a stick and throw it away. Or you can possess it with the intent to own, and you take certain steps to transform it or to put a barrier up around it, or to, as Hoppe calls it, emborder it, which basically means to put up a visible public link between you and the thing demonstrating to everyone that this thing is no longer unowned, to say "I'm owning it."[24]

This requires the merger or the combination of actual possession or transformation or embordering—with then intent to own.[25] So those two things are essential to owning a thing that was previously unowned. And then, once you own a thing, you can contractually transfer it to someone by your intent, your consent, and I'll get to the mechanics of that in a moment. And then, again, there can also be a transfer as rectification—if you have to transfer something to someone to compensate them for damages you caused them by a tort (an uninvited use of their property).

Okay. Oh, and by the way, this formulation of rights that I just went through, this way of looking at the best link and the breakdown between the body, I'm happy that I was able to help the Mises Caucus in the US get this basic formulation put into the Libertarian Party Platform[26] last May at the "Reno Reset," as we call it. Up until this time, there was no definition of aggression in the Libertarian Party platform. It was just implied.[27]

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[23] See note 36 and related text, below.

[24] See Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989], www.hanshoppe.com/tsc), chaps. 1–2.

[25] For a related notion, see my Book Review of Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), *Reason Papers* No. 20 (Fall 1995): 147–53, p. 147: "Law, far from being authority battling against power, is the interlocking of authority with power." Similarly, ownership stems from the interlocking of possession and intent. See also, on this, "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability" (ch. 9), n.40.

[26] See Libertarian Party Platform, at https://www.lp.org/platform/, and https://perma.cc/GF6J-GPWV.

[27] See Kinsella, "Aggression and Property Rights Plank in the Libertarian Party Platform," *StephanKinsella.com* (May 30, 2022). Modified Plank 2.1 reads, in part:

2.1 Aggression, Property and Contract

Contract, Selling and Ownership: External Scarce Resources

Getting back to the problem of confusing selling and ownership, of thinking there's a necessary relationship between them. *How* do we sell an external resource that we own, like the contractual title transfer we talked about early? So: when you own a resource, because the ownership requires the merger of possession and the intent to own, you can lose ownership by losing the intent to own, by making it clear you no longer intend to own the resource. This is abandonment. So if you acquire a thing, you can "unacquire" it, so to speak. And because of this, it gives you the ability to sell because you can basically abandon it "in favor" of someone else.[28]

Imagine you're on a tree, and you have an apple, and there's people walking by, below you. You can kind of toss the apple to whoever you want. You can drop it so that whoever you want will catch it. You can direct this—you can direct the re-homesteading, in effect. So if I have an apple and I give it to you to hold temporarily, you're the possessor, but you're not the owner. I'm the owner, but I'm not the possessor. So ownership and possession are distinct concepts and statuses. But if you're holding my apple, and if I then abandon it, now you're holding an unowned apple, and you can just re-homestead it right away. So that's how the mechanics, the juristic or legal mechanics, of why and how you can sell things.[29] So the way that we come to own unowned resources is *the reason why* they can be sold. So it's not an incident—it's not an aspect of ownership *per se*. It's an aspect of the way external things come to be owned.

Fallacy 1: You Can Sell What You Own

Now, what about selling yourself, your "self," i.e., your body, like Walter Block thinks we can do? Keep in mind: external things can be sold because they were *previously unowned* and *acquired* by an actor-owner who is *already a self-owner*, and he can abandon it. But your body rights don't arise by homesteading or by your intent to own yourself. They arise because of the best link based upon your direct control.

So if I try to make a contract, "I promise to sell" or "I promise to be your slave forever," *those words do not change the fact that I still have the best link to my body*. And because my words are not an act of aggression—which is the only way to come to own someone else's body, by them

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> Aggression is the use, trespass against, or invasion of the borders of another person's owned resource (property) without the owner's consent; or the threat thereof. We oppose all acts of aggression as illegitimate and unjust, whether committed by private actors or the state.
>
> Each person is the presumptive owner of his or her own body (self-ownership), which right may be forfeited only as a consequence of committing an act of aggression. Property rights in external, scarce resources are determined in accordance with the principles of original appropriation or homesteading (whereby a person becomes an owner of an unowned resource by first use and transformation), contract (whereby the owner consensually transfers ownership to another person), and rectification (whereby an owner's property rights in certain resources are transferred to a victim of the owner's tort, trespass, or aggression to compensate the victim).

[28] But see my posts "Inability to Abandon Property in the Civil Law," *StephanKinsella.com* (Aug. 3 2009) and "Homesteading, Abandonment, and Unowned Land in the Civil Law," *StephanKinsella.com* (Aug. 28, 2021). The positive law ignores the very possibility of unowned or abandoned land. I am not aware of any deep scholarly exploration of this curious feature of modern law, but suspect it stems from a combination of statism and legal positivism, or do I repeat myself. I may explore this issue in further legal scholarship at some point.

[29] See "A Libertarian Theory of Contract" (ch. 9).

forfeiting their rights by commit a crime—then promising to be someone's slave is simply not enforceable because it doesn't transfer any title to anything. You still own your body because you still have direct control and thus the better link. You can always change your mind, in other words.

So Rothbard seems to notice this in his kind of convoluted arguments about this in his contract theory. But it's implied, and I think Hoppe later clarified it, maybe unknowingly, but—so Rothbard wrote:

> It is true that man, being what he is, cannot absolutely guarantee lifelong service to another under a voluntary arrangement. Thus, Jackson, at present, might agree to labor under Crusoe's direction for life, in return for food, clothing, etc., but he cannot guarantee that he will not change his mind at some point in the future and decide to leave. In this sense, a man's own person and will is "inalienable," i.e., cannot be given up to someone else for any future period.[30]

So I think the reason he focuses on the fact that the will is inalienable is that Rothbard senses that that's *the reason* you own your body, although he never quite says it explicitly, but he gets really close. I mean, what's the relevance of the fact that your will is inalienable to the legitimacy or enforceability of a voluntary slavery contract? The only relevance could be that your direct control or your will is the reason you own your body.[31]

Okay, so again, after you promise to be a slave, you still have direct control, so you're still the owner, and you have not committed aggression, so you can always *change your mind* (in contrast to an aggressor who, as noted above, has *irrevocably* granted consent, since he cannot undo the historical fact of the aggression).

Fallacy 2: You Own What You Sell

Okay, now what about the other fallacy—owning what you sell? In a simple exchange, for two material resources that are both owned by two different people like an apple for an orange or an apple for a silver coin, the sellers do own what they sell. There are two title transfers: The orange changes ownership, and the apple changes ownership.

But in a "sale" of service, labor, or information, the contract *in legal terms*[32] only involves *one title transfer*. This is in legal terms—whatever is "paid" to the person performing the service. So if I give you a chicken to pay you for giving me a haircut, the title to the chicken transfers to you. But you don't transfer title to any labor to me. It's not like there's a bucket of labor, which I'm handing over to you. So these are *actions*, not things that can be owned.[33] So labor or services or actions are what we *do with* things that we own like our bodies or other owned resources. They're

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[30] Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholars ed., second ed. (Auburn, Ala.: Mises Institute, 2009; https://mises.org/library/man-economy-and-state-power-and-market), p. 82 n.2. As noted previously, this was later expanded on and clarified by Hoppe. See note 2, above.

[31] For elaboration, see "A Libertarian Theory of Contract" (ch. 9), Part III.C.

[32] I am referring to libertarian law here, not to modern positive law, which views contracts as enforceable, binding obligations. For more on this see "A Libertarian Theory of Contract" (ch. 9).

[33] See "A Libertarian Theory of Contract" (ch. 9) and Kinsella, "Cordato and Kirzner on Intellectual Property," *C4SIF Blog* (April 21, 2011). As Kirzner writes: "Laboring, Day contends, is an activity, 'and although activities can be engaged in, performed or done, they cannot be owned.'" See also "*Against Intellectual Property* After Twenty Years" (ch. 15), Part IV.D.

not themselves owned resources. So you don't really sell labor, in a legal sense. So why do we describe it this way?

Economic vs. Normative Realms of Analysis: Ownership vs. Possession

Now, here's what I think is the reason for the confusion. There are different modes of understanding for different realms of phenomena and different conceptual frameworks. So, for example, in the teleological versus causal realms, we have human action and purposive behavior on the one hand versus causal laws of nature on the other. We have praxeology versus the empirical method, the scientific method. We have apodictic or *a priori* versus tentative or contingent knowledge. We also have normative or juristic, legal, types or realms of understanding versus factual. So have human laws and norms versus empirical facts.

I'm getting to the point. So, now, Mises was careful to distinguish the juristic or the legal or the *should* from the factual, but he used the word "ownership" in both, which is potentially confusing. So he said: "Regarded as a sociological category"—this was in *Socialism* in 1922, he changed the word to catallactic later probably because he hadn't come up with it yet. I don't know. But he calls it the sociological or economic category of ownership, which is the *power to use a good*. Now, that's possession. That's what we would call possession or control.[34] The "factual authority" mentioned previously.

And then he says the sociological and juristic (by which he means legal or normative), concepts of ownership are different. "Ownership" (really: possession) from the sociological (economic; descriptive) point of view is the *having* of a good. It's just what Crusoe could do. So that's natural or original "ownership," and it's a purely physical relationship of man to goods. But the legal is the "should have." Who should have it? Who has a right to it? This is where property rights and law come in. So—and then later in *Human Action,* he goes on in a similar vein.[35]

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[34] For more on this, see "What Libertarianism Is" (ch. 2), notes 28–29 and accompanying text, *et pass.*; and "Law and Intellectual Property in a Stateless Society" (ch. 14), n.36. Economists often muddle this issue by either reducing ownership to possession or conflating the terms. See, on this, Geoffrey M. Hodgson, "Much of the 'economics of property rights' devalues property and legal rights," *J. Inst. Econ*. 11, no. 4 (2015; https://perma.cc/9VV3-8DX3): 683–709; and Boudewijn Bouckaert, "From Property Rights to Property Order," *Encyclopedia of Law and Economics* (Springer, forthcoming 2023), the section "Reduction to Mere Possession."

[35] As Mises observed:

> Regarded as a sociological category ownership appears as the power to use economic goods. An owner is he who disposes of an economic good.
>
> Thus the sociological and juristic concepts of ownership are different. This, of course, is natural, and one can only be surprised that the fact is still sometimes overlooked. From the sociological and economic point of view, ownership is the *having* of the goods which the economic aims of men require. This *having* may be called the natural or original ownership, as it is purely a physical relationship of man to the goods, independent of social relations between men or of a legal order. The significance of the legal concept of property lies just in this—that it differentiates between the physical *has* and the legal *should have*. The Law recognizes owners and possessors who lack this natural *having*, owners who do not have, but ought to have. In the eyes of the Law "he from whom has been stolen" remains owner, while the thief can never acquire ownership. Economically, however, the natural *having* alone is relevant, and the economic significance of the legal *should have* lies only in the support it lends to the acquisition, the maintenance, and the regaining of the natural *having*.

So as I said earlier, it's better to distinguish ownership and possession, to use those words rather than two senses of the word ownership because it could be potentially confusing because people say they own Bitcoins, but what they really mean is they possess Bitcoins. People say they own their minds, but your mind is just an epiphenomenon of your physical brain—you own your brain; you can change your mind, but you can't change your brain. They're different concepts. A dead body has a brain, but it doesn't have a mind. The brain weights three pounds; the mind doesn't weigh anything.

There's a well-known Roman law, civil law scholar who passed away a couple years ago, from Greece, but he was a Louisiana law professor, A.N. Yiannopolous. And he also defines, and the Louisiana Civil Code also defines, possession as actual control or the "factual authority" a person has over a corporeal or a material thing.[36] I like these phraseologies. And again, calling Bitcoin possession "ownership" is one reason for the confused idea that it's ownable. So if you say I possess a Bitcoin, that's fine. But it doesn't imply that you own it. Plus, Bitcoins can be sold, and so people think if you sell something, you must own it, so that's why they make that mistake. But they are referring to the economic description of the actions—saying I "sold" a bitcoin is a way of describing why the buyer gave me money: to obtain possession of "my" bitcoin—not to the juristic nature of the transaction, which is a one-way title transfer (of the money).[37]

Yiannopolous also points out something I mentioned earlier—that the accurate use of the word *property* should be the designation of rights people have with respect to things. In other words, property is not the thing itself. It's the relationship between you and the thing.[38] I have a property right in the thing. I'm the owner of the thing.[39] (And by thing I mean an ownable,

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Ludwig von Mises, *Socialism: An Economic and Sociological Analysis*, J. Kahane, trans. (Indianapolis, Ind: Liberty Fund, 1981; https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis), chapter 1, §1. See also *idem*, Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar's ed. (Auburn, Ala.: Mises Institute, 1998; https://mises.org/library/human-action-0), chap. XXIV, § 4:

> Ownership means full control of the services that can be derived from a good. This catallactic notion of ownership and property rights is not to be confused with the legal definition of ownership and property rights as stated in the laws of various countries. It was the idea of legislators and courts to define the legal concept of property in such a way as to give to the proprietor full protection by the governmental apparatus of coercion and compulsion, and to prevent anybody from encroaching upon his rights. As far as this purpose was adequately realized, the legal concept of property rights corresponded to the catallactic concept.

[36] Possession is "the *factual authority* that a person exercises over a corporeal thing." A.N. Yiannopoulos, *Louisiana Civil Law Treatise, Property* (West Group, 4th ed. 2001), § 301 (emphasis added); see also Louisiana Civil Code (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), art. 3421 ("Possession is the *detention* or *enjoyment* of *a corporeal thing*, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name"; emphasis added). For further discussion of these matters, see "What Libertarianism Is" (ch. 2), text at notes 28–29 *et pass*.

[37] Using possessives like "my" is just descriptive; it does not imply ownership. Likewise, Robert LeFevre observed:

> It is quite common for one or both spouses in a marriage contract to presume that their opposite number is actually a possession of theirs. Our language gives credence to this supposition for it is usual to hear a man refer to his partner as "my wife." She is not his in a property sense.

Robert LeFevre, *The Philosophy of Ownership* (1966; https://mises.org/library/philosophy-ownership).

[38] Technically speaking a property right is not a right to control a resource but a right to *exclude* others from using the resource; and it is not exactly a relationship between owner and thing, but between owner and other people, *with respect to* the thing owned. But these nuances are not pertinent here. See "What Libertarianism Is" (ch. 2), n.4; "A Libertarian Theory of Contract" (ch. 9), n.1.

[39] See references and quotes in "What Libertarianism Is" (ch. 2), n.5. As discussed there, the civil law has a broad understanding of the concept of a "thing," which can be owned or the subject of legal rights; see Louisiana Civil Code,

conflictable resource.)

So: why do we refer to a sale of labor or information when, as I already pointed out, there's only a one-way title transfer of the payment made to the labor performer? Why do we call it that? What happens is, just like in the way the word ownership is used in both senses sometimes to mean possession or economic "ownership," or juristic ownership or real ownership, we use the word sale in that way too. Sometimes we use it as economists to *describe* the structure of a given human action; and sometimes we use it as lawyers to describe the rights that are transferred.[40]

So in (libertarian) law, "sell" refers to transferring title to an owned thing. So you don't literally sell your labor. You just perform your labor. You perform some action. But in economics, it can be used to describe or characterize an action. So all action from an economic point of view involves an actor using scarce means to pursue some goal or purpose. So when we try to describe what someone does, we try to discern their goals and purposes, and also the means that they're using.[41] So that's what history does as well, right, which Guido was mentioning earlier.[42] We try to understand or characterize the actions of people within a means-ends (praxeological) framework.

So when we say as an economist, "*A* sold his labor to *B*," this is just a concise way of explaining the praxeological nature of that action. We're explaining *why A* performed the action, his labor. Well, he performed it to get money from *B*. So we're describing his goal. His goal was to get money from *B*. That's why he engaged in the means of using his body to perform an action, which he knew would satisfy *B*. And why did *B* transfer ownership of his money to *A*—he actually did legally sell his money to *A* because he transfers title to the money to *A*—to induce him to perform an action. So there's only one title transfer.

So in this case, the economic and the juristic uses of the word "sell" are different because, in legal terms, *B* transfers money to *A* conditional on him performing an action. There's only one title transfer—the money that was transferred. But in economic terms, *A* sells his labor to *B* "in

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art. 448: "Division of things. Things are divided into common, public, and private; corporeals and incorporeals; and movables and immovables." Incidentally this exhaustive classification schema implies that intellectual property rights are (private) "incorporeal movables." See "*Against Intellectual Property* After Twenty Years" (ch. 15), Part IV.B, and Kinsella, "Are Ideas Movable or Immovable?", *C4SIF Blog* (April 8, 2013).

[40] For example, in Israel M. Kirzner, "Producer, Entrepreneur, and the Right to Property," *Reason Papers* No. 1 (Fall 1974; https://reasonpapers.com/archives/): 1–17, p. 6, Kirzner uses the term "own" in the economic sense:

> Day is sharply critical of Locke, denying that one can talk significantly of owning labor (in the sense of "working"). Laboring, Day contends, is an activity, "and although activities can be engaged in, performed or done, they cannot be owned." However, economists will find Locke's use of terms quite familiar and acceptable. Economists speak of agents of production (in the sense of *stocks*), and of the "services" of agents of production (in the flow sense). A man who "owns" an agent of production is considered by economists to own, by that token, also the services flowing from that agent. Again, by hiring the services of a productive agent, a producer is considered by economists to have acquired ownership of the service flow, by purchase from the previous owner of that flow (i.e. the owner of the agent "itself"). In speaking of owning the services of an employee, therefore, the economist does not in fact have in mind the ownership of the *activity* of working, nor the ownership of that which the activity of working produces, nor even the ownership of the *capacity* for working. Rather the economist is perceiving the employee as a stock of human capital, capable of generating a flow of services. [citations omitted]

[41] See, on this, Hans-Hermann Hoppe, "A Note on Preference and Indifference in Economic Analysis" and "Further Notes on Preference and Indifference: Rejoinder to Block," both in *The Great Fiction*.

[42] Hülsmann, "The Ultimate Foundation of Economic Science."

exchange" for money, and *B* sells his money to *A* "in exchange" for *A*'s action. So we can use selling (or exchange) in an economic sense, but we should be careful. Otherwise, you might end up justifying intellectual property. Thank you very much.

10

Introduction to *Origitent*

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Libertarian sci-fi author J. Neil Schulman, an old friend, and I agreed on most political matters, except for intellectual property (IP), over which we've had a decades-long disagreement.[*] Neil modified his theory over time, moving from "logorights" to "media-carried property," and eventually published *Origitent: Why Original Content is Property* in 2018, which included debates and discussions with IP abolitionists Wendy McElroy, Sam Konkin III, and me, and including my Introduction.[†] I have updated my Introduction, and retained the somewhat breezy and informal style.

✣

"Introduction"

"Hey, Kinsella, why would you write an introduction for a pro-intellectual property book?" my friends might ask me. I mean, did ask me.

Why Do This?

I could think of a few possible responses. First—I might say—it's not an introduction. It's really a foreword. Hence my scare quotes.[1] But the publisher insisted on calling my contribution an introduction. Much to my aplomb. Or chagrin. Whatever the word is. But let's face it, this is a weaselly response. What does it matter whether it's a foreword or introduction?

Second, Neil objects to the term "intellectual property" to describe his views, as you'll find in the pages that follow. He argues for property rights in what he used to call logorights but now refers to as "media carried property" (MCP). He tends to say that he opposes modern IP law—patent and copyright. But though he says he's not for IP law, he has sometimes gotten upset at my suggestion that patent and copyright law should be abolished. Hey, Neil, if you're not in favor of IP law then why do you bristle at my call to abolish it? Confuses the hell out of me. I think he does that just to keep me off balance. But it's cool, it's cool, I do the same to him.

Third, this is my chance to "come out"—to announce that I have finally changed my mind about IP and am now an ardent supporter of a certain form of legal protection for products of the mind. Because of the power and clarity of Neil's revised arguments, I've finally seen the light! As

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[*] See Kinsella, "On J. Neil Schulman's Logorights," *Mises Economics Blog* (July 2, 2009); *idem*, "KOL208 | Conversation with Schulman about Logorights and Media-Carried Property," *Kinsella on Liberty Podcast* (March 4, 2016). Neil passed away in 2019. See Kinsella, "J. Neil Schulman, R.I.P.," *StephanKinsella.com* (Aug. 10, 2019).

[†] Stephan Kinsella, "Introduction," in J. Neil Schulman, *Origitent: Why Original Content is Property* (Steve Heller Publishing, 2018; https://perma.cc/2E6G-WWPE). For related and background material, see Kinsella, "On J. Neil Schulman's Logorights," *Mises Economics Blog* (July 2, 2009); *idem*, "KOL208 | Conversation with Schulman about Logorights and Media-Carried Property."

[1] See Pat McNees, "What is the difference between a preface, a foreword, and an introduction?" (March 16, 2023; https://perma.cc/72AK-MJPX).

many know, as a newly-minted libertarian I was initially in favor of IP (Ayn Rand ensnares a lot of us newbies), before developing some doubts about the notion. As a young patent attorney I diverted my libertarian efforts towards finding and developing a good argument for IP. I pored through the literature, reading and studying tons of articles and books by legal scholars, political philosophers, economists, and libertarians of various stripes, searching for a way to justify patent and copyright. Hey, I did the work, so you don't have to. Anyway. I finally gave up and became an atheist. Sorry, I mean an opponent of IP. Despite my upbringing. I mean career. I became an anti-IP IP attorney. I became a self-hating patent lawyer. (But a *damn good* one.)

But keep in mind that I was always looking for proof of God. Sorry—I mean a good argument for IP. I *wanted* to find a justification for patent law, after all—it was my career. Just like I wanted to find an argument for God after being a lifelong Catholic and altar boy. But I failed in my quest (both of them, not that they are connected, exactly). I was unable to square the circle. So I finally became the IP version of atheist, because I just couldn't find a good argument for IP.

But Neil never gave up. His original "logorights" argument (first published in 1983) didn't persuade me. But then, after repeated sparring with me, he reformulated his argument. He adjusted it. He tweaked it. Now, it's about "media carried property." And *mirabile dictu!*, he has done it! He has finally found a solid footing for a type of IP, one that has persuaded even me, Kinsella, arch-enemy of IP! Finally, my whole career is actually justified! All I need do is recant my IP heresy here, in this *soi-disant* "Introduction."

Coming Clean

Okay, time to come clean. I can't keep up pretenses anymore. As the punchline to the joke goes, "I'm just f*cking with you—she's dead."[2] In other words—I was joking. I'm not "coming out." I'm still anti-IP. So everybody just relax. I still think Neil is wrong. And he thinks I'm wrong. And we're cool with that. That's how libertarian bros do.

One thing you can say: Neil's given this issue repeated valiant efforts. Maybe it just takes him longer than me to give up. I gave it up after a good ten-plus years of diligent study and effort. Neil's been steadfast in his support for his version of IP for maybe 35 years now. That takes a special kind of stupid. I mean dedication.

So scratch the third reason. And let's face it, my first two "points" were really not very good arguments at all.

So back to the first question: why would I write this introduction. What's my purpose? What's the purpose of this book? Okay. Let me try this angle. The historical angle. The setting. The context.

THE HISTORICAL SETTING OF INTELLECTUAL PROPERTY

Look. Here's what happened. IP existed in scattered/proto forms hundreds of years ago, in the form of monopoly grants of privilege by the state. It goes back a long way, probably as far back as nascent forms of protectionism and proto-state-granted monopoly privilege. We see traces of it

[2] See "Grieving Husband," *eBaum's World* (Sep. 29, 2006; https://perma.cc/5XHM-KVWS).

as far back as 2500 years ago: in about 500 B.C., in the Greek city of Sybaris, located in what is now southern Italy, there were annual culinary competitions. The victor was given the exclusive right to prepare his dish for one year.[3] Sort of like a copyright. Or patent. Some kind of right to his origitent. And then, over the ensuing centuries, there were various forms of protectionism, and also attempts to promote or protect or "incentivize" innovation and creativity. These controls were intermixed with mercantilism (protectionism) and censorship.[4]

Patents

Let's consider the origins of patents, property rights in inventions—techniques or machine designs that accomplish some practical purpose. A mousetrap, a method for threshing corn. But the original grant of patents did not usually involve some innovative machine or process. In England, the king would hand out monopoly privilege rights to cronies, maybe in exchange for helping the king out, by helping to collect taxes, and so on. These grants were called "letters patent"—patent meaning "open." "Only John Smythe may sell playing cards in ye olde town of Bluxsome-on-Thames" or whatever (and then government goons would raid his competitors on occasion to ensure they were not selling counterfeit or "pirated" cards… a bit ironic given that one of the early uses of Letters Patent by the British Crown was to entice pirates to become "privateers" [a fancy name for legitimized piracy], by giving them a monopoly over some of the spoils of their piracy for a given time).[5]

Real Pirates

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[3] See "History of patent law," Wikipedia (https://en.wikipedia.org/wiki/History_of_patent_law); Michael Witty, "Athenaeus describes the most ancient intellectual property," *Prometheus* 35, no. 2 (March 2018; https://perma.cc/4J2J-ZNDU): 137–43; Kinsella, "Food Patents in Greece in 500 BC," *StephanKinsella.com* (Aug. 8, 2010). For another example, about a millennium later, see Michael H. Roffer, "The Irish Copyright War," in *The Law Book: From Hammurabi to the International Criminal Court, 250 Milestones in the History of Law* (New York: Sterling, 2015).

For more on the origins of IP law, see, e.g., Karl Fogel, "The Surprising History of Copyright and The Promise of a Post-Copyright World," *Question Copyright* (2006; https://perma.cc/DV92-TEH3); Fritz Machlup, U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, *An Economic Review of the Patent System* (85th Cong., 2nd Session, 1958, Study No. 15; https://mises.org/library/economic-review-patent-system), Part II, "Historical Survey"; Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," *Hamline L. Rev.* 12, no. 2 (Spring 1989; https://perma.cc/DH7K-ZCRV): 261–304, Part II, "Historical Origins of Intellectual Property Rights"; Christopher May & Susan K. Sell, "The Emergence of Intellectual Property Rights," in *Intellectual Property Rights: A Critical History* (Boulder and London: Lynne Rienner Publishers, 2006); Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (Cambridge University Press, 1999); Ronan Deazley *et al.*, eds., *Privilege and Property: Essays on the History of Copyright* (Cambridge: OpenBook Publishers, 2010); Maximilian Frumkin, "The Origin of Patents," *J. Pat. Off. Soc'y* 27, no. 3 (1945): 143–49; Benedict Atkinson & Brian Fitzgerald, *A Short History of Copyright: The Genie of Information* (Springer, 2014); Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Cheltenham, UK: Edward Elgar, 2006); Adam D. Moore & Kenneth Einar Himma, "Intellectual Property," in Edward N. Zalta, ed., *Stanford Encyclopedia of Philosophy* (Stanford University, 2011; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980917), §1; Carla Hesse, "The Rise of Intellectual Property, 700 B.C.–A.D. 2000: An Idea in the Balance," *Daedalus* 131, no. 2 (Spring, 2002), pp. 26–45.

[4] As Tom Palmer writes, "[m]onopoly privilege and censorship lie at the historical root of patent and copyright." Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," p. 264 (footnote omitted).

[5] See Kinsella, "Rothbard on Mercantilism and State "Patents of Monopoly," *C4SIF Blog* (Aug. 29, 2011).

A notorious example is Francis Drake, who was given a Letter Patent on March 15, 1587 to authorize his piracy, such as attacking Spanish ships sailing back from South America laden with silver, handing it over to the Queen after taking his share. Sir Francis Drake

> made the first English slaving voyages, taking Africans to the New World. Drake attacked Spanish ships sailing back from South America laden with silver. He took their treasure for himself and his queen. He also raided Spanish and Portuguese ports. He undertook a circumnavigation of the world in 1572 and 1573. He discovered that Tierra del Fuego was not part of the Southern Continent and explored the west coast of South America. He plundered ports in Chile and Peru and captured treasure ships. He sailed up to California and then across the Pacific Ocean to the East Indies. He returned to England with his ship full of spices and treasure, so gaining great acclaim."[6]

In other words, patents were originally used to *authorize* actual piracy, in addition to protecting favored court cronies from competition and thus restricting the free market. So it is a bit ironic that modern defenders of IP claim to be opposed to IP "pirates"—even though *real* pirates (like Francis Drake) kill people, break things, and take things from people (and delivered slaves into bondage), while "information pirates" do none of these things.

The Statute of Monopolies of 1623

In any case, "Letters Patent" began to be used widely by monarchs to grant monopoly privileges to favored cronies on a certain trade or industry or product in a certain region. When this protectionism and restraint on free trade became too noticeably abusive, Parliament stepped in and passed the Statute of Monopolies of 1623 (notice the name: "monopolies"; they were at least honest back then), which restricted the King's power to issue letters patent, since they were basically trade restrictions, protectionism, privileges, *monopolies*. But the statute made an exception: monopoly privileges could still be granted for genuine "inventions"—i.e., for technical innovations.

Copyright

As for copyright—until the printing press, the Church and Crown held a nice monopoly over controlling published thought, by means of scribes and guilds like the Stationer's Company, which held a monopoly over publishing from about 1557 until the Statute of Anne of 1710. During this time the printing press emerged and disrupted the state and church's control over printed works, leading to the Statue of Anne 1710, which recognized authors' copyrights in their works. But because as a practical matter authors still had to appeal to regulated presses to publish their works, the state and church were able to maintain their censorial control over what could be published, and the modern publishing system arose where publishing houses served as gatekeepers and the middlemen between authors and consumers.[7]

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[6] See Wikipedia, "Maritime History of England" (https://en.wikipedia.org/wiki/Maritime_history_of_England). See also my post "The Real IP Pirates," *C4SIF Blog* (Oct. 16, 2010).

[7] See Fogel, "The Surprising History of Copyright and The Promise of a Post-Copyright World."

IP IN THE INDUSTRIAL AGE

Fast-forward to the dawn of the Industrial Revolution. The United States of America managed to break free from England in 1776 and established its own Constitution in 1789, which drew, of course, upon English legal principles and practices. And so Article 1, Section 8, Clause 8 of the US Constitution authorizes Congress "to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries." Basically, this is the authorization for modern patent and copyright law. And thus emerged the modern system of patent and copyright that dominate the world today. Modern patent law, anchored in protectionist grants of monopoly privilege; and copyright law, rooted in censorship, gatekeepers, and control of thought and freedom of the press.

And of course world GDP, flat for thousands of years, began to exponentially increase right around this time.[8] Those who mistake correlation with causation argue that the wealth and might and prosperity of the West are linked to our adoption of European/English-style patent and copyright law, though studies backing up these claims are wanting.[9]

And so the narrative was put in motion. The previous gatekeeper publishing industries seized on the new copyright system and quickly internationalized it apace with the progress of the Industrial Revolution (google "Berne Convention"). And new industries, captured by the monopoly profits possible by using institutionalized patents granted by an inept state bureaucracy, became entrenched and started defending patents.

And then the free market economists emerged in the 1800s and started to become alarmed at the proliferation of widespread, institutionalized grants of IP—which was obviously a restraint on trade, protectionism, censorship, and infringement of free market property rights. They basically emerged from their slumbers and said "what the hell? You people have got to stop this." And they correctly referred to these state-initiated practices as "grants of monopoly privilege."[10] In response, the publishers, the gatekeepers, and industries now increasingly reliant on patent and copyright, intentionally, and deceitfully, bent the language of "natural property rights" to serve their purpose. Patent and copyright became "intellectual property rights" instead of monopoly privilege grants.[11] Much like health care is thought of as a "right" today. And thus the ideological battle for IP was won by means of cheap semantics. Plus pressure groups (big Pharma, Hollywood, music, software), and some confusion spawned by Locke himself about the labor theory of property.[12]

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[8] See Figure 2 in Hans-Hermann Hoppe, "From the Malthusian Trap to the Industrial Revolution: An Explanation of Social Evolution," in *The Great Fiction: Property, Economy, Society, and the Politics of Decline* (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf).

[9] See Kinsella, "The Overwhelming Empirical Case Against Patent and Copyright," *C4SIF Blog* (Oct. 23, 2012); *idem*, "Legal Scholars: Thumbs Down on Patent and Copyright," *C4SIF Blog* (Oct. 23, 2012).

[10] See Fritz Machlup & Edith Penrose, "The Patent Controversy in the Nineteenth Century," *J. Econ. History* 10, no. 1 (May 1950): 1–29; Machlup, *An Economic Review of the Patent System*, Part II, "Historical Survey"; Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," Part II, "Historical Origins of Intellectual Property Rights."

[11] See Kinsella, "Intellectual Properganda," *Mises Economic Blog* (Dec. 6, 2010); and comments by Machlup and Penrose in "*Against Intellectual Property* After Twenty Years" (ch. 15), n.78; also Machlup, *An Economic Review of the Patent System*, Part II.D, "The victory of the patent advocates (1873–1910)."

[12] See "*Against Intellectual Property* After Twenty Years" (ch. 15), Part IV.C; Kinsella, "KOL037 | Locke's Big

Nowadays virtually everyone assumes that the innovation that accompanied the spectacular prosperity in the modern West was due, at least in part, to patent and copyright law. And that if you are in favor of innovation or artistic creativity, you must be in favor of property rights for "products of the mind," or "the fruits of one's labor," or other metaphors that serve only to distort and deceive and lie and confuse thought.

HISTORICAL AND MODERN ARGUMENTS ABOUT IP

We can say that institutionalized IP rights began at the dawn of the Industrial Revolution, for example in the American and then European patent and copyright systems, which traced back to European institutions and practices such as the Statute of Monopolies of 1623 and the Statute of Anne of 1710. As these modern, institutionalized IP systems began to take hold in the 1800s, this provoked, first, a backlash from free market economists and then a defensive response from the entrenched IP interests. By the 1870s, the IP side had won.[13]

Among proto-libertarians, and especially some anarchists, the chief figures debating IP, in the late 1800s, were Lysander Spooner and Benjamin Tucker. Spooner proposed a radically pro-IP theory, rooted in the Lockean labor theory of property, while Tucker opposed IP, on grounds similar to his arguments against other forms of monopoly.[14]

Amongst libertarians and proto-libertarians, the issue lay mostly dormant until the mid-1980s, when thinkers such as Sam Konkin, Wendy McElroy, and J. Neil Schulman entered the fray again. Konkin and especially McElroy provided the first systematic arguments against IP rooted in modern libertarian property rights principles, while Schulman was one of the first to attempt to provide a principled (as opposed to utilitarian or empirical) argument for a type of IP also rooted in libertarian propertarian principles.[15]

With the dawning digital age and the Internet of the mid-late 1990s making copying and "piracy" far easier than ever before, copyright and related IP issues began to attract more attention from libertarians. Libertarians have long recognized that the main issues that confront us are war, taxation, state education, the drug war, and central banking. Many of us now believe that IP lies in the baleful company of these other horrible institutions and, in a sense, is worst of all: because war, taxation, etc., are seen, at least by some libertarians, as *necessary evils*; but patent and copyright are labeled "intellectual property" and thus fly under the banner of "property rights," which are supposed to be good things, by libertarian lights. Thus, IP is far more insidious because, while you might want to minimize war and taxation as much as possible even if you think they are necessary evils—they are evils, after all—all good libertarians support robust legal support for strong property rights. And if IP is a legitimate property right, it's not a necessary evil at all; it's a good thing.

With patent law threatening, impeding, and distorting innovation and technological

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Mistake: How the Labor Theory of Property Ruined Political Theory," *Kinsella on Liberty Podcast* (March 28, 2013).

[13] See Machlup & Penrose, "The Patent Controversy in the Nineteenth Century"; Machlup, *An Economic Review of the Patent System*, Part II, "Historical Survey."

[14] See references in "Law and Intellectual Property in a Stateless Society" (ch. 14), n.4 *et pass*.

[15] See my posts "The Four Historical Phases of IP Abolitionism," *Mises Economics Blog* (April 13, 2011); "The Origins of Libertarian IP Abolitionism," *Mises Economics Blog* (April 1, 2011); and "Classical Liberals and Anarchists on Intellectual Property," *C4SIF Blog* (Oct. 6, 2015).

growth and human prosperity, and with copyright distorting culture, censoring thought and speech and freedom of the press and indeed threatening Internet freedom, it is no wonder that IP has become an issue of interest and overwhelming importance amongst libertarians.[16]

This is why it is crucial for libertarians to understand modern IP and its relationship to property rights. To think about whether and how anything like patent or copyright can be justified. This issue is crucial. Innovation and creativity are essential for human survival, and so are property rights. And the state and its laws are dangerous. So it's important that we get this right: whether there should be any form of intellectual property rights, or not, and, if so, what and why. Unprincipled, utilitarian, empirical thinking will not help us figure this out. You can't just say that a 120 year copyright term is "too much" but we "need something greater than zero."[17] You need a principled approach. And though I disagree with Neil's conclusions I respect the fact that he has for over three decades fought to figure out these issues with libertarian property rights principles in mind.

One final note. One argument we IP abolitionists use is that copyright is a form of censorship, and we oppose censorship. We applaud the communication and publication of ideas, arguments. Those of us interested in libertarian ideas about justice and property rights, and innovation and creativity, should applaud Neil for providing to the public, in accessible form, his sincere and interesting thoughts about these matters.

Stephan Kinsella
Houston, June 2018

[Note from JNS: I just got off the phone with Stephan, who's approved my making this bracketed comment about his Introduction: Stephan is aware that I do not take an historical approach to the question of logorights/MCP/origitent, but a theoretical approach based on natural law and natural rights. —J. Neil Schulman, June 15, 2018]

[16] See, e.g., my posts: "Legal Scholars: Thumbs Down on Patent and Copyright"; "The Overwhelming Empirical Case *Against* Patent and Copyright"; "Death by Copyright-IP Fascist Police State Acronym," *C4SIF Blog* (Jan. 30, 2012); "SOPA is the Symptom, Copyright is the Disease: The SOPA Wakeup Call to Abolish Copyright," *The Libertarian Standard* (Jan 24, 2012); "Where does IP Rank Among the Worst State Laws?", *C4SIF Blog* (Jan. 20, 2012); "Masnick on the Horrible PROTECT IP Act: The Coming IPolice State," *C4SIF Blog* (June 2, 2012); "Copyright and the End of Internet Freedom," *C4SIF Blog* (May 10, 2011); and "Patent vs. Copyright: Which is Worse?", *C4SIF Blog* (Nov. 5, 2011).

[17] See, e.g., my posts "Tabarrok: Patent Policy on the Back of a Napkin," *C4SIF Blog* (Sept. 20, 2012); "Optimal Patent and Copyright Term Length," *Mises Economics Blog* (June 16, 2011); "Tom Bell on copyright reform; the Hayekian knowledge problem and copyright terms," *C4SIF Blog* (Jan. 6, 2013); "Yaron Brook on the Appropriate Copyright Term," *C4SIF Blog* (July 29, 2013); see also Cory Doctorow, "What's the objectively optimal copyright term?", *Boing Boing* (Oct. 6, 2015; https://perma.cc/UMJ3-4JHH).

11

Conversation with Schulman about Logorights and Media-Carried Property

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This edited transcript of a conversation between libertarian sci-fi author J. Neil Schulman and me was in his book *Origitent: Why Original Content is Property* (2018).[*] My introduction to *Origitent* is included as chapter 16 in this volume.

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Stephan Kinsella: Hey, this is Stephan Kinsella doing an episode of the *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.[1]

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.[2]

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.[3]

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[*] J. Neil Schulman, *Origitent: Why Original Content is Property* (Steve Heller Publishing, 2018; https://perma.cc/2E6G-WWPE). This chapter of his book was based on Kinsella, "KOL208 | Conversation with Schulman about Logorights and Media-Carried Property," *Kinsella on Liberty Podcast* (March 4, 2016), which was transcribed by Rosemary Denshaw and edited for clarity for use in Schulman's book. I have further improved the transcript and added some references and comments in footnotes.

[1] See my talks at Libertopia that year (all at the *Kinsella on Liberty Podcast*): "KOL236 | Intellectual Nonsense: Fallacious Arguments for IP (Libertopia 2012)" (Feb. 10, 2018); "KOL237 | Intellectual Nonsense: Fallacious Arguments for IP—Part 2 (Libertopia 2012)" (Feb. 12, 2018); "KOL238 | Libertopia 2012 IP Panel with Charles Johnson and Butler Shaffer" (Feb. 14, 2018). Neil was in the audience for my talk (KOL236) asked some questions during the Q&A session.

[2] See Kinsella, "Schulman: 'If you copy my novel, I'll kill you,'" *C4SIF Blog* (June 6, 2012). Or this Facebook post comment by Neil: "Stephan, let me make this as plain as I can. You're the foremost enemy of property rights because you masquerade as a defender of them while putting forward the proposition that the unique thing which an author or composer creates is the one thing that cannot be owned because of your misplaced test for non-rivalrousness." (March 22, 2011; https://www.facebook.com/nskinsella/posts/198807836808078.)

[3] See Kinsella, "Book Review of Schulman, *The Robert Heinlein Interview and Other Heinleiniana* (1991)," *StephanKinsella.com* (Dec. 12, 2013).

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.[4]

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: Ha ha. 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.[5]

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.[6] 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 basis for a concept of ownership of content which existed only as what today I now call media-carried property,[7] but back then I called logorights.

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 ...[8]

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[4] This was tongue in cheek. I didn't know Heinlein at all.

[5] See Wendy McElroy, "Contra Copyright," *The Voluntaryist* (June 1985), included in *idem*, "Contra Copyright, Again," *Libertarian Papers* vol. 3, art. no. 12 (2011; http://libertarianpapers.org/12-contra-copyright/); Kinsella, "The Origins of Libertarian IP Abolitionism," *Mises Economics Blog* (April 1, 2011) and *idem*, "The Four Historical Phases of IP Abolitionism," *C4SIF Blog* (April 13, 2011).

[6] See Samuel Edward Konkin, III, "Copywrongs," *The Voluntaryist* (July 1986), reprinted at *LewRockwell.com* (Nov. 15, 2010; https://archive.lewrockwell.com/orig11/konkin1.1.1.html); Kinsella, "LeFevre on Intellectual Property and the 'Ownership of Intangibles,'" *C4SIF Blog* (Dec. 27, 2012)

[7] See "MCP," in *Origitent*.

[8] Well before the advent of creative commons (https://creativecommons.org), the generally anti-IP libertarian Leonard Read would publish FEE works with the notice "Permission to reprint granted without special request." See Kinsella, "Leonard Read on Copyright and the Role of Ideas," *C4SIF Blog* (Sept. 12, 2011).

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.[9] 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.[10] 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: Well 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's—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,"[11] 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.

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[9] See Schulman, "My Unfinished 30-Year-Old Debate with Wendy McElroy," in *Origitent*.

[10] See this Facebook post: https://www.facebook.com/nskinsella/posts/10153462577483181 (March 4, 2016).

[11] Schulman, "Informational Property: Logorights" (1983, 1989; https://perma.cc/ECB9-KZQ9) (also in *Origitent*), responding to Konkin, "Copywrongs."

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 von Mises liked a lot, paralogia. In other words, it transfers the argument from a debate of the merits to a debate on the motivation of the people who are arguing it.[12]

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 the 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[13] as if, if my arguments, if they were correct, it's 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? 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; 30/70, whatever. I don't know. I mean it would be ironic if *some* percentage of patent lawyers didn't take that side, 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.

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[12] I am unfamiliar with Mises talking about "paralogia," which appears to have something to do with schizophrenia. I suspect this might have been a mistake by Neil; he may have been thinking of polylogism, even though it is not quite related to the error of psychologizing, but rather to a different, Marxian error. See Jeffrey A. Tucker, "Marxism Without Polylogism," in Jörg Guido Hülsmann & Stephan Kinsella, eds., *Property, Freedom and Society: Essays in Honor of Hans-Hermann Hoppe* (Auburn, Ala.: Mises Institute, 2009).

[13] See, e.g., my posts: "Are anti-IP patent attorneys hypocrites?" *C4SIF Blog* (April 22, 2011); "Patent Lawyers Who Don't Toe the Line Should Be Punished!" *C4SIF Blog* (April 12, 2012); "Is It So Crazy For A Patent Attorney To Think Patents Harm Innovation?" *StephanKinsella.com* (Oct. 1, 2009); "An Anti-Patent *Patent* Attorney? Oh my Gawd!" *StephanKinsella.com* (July 12, 2009).

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

Schulman: Okay and now 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 background 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.[14]

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.

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[14] On this, see Kinsella, "The Death Throes of Pro-IP Libertarianism," *Mises Daily* (July 28, 2010); *idem*, "The Origins of Libertarian IP Abolitionism"; *idem*, "The Four Historical Phases of IP Abolitionism"; and other references and discussion in "Law and Intellectual Property in a Stateless Society" (ch. 14), at n.5 and "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), at n.21.

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 [where the nation state is].[15]

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. In other words, presumably you drive a car which is registered with the Department of Motor Vehicles and 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. And so 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."[16] Scarcity is not absolute. I'll refer people to that article rather than repeat myself.

Kinsella: 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 that 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, perhaps—but it does a similar function because—well, for several reasons. We don't agree that these kinds of things should be property.

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[15] Neil's words are not quite clear here in the recording.

[16] Schulman, "Human Property," *Agorist.com* (2012; https://perma.cc/E9W5-T7UA); also in *Origitent*.

That's what we dispute. And, you know, 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 eminent 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 for 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.[17]

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.[18]

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.[19] 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

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[17] See my posts "Monsanto wins lawsuit against Indiana soybean farmer," *C4SIF Blog* (Sep. 24, 2011) and "Farmers and Seed Distributors Defend Right to Protect Themselves From Monsanto Patents," *C4SIF Blog* (Aug. 24, 2011).

[18] "*The Thing! the Thing itself is the Abuse*!" Edmund Burke, "A Letter To Lord****," in *A Vindication of Natural Society* (Liberty Fund, 1756; https://oll.libertyfund.org/title/burke-a-vindication-of-natural-society) (emphasis added).

[19] I disagree with criticisms of the legitimacy of current property titles because of injustice or taint in the title back in history. See "What Libertarianism Is" (ch. 2), at n.36; and "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11), at n.12.

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 as to what the libertarian system would look like, but it would be better. But you cannot say that [re IP]. 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 up—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, 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 ownable, 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 sufficient. 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 from one 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: … and 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". Obviously—*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 is only 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? Or, 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 alphanumeric sequence itself which is separable from the thing on which it is carried, the media-carried property, is the economic good which is being traded. 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've 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 for the starting point here ...

Schulman: No, I would say necessary but not sufficient.

Kinsella: Okay but ...

Schulman: There are other things. 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, and 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 need 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 alphanumeric sequence in this particular case is different, then you have a different thing, a different commodity.[20]

Kinsella: Right. But the different commodity is the physical book which is different than another physical book because of the way it's impatterned. 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 their 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.

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[20] Tibor Machan advanced a similar "ontology" based argument for IP. See Tibor Machan, "Intellectual Property and the Right to Private Property," Mises.org working paper (2006; https://mises.org/wire/new-working-paper-machan-ip), discussed in Kinsella, "Owning Thoughts and Labor," *Mises Economics Blog* (Dec. 11, 2006), and in *idem*, "Remembering Tibor Machan, Libertarian Mentor and Friend: Reflections on a Giant," *StephanKinsella.com* (April 19, 2016); see also "Law and Intellectual Property in a Stateless Society" (ch. 14); at n.74.

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, "Copywrongs," 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 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, though, Neil.

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 statue.

Schulman: We're talking plain language.

Kinsella: But they wouldn't use that word if the copyright statue 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 for 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 of 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 in a sense. 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 alphanumeric sequence is. I maintain that an alphanumeric 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 behavior ... 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 alphanumeric 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.[21] 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's 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.[22] So does this view, because it seems to me ...

Schulman: Back in 1983 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, independent, ontologically separate from the...

Schulman: I don't accept a Platonic metaphysics.

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[21] For discussion of the "universals" problem of IP law, see "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), Part IV.F.

[22] See Neil's novel *Escape from Heaven* (Pulpless.com, 2017).

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 alphanumeric 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 is 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.[23]

Kinsella: Well, but there's 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 are 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

[23] Neil is here implicitly making an argument that I criticize elsewhere. See "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), Part IV.H.

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.[24]

Schulman: Yeah, 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 republish 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 Colosseum?

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 copyright 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 Koman. And 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

[24] See Kinsella, "Thomas Jefferson's Proposal to Limit the Length of Patent and Copyright in the Bill of Rights," *C4SIF Blog* (Dec. 1, 2011).

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's 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*.[25] 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*.[26] Mises argues human beings act to remove felt 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 the second …

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[25] Here I was trying to explain to Neil why successful action requires both availability of scarce (conflictable) resources and information or knowledge to guide one's action, but that only the former is subject to property rights and ownership since information cannot be owned. However we started having technical glitches so ended the discussion before we could make much headway on this. I discuss this issue in "Law and Intellectual Property in a Stateless Society" (ch. 14), Part III.D, and "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), Part IV.E.

[26] Schulman, *Alongside Night*, 20th anniv. ed. (Pulpless.com, 1999).

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*.[27]

Kinsella: By Nina Paley.

Schulman: I responded to that ... I think it's linked in an article called *The Libertarian Case for IP.* I'm basically saying that scarcity is itself a limited concept. In other words, that it is a relative concept ... 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 alphanumeric sequence, for example, then that alphanumeric sequence is a unique object. There's only one of it …

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 that 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?

[27] See Nina Paley, "*Copying Is Not Theft*," YouTube (https://youtu.be/IeTybKL1pM4). Neil's reply to the video is in *Origitent*.

Schulman: Hold on. Let me try to answer your question. I think that human action is itself a scarcity [Kinsella sighs] and therefore the employment of human action on something else has at least the potential to satisfy the conditions of creating a scarce something.[28]

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.[29]

Schulman: No, no. 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's 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.

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[28] Here Neil is making argument I call libertarian creationism, which I explain and criticize in "Law and Intellectual Property in a Stateless Society" (ch. 14), Part III.B and "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward" (ch. 15), Part IV.C.

[29] See, e.g,. Israel M. Kirzner, *Market Theory and the Price System* (Princeton, N.J.: D. Van Nostrand Co., Inc., 1963; https://mises.org/library/market-theory-and-price-system-0), p. 46–47:

> In the actuality of the everyday world, human beings are able to satisfy their wants only through directing their efforts toward appropriate *means* for such satisfaction. A man who wishes to eat may purchase food, cook food, or simply put on a hat and coat and go to a restaurant. His actions have been intermediary to the goal of eating. "Eating" is the *end* of his present endeavors; the *means* that he adopts for the attainment of his end can be an act of purchase, cooking, or walking to the restaurant.

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: Which is the part of the thing 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: [Laughs] 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.

The Libertarian Standard

Intellectual Freedom and Learning Versus Patent and Copyright

January 19, 2011 11:27 pm

Introduction

I've given several speeches about intellectual property (IP).[1] Tonight I'll take a somewhat different approach to the subject. Let me ask you a general question. Why are you here at this great (government) school? It's to have fun, right? But it is also *to learn*; that is the basic purpose of education: to learn. To be sure, we learn things all the time. A university is a more formalized way of learning, but learning as a general matter is very important. This may sound like a trite observation. We make these comments all the time: "Education is important. Learning is good."

The Role of Learning and Knowledge in Human Action

But this leads me to the focus of my talk, which is about learning and the importance of information and knowledge, and copying and emulation on the market and in life in general. So let's think about how learning is important and how it's used in everyday life.

Ludwig von Mises, the famous Austrian economist, the father of modern Austrian economics, systematized the study of human action and gave it a name: praxeology. This is the study of the logic of human action. Mises analyzes action in very simple, elementary terms. He breaks it down. I want you to think about it. If you haven't heard of praxeology,

don't be daunted by the expression. The idea is to look at what the components of human action are; what we do every day, all the time.[2]

The Structure of Human Action: Means and Ends

When a human acts, what is he doing? He looks around the world. He chooses an end or a goal that he wants to achieve, some purpose of his, something he wants to happen, something that would not happen without his active intervention in the world. So he chooses one action over another. He chooses his highest value action or end, and demonstrates this preference by his action.

So we have a chosen end, or goal. But how does an actor *achieve* the goal he has chosen? He has to select certain means. This is what Mises and the Austrians call *means*: things that are physically efficacious, things that let you causally interfere in the world to achieve some desired goal.

Let's take an example. You're all eating now so let's take a food example. Let's say you're hungry. So you say, "I know I like cake. I know I like chocolate cake. I think I'll try to acquire a chocolate cake."

You can see right off the bat that knowledge has entered the picture; the knowledge of *what you like*. Maybe you've learned this from experience, but knowledge is already playing a role in your decisions and actions. It has informed your choice of ends.

So how do you achieve your end? How do you get the chocolate cake? Well, you might obtain a recipe for cake and get the ingredients and tools to make the cake: mixing bowl, eggs, flour, spoon, kitchen, oven. Then you spend some time and effort and make a cake. You make that cake *instead* of watching television or getting your car washed or changing your clothes or making a vanilla cake.

This illustrates that human action is the *purposeful use of means to achieve a desired end or result*.[3] Notice that the means you employ have to be physical or scarce resources, things that are real things in the world, things that you can affect, like the mixing bowl and the oven.[4] This is what you employ to achieve your goal. The Austrians, especially Mises, go into the logical structure of human action, which we just discussed, and show that it

implies so many things.[5] For example, it implies opportunity cost. You choose *this* goal instead of the *other* ends. The things that you did not choose are the opportunity cost of your action.

Action also presupposes causality. You have to believe there is a way to achieve your result by manipulating the world in accordance with time-invariant causal laws. The structure of human action also has the concept of profit and loss built in, which is not only a monetary concept, but a psychic concept. Not psychic in the Shirley MacLaine sense, but psychic in the sense of pertaining to mental phenomenon, such as value and ends. For example, if you achieve your goal, which is to obtain a nice chocolate cake, and if it is as you envisioned it, and if you enjoyed it like you expected that you would, then you've achieved a *profit*. If it turns out to be a failure or you don't enjoy it for some reason, then there is a loss.[6]

Knowledge as a Guide to Action

Where does this leave the role of learning? Learning is important because it is how we acquire information. Information is important because it gives us knowledge of how the world is. The more knowledge you have, the wider is your universe of choices. You have more ends to choose from, for example.[7]

Let's say one person only knows the possibility of making a vanilla cake or a chocolate cake. If he learns that it's possible to make a coconut cake, now he can choose between three possible goals. So his knowledge of the ends can expand and give him a wider array of choices.

Importantly, you also have to have knowledge of means and causal laws of the world because this informs your choice of means. To be able to choose a given end, you also need to know how to achieve it. You need to have a *recipe*.[8] I don't mean only food recipes. A recipe in this sense is just a general way to do something by exploiting resources in the world to achieve some end.

You know, for example, that if you take an egg, some flour, and chocolate, mix them in a certain way, and bake it, then, after a while, you have something that is edible. So the role of knowledge in action is to *guide action*. It is not the *means* of action. For example, you

might know five different ways of getting the cake you desire. One may be to steal the cake. It's immoral, but it's a possible way. One may be to bake the cake. Another may be to purchase the cake. Yet another is to hire someone to bake the cake for you. So, in other words, the more knowledge you have, the *wider the universe of ends and means* that you have to draw on. This is the reason why learning is good.

Consider the great creators in the past — Shakespeare, Michelangelo, Bach, say — they drew upon knowledge that they acquired from the culture they were born into. Even the greatest of inventors, innovators, and creators didn't think of everything on their own.

Scarcity, the Free Market, and Abundance

Now, let's think about the role of scarcity in the free market. Given the above-mentioned understanding of what human action is, this very simple structural view of human action — that we use knowledge to guide our choices of ends and of what means to use to achieve the chosen ends — what is the role of external resources? That is, external objects, scarce things in the world? The role of these things is to be used by men to achieve their ends. Knowledge *guides* your action. It helps you choose what you want to do.

So reflect on the purpose of the free market system. What is its purpose, its role? What is its function or result? It is to help us *achieve abundance*. We live in a world of scarcity. We don't live in the Garden of Eden.[9] We live in a world where survival is not easy. It's difficult. We have to find ways to survive *because* there is scarcity. There aren't bananas hanging from every tree, enough for everyone to survive off of, but the free market operates to unleash creative energy and to allow tremendous productivity.

If you think about it, although we have scarcity and there is nothing we can do about this fundamental fact of the universe, the free market, in a way, helps us fight and overcome this situation.[10] The thing is, the only way you can do this is by having a free market. A free market has to be built on private property principles. The reason we have to have private property is because these things are scarce. Economists call them rivalrous because you can have rivalry or fighting over them. For example, for a productive use to be made of the spoon, in the cake example, someone has to own the spoon. Someone has to be the one person who has the right to control that spoon. How do other people

know that a given resource is owned, and who owns it? Property rights set up objective borders. They tell you who owns things. They're visible and observable.[11]

This doesn't mean there is no crime. This doesn't mean that everybody respects these property rights. There can be thieves, but at least with thieves we can theoretically deal with them with crime prevention techniques. Paraphrasing Hans-Herman Hoppe, thieves and criminals are just a *technical problem*.[12] People who want to live in harmony and use these resources productively have to have a system of property rights to allocate the use of the spoon.

Sometimes it's said that libertarians believe in property rights and that other political systems do not uphold property rights. This is true in a sense, if you mean property rights in a particular way, but if by "property rights" you mean the right to control a scarce resource, which is what property — ownership — is,[13] then every system on the face of the earth upholds some form of property rights. Every system on the earth will have a legal rule that says who is the owner of this platform, who is the owner of that factory, who is the owner of your paycheck.

For example, in the modern quasi-socialist welfare state that we live in today, the ownership rule is that the government owns about half of my paycheck. It's clear there are property rights. It's just that I only have about half and the government has the other half.

So in every society the legal system assigns an owner to a given contestable resource. What's unique about libertarianism is not that we believe in property rights; everyone does. Rather, it's our particular property rights scheme, which is basically the spinning out of the Lockean idea that the person who owns a given contested resource is the *first user* of it, or someone that he sold or gave the property to. The purpose of property rights is to permit us to peacefully, productively, and cooperatively use these things that are, unfortunately, scarce and cannot be used by more than one person at a time.[14]

Cooperation, Emulation, and Competition

I don't know if all of you have heard of the Misesian "calculation argument," but in the 1920s, Ludwig von Mises published a seminal paper that explained why socialism cannot work, why economics is literally impossible under full-fledged socialism.[15] The reason is

there is no way to compare competing projects unless you can do so in cardinal, numerical terms. It's a very simple idea. You can't compare building a bridge to planting an orchard. They're not comparable units. Mises realized that in a free market system with money prices, everything resolves in terms of money. You can *compare* with money prices. The problem in socialism is you don't have real money prices. You don't have real money prices because there is no private property in the means of production. This is the basic insight of Mises as to exactly why a private property system permits the free market to be prosperous and to generate wealth and to fight this condition of scarcity.

The market is producing more things all the time. It doesn't ever eliminate scarcity, but it fights it. If we had the government off of our backs, you could probably buy a Mercedes for $500. You could buy a microwave oven for a penny. It would not be infinitely plentiful, but it would be so plentiful everyone could have what they wanted.[16]

What are the key elements of a free market economy that allow this to happen? One is *cooperation*. The free market, by setting up property borders, allows people to cooperate instead of fighting over a resource.

It also gives rise to *competition*. My friend Jeff Tucker, of the Mises Institute, related to me a really good formulation of what competition is that was given to him by Larry Reed who is now the president of FEE, the Foundation for Economic Education. Reed's formulation is "*competition is the striving for excellence in the service of others*." That's true. That's what it is. You try to constantly improve what you're making to try to please the customer. This gives rise to a relentless effort on the part of the people in the market to lower cost, to make things more efficiently, to serve customers the best you can because you're in competition with others.

But we've left out one thing. Remember we talked about human action. A key aspect of human action is knowledge. You have to have knowledge to guide your actions. So how does this relate to the market? What's the role of knowledge in human action, in the market context? It's *emulation*.[17] If you see someone successful in the market, you emulate them. This is how competition arises. You see someone attracting customers. Let's say some guy invents a slushee stand and he's getting a lot of customers. You might build your own slushee stand to compete with him. You copied his idea. So what?

Customers are better off. Now the original guy might improve his slushee stand. He might offer more flavors.

This relentless striving to please the customer benefits everyone. This is the process of the market and it presupposes the idea of copying information, learning information, emulating. Competition means you can compete with someone, but you have to respect their property rights. You cannot trespass against them. You can't steal your competition's property, but you can "steal" their customers because *they don't own their customers*.

Let's tie this back to the structure of human action. Remember, we said human action *uses* means and it is *guided* by knowledge. So the means of action need to be privately owned only because they're scarce. That's why we have to have property in those things. Now, you can't say scarcity is a bad thing, as it's part of the nature of reality, but it's definitely a challenge. We humans have to try to overcome scarcity. The free market allows us to create wealth.

Creation of Wealth versus Creation of Property

Now, I want you to think about this for a second. What does it mean to create wealth? Does it mean to actually create an object out of thin air? No. It means to make things that you own more valuable. That increases wealth.[18]

Imagine two people engaging in a simple exchange. I give you my goat and you give me some eggs from your chickens. Was anything physically created? No. There was just an exchange. But as we know from very basic Austrian economics that one transaction increased the sum total of wealth in society because I wouldn't have given you my goat if I didn't want the eggs more. So after the exchange, I'm better off and the same thing for the other guy.[19]

So just by allowing people freedom and respecting property rights, you can increase wealth, but the key thing to recognize is that wealth is not an object. Value is not a substance. Things are more valuable because they're in a different shape. They're more valuable to customers, for example. When we talk about creating wealth, what we mean is we are *rearranging things* that we *already own*, rearranging scarce resources to make them more valuable to customers or to yourself.

So, yes, you use your creativity, you use labor to do these things. Labor and creativity can be said to create wealth, but that is just another way of saying that one's labor and actions are guided by knowledge to transform things that you own already to make them more valuable to you or to others.

I emphasize this because there's an insidious argument that is commonly used, even by libertarians, by proponents of this idea of intellectual property. The argument goes like this:

Oh sure, I agree with you that if you find something in the state of nature that was never owned, you're the owner. Finders keepers. Yes, that is one source of ownership. And sure, I agree that if someone transfers something to you by contract, which can include gifts, a contractual consensual voluntary transfer, that is another way you can come to own something.[20] That's another way of acquiring property rights.

So, they admit that we're right on two things: you can come to own some scarce resource by *finding* it or *buying* it.

But they say if you *create* it, you also own it. It just seems natural. We're used to thinking about this because what do we say in America? "You *make* money." Now, all that really means is you had a profit from a certain entrepreneurial endeavor. These metaphors can mislead us if we're not careful.[21] You don't really make money. (Now the Fed makes money, but that's a different story! They don't make real money. They make these artificial tickets we have now by printing them.)

Then they will say there are *three* ways to acquire ownership of things: you can find it, you can buy it, or you can create it. If you create it you should own it. It's natural. If there is a thing that someone created, and it's got to have an owner, well I guess it's got to be the creator. He's got the best connection to it. It just makes sense, right? Then they'll say, well, who created that song? Didn't you create that song? Who created that painting? Didn't you create that painting? So, you're the owner of it. The problem is they're wrong. Creation is *not* a third means of acquiring ownership of things.

We can see it in the examples I gave already. Creation just means *transforming* things you own already. Think about a man who has a big chunk of marble. He owns it because he

found it. He didn't create any new ownable thing. I guess you could say he's creative in finding it, but he's not creative in the modern intellectual property sense. His neighbor sneaks over in the middle of the night and carves a statue out of it. Who owns the statue? Under current law, it's indeterminate. Under libertarian law, the original guy owns it. This is a clear example that creation by the neighbor is not *sufficient* to give rights. It's also not *necessary* since the first guy acquired ownership because he *found* it. So you can see that creation is neither necessary nor sufficient for property rights and things. Creation is *not* an independent source of ownership or property rights.

This is the mistake that is made over and over again by pro-IP libertarians. One libertarian philosopher says there are ontologically many types of things out there. Sure there are tangible things, but there are poems and movies. Why can't we own those too?[22]

But what about, say, welfare rights? If rights are good, why can't there by welfare rights? What do modern liberals say? They say, "oh, I believe in property rights, but there is "also" a right to education and a right to food. Now, of course, we libertarians already understand that the problem with this idea is that these rights *are not free*. They come from something else. When you have a set of rights allocated and you start giving out more rights, they have to start chipping into the previous ones recognized. They have to come from something else. Rights and obligations are correlative. If you have a right to education or welfare, someone's got to provide it. They have to provide it out of their property. So recognizing "new" rights just amounts to a redistribution of property.

It's the same thing with intellectual property, which is nothing but a redistribution of rights. It is a redistribution of property rights from the original owner of a thing, to someone who applied at a state agency for some kind of monopoly certificate that gives them the right to go to government courts to ask the court to point their guns at the original owner and tell them "you have to share your property with this guy, or you can't use it in this way without this guy's permission." It is a way of redistributing property rights. The idea that you can just add IP rights to the set of property rights in scarce resources is a pernicious one that leads to redistribution of control that owners have over their property, to other people.

Here is what's perverse about it. As I've already pointed out, the free market is working to let humans overcome scarcity. Yet, you have people who advocate intellectual property

rights in the name of the market. What's going on here? They're actually imposing an *artificial scarcity* on things that are non-scarce by their nature.[23] The free market is trying to overcome the problem of scarcity. These people are saying, "let's make something that is already free and not scarce artificially scarce just like real things are." Why would we want to do this?

Let's imagine we had the ability to change physical laws so that you could easily duplicate a car just by looking at it. I look at your Rolls Royce and I blink my eyes and I have my own. It didn't take anything from you. You can still drive your car around. Who would be against that? Well, the auto workers' union would be against it I guess, but normal people wouldn't be against this. This would be free wealth — a good thing.

Yet, we already have this idealized situation in the case of knowledge. We have an expanding base of knowledge that we have all benefited from. It is growing all the time with every succeeding generation. The idea of shackling it is crazy. Why would libertarians support the government in imposing restraint on information?

IP as Censorship and Monopoly

There was one free market economist who actually wrote for one of the free market think tanks that many of you have probably read from before. He explicitly says "*patents and copyrights slow down the diffusion of new ideas* for a reason: to ensure there will be more new ideas to diffuse."[24] We can debate whether he's right about this means (slowing down the diffusion of ideas by means of state grants of monopoly privilege) achieving this end (ensuring there are more new ideas generated). I think, of course, that he's wrong — obviously wrong — but he's admitting that IP advocates want to slow down the spread of ideas. They want to make it more difficult to spread ideas.

There was a recent *Salon* magazine article about copyright in China. The magazine article's author sort of innocently stated that "We may have more to gain, economically, from removing impediments to the widespread distribution of knowledge than from attempting to restrict them."[25] Oh really!

It should be no surprise that patent and copyright have such perverse effects. If you realize the history of these statutes, it is no surprise at all. Patents originated in the

granting of monopoly privileges by monarchs. The first modern patent statute is called the Statute of Monopolies of 1623 in England. A patent was given to Sir Francis Drake, a notorious pirate, or privateer as he was euphemistically called, in the late 1500s, which authorized him to go around looting Spanish ships. The origin of patents is in privilege, monopoly, and *real* piracy. So all these proponents of intellectual property who point their fingers at today's "pirates" and are against piracy, well, there *is* a link between piracy and intellectual property: they go hand in hand.[26]

Copyright's origin is literally in censorship. Before the printing press, the state and the church found it pretty easy to control the distribution of thought. There were certain scribes who would copy books by hand. So the state and church could stop people from copying what they didn't want copied. The printing press started to upset matters and so the state established an elaborate system of monopolies and controls over the use of printing presses. This led to the Statute of Anne in 1710 in England, is the first modern copyright statute. Actually, part of the reason that some authors in the French Revolution, and even in England, were in favor of modern copyright laws was they wanted the control back. The government was controlling whether their own works could be reproduced. It wasn't a desire to get this monopoly from the state to go around suing people to stop them from reading their work. It was a desire just to have the ability to have it reproduced and copied.[27] So the entire history of patent and copyright lies in statism. It lies in piracy — real piracy — pirates that kill people and break things, not guys that have a Jolly Roger banner on their website.

Let me give an example of a mousetrap. Let's say some guy makes a mousetrap. He gets the idea to improve the standard mousetrap by coating it with Teflon. He figures these rat guts are sticky; they keep sticking to my mousetrap. I'll coat it with Teflon and this will make a better mousetrap. So maybe he sells some and when he sells his mousetrap a lot of people learn about it. The realize, "Hey, it's possible to make a mousetrap out of Teflon. It works even better."

Let's say I have some Teflon and a mousetrap. I improve my own mousetrap by adding Teflon to it. Now, the first guy has a patent on his Teflon-coated mousetrap. He can actually get a court order, an injunction, that tells me I cannot make this mousetrap even in the privacy of my own home or I will go to jail. This is really the force of government. So this is just an example of how patent rights literally rob people of their property rights.

(Note: the patentee can do this to me even if I independently came up with the idea of a Teflon-coated mousetrap; even if I came up with it *first*.)[28]

The IP Mistake

Why did this happen? How did my property get transferred to this patentee? Ultimately, causally, it was transferred because of a mistake, a mistake in the law, a mistake in people's thinking, a mistake in believing that ideas can be owned. Ideas cannot be owned. Ideas guide action. Means of action are scarce. Property rights are recognized in means *because* they're scarce. Ideas are not scarce things. They are infinitely reproducible. The growing body of knowledge is a boon to mankind.

We need to cast off the mistakes of the past. The young libertarians — you get this. You're immersed in the internet, digital information, easy access to online books and online information, billions of pages of information available at your fingertips, yeasty productivity, copying, emulating, file-sharing, social networking and borrowing. The movie *The Social Network* depicts Mark Zuckerberg, the creator of Facebook, as being accused of stealing the Winklevoss twins' idea. He was rightly outraged at the suggestion. He says, "Does a guy who makes a really good chair owe money to anyone who ever made a chair"?[29]

He's right. The very idea is ridiculous. Copying information and ideas is not stealing. Learning is not stealing. Using information is not trespass. I urge you young libertarians to stay on the vanguard of intellectual freedom. Fight the shackles of patent and copyright and keep on learning.

Thank you.

~*~

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Comment on the blog.

1. This paper is based on my speech of the same title delivered Nov. 6, 2010, at the 2010 Students for Liberty Texas Regional Conference, University of Texas, Austin; audio and video available at KOL062 | "Intellectual Freedom and Learning versus Patent and Copyright" (2010). A previous version was published under the same title in Economic Notes No. 113 (Libertarian Alliance, 2011).

   All of my articles cited herein may be found at www.stephankinsella.com/publications/. For more extensive treatment of some of the ideas dealt with in this article, see my monograph Against Intellectual Property(Mises 2008), and my articles "The Case Against IP: A Concise Guide," Mises Daily(Sep. 4, 2009), "Intellectual Property and Libertarianism," Mises Daily (Nov. 17, 2009), and "What Libertarianism Is," Mises Daily (August 21, 2009). ↩

2. For further discussion of the structure of human action and its relationship to IP, see note 13 and accompanying text, *et pass*., of my article "Ideas are Free: The Case Against Intellectual Property," *Mises Daily* (Nov. 23, 2010). ↩

3. For further discussion of the nature of human action, see n.4 and accompanying text of my "Ideas are Free"; also Stephan Kinsella & Patrick Tinsley, "Causation and Aggression," *The Quarterly Journal of Austrian Economics* 7 no. 4 (Winter 2004): 97–112. ↩

4. Non-scarce things are classified by Austrians as "general conditions" of action, as opposed to scarce means or goods. See Ludwig von Mises, *Human Action* (Mises Institute, 4th ed., 1996), ch. 4, sec. 1, and Murray N. Rothbard, *Man, Economy and State* (Mises Institute 2004), ch. 1, sec. 2, both available at mises.org. ↩

5. See Hans-Hermann Hoppe, "Praxeology and Economic Science," in *Economic Science and the Austrian Method* (Mises Institute, 1995), text following n. 18 ("All of these categories—values, ends, means, choice, preference, cost, profit and loss, as well as time and causality—are implied in the axiom of action."); idem, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Mises Institute 2010 [1989]), p. 141; and idem, "In Defense of Extreme Rationalism: Thoughts on Donald McCloskey's The Rhetoric of Economics," *Review of Austrian Economics* 3, no. 1 (1989), p. 200; both available at hanshoppe.com/publications. ↩

6. See Mises, *Human Action*, ch. 4, sec. 4; Rothbard, *Man, Economy and State*, ch. 4, sec. 5.C. ↩

7. For related commentary, see my post "Knowledge is Power," *C4SIF Blog* (Dec. 28, 2010). ↩

8. See Rothbard, *Man, Economy and State*, ch. 1, sec. 8; Kinsella, "Ideas are Free"; and Jeffrey A. Tucker & Stephan Kinsella , "Goods, Scarce and Nonscarce," *Mises Daily* (Aug. 25, 2010). ↩

9. See Tucker & Kinsella, "Goods, Scarce and Nonscarce," text at notes 4–5. ↩

10. See the concluding three paragraphs of my "The Death Throes of Pro-IP Libertarianism," *Mises Daily* (July 28, 2010). ↩

11. See notes 23–24 and accompanying text of my "Intellectual Property and Libertarianism." ↩

12. See Hans-Hermann Hoppe, "Rothbardian Ethics," *LewRockwell.com* (May 20, 2002) ("The existence of Friday the gorilla poses for Crusoe merely a technical problem, not a moral one. Crusoe has no other choice but to learn how to successfully manage and control the movements of the gorilla just as he must learn to manage and control the inanimate objects of his environment."); idem, *Democracy: The God That Failed* (Transaction, 2001), pp. 201–202. ↩

13. See note 4 to my "Intellectual Property and Libertarianism." ↩

14. For elaboration, see my "What Libertarianism Is." ↩

15. See Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth* (1920), idem, *Human Action*, ch. 16, secs. 1–3, and other references in Kinsella, "Knowledge vs. Calculation," Mises Economics Blog (July 11, 2006). ↩

16. See Stephan Kinsella, "How much richer would be in a free society? L. Neil Smith's great speech," StephanKinsella.com (Nov. 7, 2009). ↩

17. See Jeffrey Tucker's talk "The Morality of Capitalism," FEE Freedom University (2010). ↩

18. See "Intellectual Property and Libertarianism," text at n. 26; and Kinsella, "Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and 'Rearranging,'" *Mises Economics Blog* (Sep. 29, 2010). ↩

19. See Murray N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," *Mises Daily* (July 8, 2006). ↩

20. See Kinsella, "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability," *Journal of Libertarian Studies* 17, no. 2 (Spring 2003): 11-37. ↩

21. See Kinsella, "Objectivist Law Prof Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors," *Mises Economics Blog* (Jan. 3, 2008). ↩

22. See Kinsella, "Owning Thoughts and Labor," *Mises Economics Blog* (Dec. 11, 2006). ↩

23. Kinsella, "IP and Artificial Scarcity," *Mises Economics Blog* (Dec. 3, 2009). ↩

24. See Kinsella, "Shughart's Defense of IP," *Mises Economics Blog* (Jan. 29, 2010). ↩

25. Andrew Leonard, "The key to economic growth: Stealing," *Salon* (Aug. 18, 2010). ↩

26. See Kinsella, ""How Intellectual Property Hampers Capitalism," Mises Institute Supporters' Summit 2010 (Oct. 8-9 2010, Auburn Alabama). ↩

27. See Michele Boldrin & David K. Levine, *Against Intellectual Monopoly* (Cambridge 2008), at ch. 2, text at n. 27 *et pass*. ↩

28. See Kinsella, "Common Misconceptions about Plagiarism and Patents: A Call for an Independent Inventor Defense," *Mises Economics Blog* (Nov. 21, 2009). ↩

29. See Jeffrey A. Tucker, "A Movie That Gets It Right," *Mises Daily* (Oct. 26, 2010). ↩

The Origins of Libertarian IP Abolitionism

by STEPHAN KINSELLA*on* APRIL 1, 2011

From the Mises blog. Archived comments below.

David Gordon has a great article up today on LewRockwell.com, Sam Konkin and Libertarian Theory, which devotes a good deal of space to discussing Konkin's role in the anti-IP movement. David is absolutely correct here:

> Konkin's work on IP deserves at least equal recognition as his better-known defense of counter-economics and agorism; and, to the extent that anti-IP views come to prevail among libertarians, I predict that Sam Konkin will be a name we shall often hear.

It was great to see Konkin's amazingly clear and perceptive thoughts on this issue, way back in 1986 before it seemed that relevant. I learned about Konkin's views on IP a few months ago—from Lew Rockwell's post Remembering Samuel Edward Konkin III, I think, where Lew wrote:

> This weekend, … I was going over [Konkin's] Wikipedia articles, and realized I had never read what turned out to be a pioneer article mentioned there, Copywrongs, which I published today on LRC. [Samuel Edward Konkin, III, "~~Copywrongs~~," *The Voluntaryist* (July 1986), reprinted as "Copywrongs," *LewRockwell.com* (Nov. 15, 2010)]

I noted this piece in my C4SIF blog post, Copywrongs. What's ironic is that one of the strongest libertarian defenders of (a variation of) IP is J. Neil Schulman,[1] who was a big fan of Konkin—he included an afterword to Schulman's classic libertarian sci-fi novel *Alongside Night*. Schulman thinks it significant that the anti-IP Konkin "never successfully challenged" Schulman's Rand-inspired, confused defense of IP, but this seems to me to be an odd negative appeal to authority.

Gordon is right to credit earlier libertarians such as Wendy McElroy, Murray Rothbard, and even Benjamin Tucker for their rejection of the basis of IP. I mention these, and other significant influence in my own thinking, including Tom Palmer, in notes 37-38 and accompanying text of my *Against Intellectual Property* (first published 2000). [Update: LeFevre was also good on this issue, as early as 1966: LeFevre on Intellectual Property and the "Ownership of Intangibles".] I myself did not firmly come out against IP in print until about 1995 (Roderick Long, too, who is also great on IP[2] —and, in fact, is debating Schulman on IP in New Hampshire at ~~PorcFest 2011~~ June 20-26 2011). These and others are also linked on the C4SIF Resources page, including Rothbard's key anti-IP contributions, Knowledge, True and False and *Man, Economy, and State and Power and Market*, Scholars Edition, pp. liv, 745-54, 1133-38, 1181-86.

Earlier libertarians, like Tucker, basically had the right approach (though Tucker was weak on land); but to have a sound, coherent approach to IP you must be informed by libertarian and really Austrian insights. (Spooner was out of his gourd on IP (I discuss him briefly in *Against Intellectual Property*, text at notes 32 and 48), as were Rand and Galambos; as was even Proudhon, who otherwise railed against "property" as "theft" [**update**: this may be incorrect, as noted now on the updated post linked above]). The austro-libertarian opposition to IP is already implied in Mises, Rothbard, and Hoppe's political and economic writings. It is implied in Mises's recognition that ideas and recipes are infinitely

replicable, and in his understanding of the role of ideas and knowledge in action: that it is a *guide* to action, but not a scarce means of action. It is of course also present in both Rothbard's rejection of state patent and copyright, and Hoppe's views of property rights and scarcity. The anti-IP aspects of their ideas lay somewhat dormant or unappreciated until the full brunt of the IP system started to be felt with force in the mid-90s as a result of the rise of digital copying and information, the Internet, file sharing, and so on. Tucker, Mises, Rothbard, Konkin, Palmer, McElroy, et al.—they are true anti-IP pioneers. We should all be grateful to them for their intellectual leadership, which helps to clarify our understanding of yet another facet of the criminal state.

[**Update**: for more on McElroy's role in developing the anti-IP case, see my article "The Great IP Debate of 1983," *Mises Daily* (July 18, 2011).]

Update: See Classical Liberals and Anarchists on Intellectual Property.

Brian Doherty, Intellectual Property: Dying Among Libertarians?

The Four Historical Phases of IP Abolitionism

by STEPHAN KINSELLA*on* APRIL 13, 2011

Mises post; Archived comments below.

In my post The Origins of Libertarian IP Abolitionism, I discussed the origins of the modern libertarian anti-IP movement. I've learned a lot more about the antecedents and history of all this from teaching the Mises Academy course "~~Rethinking Intellectual Property: History, Theory, and Economics~~." This history if very interesting. It seems to me we can mark at least four periods of significant and vigorous debate about IP that included strong arguments against IP, which I set forth below.

1. The Anti-patent movement from 1850–1873

Machlup[1] lays out four historical periods leading to the modern patent systems of the world:

- Early History (pre–1624)
- Spread of the Patent System (1624–1850)
- Rise of the Anti-patent movement (1850–1873)
- Victory of the Patent Advocates (1873–1910)

Interestingly, many of the same argument, pro- and con, that were made then, have been made since. The most interesting of these four periods for our purposes is the third, 1850-1873. There is a huge amount of material from this period attacking IP—and from a free market perspective—that I have not been able to access or study in detail yet (but plan to). In this period, patents were attacked along with tariffs by free-traders, since both were seen to be obviously contrary to the free market. But with the depression following the Panic of 1873, there was a rise in nationalism and a reduced opposition to tariffs and protectionism. With the free trade cause on the ropes, its opposition to patents also became less relevant. The willingness to tolerate protectionism and other incursions into free markets and free trade opened the door to increased patent propaganda by special interest groups.

Thus, the anti-patent movement lost steam, and holdout nations such as Switzerland and the Netherlands finally gave in and reintroduced patent systems previously abolished (in the case of the Netherlands) or not yet adopted (Switzerland). Ever since, we have had a more or less universal, modern patent system in place in countries around the world.

2. The Debates among Individualist Anarchists the Late 1800s

As detailed by Wendy McElroy in works such as Copyright and Patent in Benjamin Tucker's periodical Liberty and ~~Contra Copyright, Again~~, early libertarian and proto-libertarians and anarchists in the late 1800s had vigorous debates on this topic. Lysander Spooner in *The Law of Intellectual Property; Or an Essay on the Right of Authors and Inventors to a Perpetual Property in their Ideas* (1855) had argued for IP but Benjamin Tucker deviated from Spooner, his mentor, and rejected IP. A vigorous debated ensued in the pages of *Liberty*, in the 1890s, with Tucker taking the most consistent anti-IP position, and others, such as Tak Kak (pen name for James L. Walker) and Victor Yarros, arguing for IP. Tucker's arguments were powerful and influenced others later, such as McElroy.[2]

3. Mounting Libertarian IP Skepticism in the Pre-Internet Age

Free market economists had long voiced skepticism over the case for IP. This trend was continued, in the 20th century, by Arnold Plant (1934) and Fritz Machlup (1950s) (see the C4SIF Resources page).

In the latter half of the 20th century, more explicitly libertarian thinkers began to seriously doubt or completely deny the legitimacy of IP, including F.A. Hayek (1948), Murray Rothbard (1962, in *MES*), Wendy McElroy (1981, 1985), Samuel Edward Konkin III ("SEK3") (1986), and Tom Palmer (1989/90) (again, see the C4SIF Resources page).[3]

4. Austro-Libertarian IP Abolitionism in the Digital/Internet Age

As Roderick Long notes in his 1995 article The Libertarian Case Against Intellectual Property Rights (one of the first sallies of Phase 4),

> Though never justified, copyright laws have probably not done too much damage to society so far. But in the Computer Age, they are now becoming increasingly costly shackles on human progress.

The digital information/Internet age made the problem of IP more obvious and serious, which led to our current modern resurgence of libertarian IP abolitionism, a position which seems to have grown and become dominant in the last 10 years, as I argue in "The Death Throes of Pro-IP Libertarianism."

The case against IP is today especially clear to Austrian-, anarchist-, and left-libertarians, and has intensified and grown significantly in recent years, and shows no sign of abating. The libertarian IP proponents are on the ropes and dwindling in numbers, or so it seems to me.

Thus, in addition to the younger libertarian IP opponents from Phase 3, above (McElroy and Palmer), there are today a large number of libertarian and free market/semi-libertarian opponents of IP, including: Roderick Long, Kinsella, Jeff Tucker, Boldrin and Levine, Julio Cole, Karl Fogel, Nina Paley, David Koepsell, Bertrand Lemmenicier, Sheldon Richman, Kevin Carson, Tom Bell (many of whom are members of the C4SIF's advisory board), and many others (again, see the C4SIF Resources page for link to many of these scholars' work).

Let's hope our numbers in the fourth phase continue to grow, culminating in **Phase 5: IP Abolition**.

Classical Liberals, Libertarians, Anarchists and Others on Intellectual Property

by STEPHAN KINSELLA*on* OCTOBER 6, 2015

I've discussed before the IP stances of various older libertarians, classical liberal, and anarchist thinkers on IP.[1] I keep trying to add to this list. I'll supplement this post from time to time, but here is some of what I've collected.[2] I'm omitting more recent libertarians such as Rand and Galambos. These are sorted chronologically (by date of birth). Good guys in blue (lighter blue for the ones that are semi-good). Bad in red.

- **John Locke** (1632–1704): **weak**, confused, but not as bad as some, like Adam Mossoff, claims he is[3]
- **David Hume** (1711–76): unclear, but seemed to reject aspects of Locke's labor argument that are now used to justify IP[4]
- **Adam Smith** (1723–1790): apparently in favor, but somewhat cautious and skeptical[5]
- **Blackstone** (1723–1780): apparently opposed to patents[6]
- **Thomas Paine** (1737–1809): pro-copyright[7]
- **Jeremy Bentham** (1748–1832): weak[8]
- **James Madison** (1751–1836): bad[9]
- **Jean-Baptiste Say** (1767–1832) bad[10]

- **Charles Comte** (1782–1837): good ((According to Louis Rouanet, "Michel Chevalier's Forgotten Case Against the Patent System" (2015).))
- **Charles Dunoyer** (1782–1862): good[11]
- **Frédéric Bastiat** (1801–50): a friend tells me he is good on patents (against them) but bad on copyright, though I haven't verified this yet myself[12]
- **William Leggett** (1801–39): *very good*, for his time, on both patent and copyright[13]
- **Charles Coquelin** (1802-52): bad ((According to Louis Rouanet, "Michel Chevalier's Forgotten Case Against the Patent System" (2015).))
- **Charles Coquelin** (1802–52): bad
- ((According to Louis Rouanet, "Michel Chevalier's Forgotten Case Against the Patent System" (2015).))
- **John Stuart Mill** (1806-1873): **bad**[14]
- **Michel Chevalier** (1806–1879): **good**[15]
- **Lysander Spooner** (1808–87): ***horrible*** on IP, just about the worst, next to Galambos, Rand, and Schulman[16]
- **Pierre-Joseph Proudhon** (1809–65): *possibly* bad on IP (claim disputed)[17]
- **JK Ingalls** (1816–98): Seems to be almost identical to Tucker: good on IP, but for confused reasons, including hostility to the "land monopoly"[18]
- **Gustave de Molinari** (1819–1912): bad on patent and copyright[19]
- **Herbert Spencer** (1820–1903): horrifically bad on IP[20]
- **Leo Tolstoy** (1828–1910) good on copyright
- **Auberon Herbert** (1838–1906): *unknown*[21]
- **Henry George** (1839–97): bad on copyright[22]
- **James Walker (Tak Kak)** (1845–1904): excellent on both patent and copyright, like Tucker[23]
- **Eugen Böhm-Bawerk** (1851–1914): expresses skepticism about both patent and copyright[24]

- **Benjamin Tucker** (1854–1939): great on IP, but perhaps not completely for the right reasons[25]
- **Albert Jay Nock** (1870–1945): possibly skeptical of patents[26]
- **H.L. Mencken** (1880–1956): *unknown*
- **Ludwig von Mises** (1881–1973): skeptical, but mixed and confused on IP; seem to be somewhat anti-patent but pro-copyright[27]
- **Frank Knight** (1885–1972): skeptical of patents, but perhaps in favor of state funding of R&D[28]
- **Henry Hazlitt** (1894–1993): weak[29]
- **Arnold Plant** (1898–1978): skeptical of empirical case for patents[30]

- **Lionel Robbins** (1898–1984): skeptical of empirical case for patents[31]
- **Leonard Read** (1898–1983): appeared to be skeptical of ownership of ideas in general, i.e. anti-IP[32]
- **F.A. von Hayek** (1899–1992): seemed to be leaning against IP, though not entirely clearly[33]
- **Fritz Machlup** (1902–83): skeptical of the empirical case for patents[34]
- **Robert LeFevre** (1911–86): expresses very good, early skepticism of the notion of IP or ownership of ideas [**Update**: as noted in an update in the post linked below, LeFevre oddly has some quasi-pro-IP comments on the copyright page of his book *This Bread Is Mine*, which seem incompatible with his anti-IP thoughts expressed elsewhere. Not sure if his thinking changed on this, or he was just confused.][35]

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Update: More recent thinkers (not a comprehensive list; for more on modern libertarian views on IP see The Four Historical Phases of IP Abolitionism, The Origins of Libertarian IP Abolitionism; see also Pro-IP "Anarchists" and anti-IP Patent Attorneys):

- **Ayn Rand** (1905–82): bad (central plot point of *The Fountainhead*: IP terrorism)
- **F.A. "Baldy" Harper** (1905–73): indications are he was or would have been bad on IP; infected by the Lockean "creationism" virus[36]
- **Milton Friedman** (1912–2006): TBD
- **Bettina Bien Greaves** (1917–2018): bad/weak/confused (just as Mises and Rothbard were)
- **Andrew Joseph Galambos** (1924–97): bad (one of the worst, with Spooner a close competitor for this title): total nutjob on IP, utterly in thrall the scientism, the labor theory of property, and non-rigorous, overly metaphorical reasoning
- **Murray N. Rothbard** (1926–95): decent on patent; confused on copyright; good on defamation
- **Morris** (1926–1988) and **Linda Tannehill** (1939–?): weak/confused on IP. They were anarchists but advanced a strained argument as to how a free market, anarchist society could still enforce some version of Ayn Rand's insane IP views. It can't. They were wrong. See *The Market for Liberty*, ch. 7 (confused comments about inventorship and royalties (i.e., patent law) and some vague assumption (like Rothbard tried to briefly advance) that IP law is based on contract–it's not).
- **Israel Kirzner** (1930–): seems to lean against IP, but not clearly[37]
- **Jan Narveson** (1936–): pro-IP[38]
- **Robert Nozick** (1938–2002): confused and weakly in favor of some form of patent law; very diletanttish reasoning, as often is the case for Nozick. See here, text at note 5
- **Tibor Machan** (1939–2016): confused and bad on IP[39]
- **Henri LePage** (1941–): somewhat skeptical[40]
- **Deirdre McCloskey** (1942–): somewhat skeptical of patent and copyright, but not in favor of abolition and expresses no principled or coherent view

- **Gary North** (1942–): **pretty good**: appears to oppose patent and copyright on biblical and economic grounds, but favors trademark and defamation law[41]
- **Richard Epstein** (1943–): **bad**[42]
- **Bertrand Lemennicier** (1943–2019): **good**[43]
- **Ejan Mackaay** (1943–): bad[44]
- **David Friedman** (1945–) (bad/confused)[45]
- **L. Neil Smith** (1946–2021): bad[46]
- **Sam Konkin** (1947–2004): **good** (see Copywrongs)
- **William F. Shughart II** (1947–): **bad**[47]
- **Mark Skousen** (1947–): **bad** (private correspondence)
- **George H. Smith** (1949–2022): *unknown*; probably good
- **Mary Ruwart** (1949–): good: indicates here she is generally against IP (previously, position a bit unclear: here she doesn't clearly condemn defamation law, which is a type of IP [discussed further at this facebook post])
- **Hans-Hermann Hoppe** (1949–)**: good**
- **Sheldon Richman** (1949–): **good**
- **Ken Schoolland** (?): seems very skeptical of patents[48]
- **Jacob "Bumper" Hornberger** (1950–): apparently bad[49]
- **Randall Holcombe** (1950–): **unclear** (said it's an open question but admires my work)
- **Wendy McElroy** (1951–): **good** (the first to get it basically right from a libertarian perspective)
- **J. Neil Schulman** (1953–2019): very bad[50]
- **Tom Palmer** (1956–): **good** (at least originally)
- **Tyler Cowen**: bad
- James DeLong: bad
- **Matt Ridley** (1958–): **pretty good**; somewhat skeptical about patent and copyright[51]
- **J.C. (Jan) Lester**: confused and bad on IP[52]
- **Lawrence Lessig** (1961–): weak/confused/unprincipled[53]
- **Jeffrey Tucker** (1963–): **good**
- **Roderick Long** (1964–): **good** (early radical libertarian opponent of IP)
- **Stephen Davies**: **good**
- **N. Stephan Kinsella** (1965–): **good (to say the least)**
- **Alex Tabarrok** (1966–): **confused/bad-mixed**[54]
- **Adam Thierer** (?): weak, unprincipled[55]
- **Bryan Caplan** (1971–): bad
- **Tom Bell**: not abolitionist, but skeptical and favors significant rollbacks
- **Mike Masnick**: not abolitionist, but skeptical and favors significant rollbacks
- **Cory Doctorow**: not abolitionist, but skeptical and favors significant rollbacks (I believe)
- **Adam Mossoff**: **bad** [basically: among the worst, along with Rand, Spooner, Galambos, and Schulman, all of whom were insane on IP]
- **Jerry Brito**: skeptical of IP and favors reform, but not abolition
- **Paul Cwik**: **bad** [so bad he's hardly even wrong]
- **Peter Leeson** (1979–): not clear; touches on it briefly in this paper
- **Michael Huemer**: **confused**: doesn't think it's clear that IP is unlibertarian[56]
- **Sharon Presley**; and some less-known more modern soi-disant anarchists who are nonetheless confused and bad on IP: Bob Wenzel, for example,[57] as well as other lesser/modern figures such as Chris LeRoux,[58] Shayne Wissler,[59] Silas Barta (aka John Sharp, "Person," Richard Harding/Hard Dick).[60]

1. See The Four Historical Phases of IP Abolitionism, The Origins of Libertarian IP Abolitionism, The Death Throes of Pro-IP Libertarianism. [↩]
2. See also my post Pro-IP "Anarchists" and anti-IP Patent Attorneys. [↩]
3. See the discussion of Locke and comments by Bell and Deazley etc. here: Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and "Rearranging". [↩]
4. see Hume on Intellectual Property and the Problematic "Labor" Metaphor [↩]
5. From *Lectures on Jurisprudence*, Part I, Div. III, §8, p. 130: "The privilege, however, of vending a new book or a new machine for fourteen years has not so bad a tendency, it is a proper and adequate reward for merit." From *Wealth of Nations*, G.Ed. p. 754: "When a company of merchants undertake, at their own risk andThe grant of a temporary monopoly to a joint-stock company may sometimes be reasonable, but a perpetual monopoly creates an absurd tax expence, to establish a new trade with some remote and barbarous nation, it may not be unreasonable to incorporate them into a joint stock company, and to grant them, in case of their success, a monopoly of the trade for a certain number of years. It is the easiest and most natural way in which the state can recompense them for hazarding a dangerous and expensive experiment, of which the public is afterwards to reap the benefit. A temporary monopoly of this kind may be vindicated upon the same principles upon which a like monopoly of a new machine is granted to its inventor, and that of a new book to its author." (discussed in Adam Smith and the Role of Government). See also *The Economist*: "'The granting [of] patents "inflames cupidity", excites fraud, stimulates men to run after schemes that may enable them to levy a tax on the public, begets disputes and quarrels betwixt inventors, provokes endless lawsuits…The principle of the law from which such consequences flow cannot be just.' … *The Economist* may have put it rather strongly in 1851, but its disapproval of patents represented conventional wisdom at the time. A century earlier, Adam Smith had described them as necessary evils, to be handed out sparingly, and many other economists have since echoed his reservations. Patents amount to temporary monopolies on useful new inventions." See also Tom Bell's comments showing Smith did not view IP as natural rights. **Update**: See also pp. 7–8 of Machlup & Penrose, "~~The Patent Controversy in the Nineteenth Century~~" (1950), where the authors point out that while Smith argued that monopolies in trade are harmful, he thought that "a temporary monopoly granted to the inventor of a new machine could be justified as a means of rewarding risk and expense." [Citing *Wealth of Nations*, at Bk. V, chap. i., Part III, 388, from the Oxford version 1928; online]. [↩]
6. See Bob Baxt and Henry Ergas, "Australia" country chapter, in R Ian McEwin, *Intellectual Property, Competition Law and Economics in Asia*, p. 98 (2011), stating: "Arguments that 'publicutility requires that production of the mind should be diffused as widely as possible' [5] were common in the English literary property debate of the eighteenth century; so too was the hostility embodied in Blackstone's view that 'mechanical inventions tend to the improvement of arts and manufactures, which employ the bulk of people; therefore they ought to be cheap and numerous'. [6]" citing [5] "The Cases of Appellant and Respondents in the Cause of Literary Property before the House of Lords (1774) 6, cited in B Sherman and L Bently, *The Making of Modern Intellectual Property Law* (Cambridge, Cambridge University Press, 1999) 29." and [6] "W Blackstone [as Counsel] in *Tonson v Collins* (1760) 96 ER 189". See also Ronan Deazley, Commentary on: *Tonson v. Collins* (1762); and *Tonson v. Collins, London (1762)*. [↩]
7. See Tom Paine, Copyright Statist. [↩]
8. See p. 7 of Machlup & Penrose, "~~The Patent Controversy in the Nineteenth Century~~" (1950) [↩]
9. Madison Lied about Patent and Copyright [↩]
10. See Say, *A Treatise on Political Economy*:

> "In Great Britain, the individual inventor of a new product or of a new process may obtain the exclusive right to it, by obtaining what is called a patent. While the patent remains in force, the absence of competitors enables him to raise his price far above the ordinary return of his outlay with interest, and the wages of his own industry. Thus he receives a premium from the government, charged upon the consumers of the new article; and this premium is often very large,

> as may be supposed in a country so immediately productive as Great Britain, where there are consequently abundance of affluent individuals, ever on the look-out for some new object of enjoyment. Some years ago a man invented a spiral or worm spring for insertion between the leather braces of carriages, to ease their motion, and made his fortune by the patent for so trifling an invention.
>
> **Privileges of this kind no one can reasonably object to**; for they neither interfere with, nor cramp any branch of industry, previously in operation. Moreover, the expense incurred is purely voluntary; and those who choose to incur it, are not obliged to renounce the satisfaction of any previous wants, either of necessity or of amusement.

See also p. 7 of Machlup & Penrose, "~~The Patent Controversy in the Nineteenth Century~~" (1950); also Louis Rouanet, "Michel Chevalier's Forgotten Case Against the Patent System" (2015). [↩]

11. According to Louis Rouanet, "Michel Chevalier's Forgotten Case Against the Patent System" (2015). [↩]
12. see *Economic Harmonies*, ch. X, and clearer mentions in "Propriété et Spoliation". Re Bastiat being in favor of indefinite copyright, see "Discours au cercle de la librairie" [↩]
13. William Leggett on Intellectual Property [↩]
14. See p. 7 of Machlup & Penrose, "~~The Patent Controversy in the Nineteenth Century~~" (1950), noting that Mill "stated categorically that [the condemnation of monopolies ought not to extend to patents …]'"; also Mackaay, p. 359, n. 273: "John Stuart Mill justified intellectual property in similar terms: 'an exclusive privilege, of temporary duration is preferable; because it leaves nothing to anyone's discretion; because the reward conferred by it depends upon the invention's being found useful, and the greater the usefulness, the greater the reward; and because it is paid by the very persons to whom the service is rendered, the consumers of the commodity' (Mill 1985 [1848], 296 (Bk V, Ch. X, §4 [10.24])." [↩]
15. Louis Rouanet, "Michel Chevalier's Forgotten Case Against the Patent System" (2015). [↩]
16. Tucker on Spooner's One Flaw [↩]
17. Proudhon: For Intellectual Monopoly [↩]
18. See his *Social Wealth* [1885], pp. 85–86: "The idea of a natural exclusive right in invention or in the publishing of books is absurd. If there is one, why our patent and copyright laws? Why not defend the right at common law or by general consent? Because a man utters a new word, or coins a new phrase, is that his property which no one may repeat? If we may not be prevented from reiterating it, why from rewriting it or reprinting it? Because a man builds a house to shelter himself and family, shall all mankind be compelled to dwell in caves to the end of time? or pay him and his descendants a royalty or kingly tribute? Doubtless, society will feel under obligation to one who has invented a useful thing or written an instructive or entertaining book. And the man who has conceived or perfected either of these has the power of property over it, while he keeps it private or secret, and will usually find means to secure an advantage from it before making it public property, as Daguerre did with his beautiful invention. Society, too, may take lawful methods of awarding services of that kind; but to create a monopoly is not one of them. For books and inventions a premium might be allowed for a given time; but not to interfere with the freedom of manufacture and sale by all who would respect the right." See also Wikipedia: "He was an associate of Benjamin Tucker and the "Boston anarchists." He believed that government protection of idle land was the foundational source of all limitations on individual liberty." [↩]
19. Molinari (and Tucker, and Mutualists) on IP [↩]
20. See *The Principles of Ethics*, Vol. 2, Ch. 13, §§ 303–306; also, according to Roderick Long, from Spencer's *Autobiography*. See also Spencer's *Social Statics*, ch. XI, § 3: "As already remarked, it is a common notion, and one more especially pervading the operative classes, that the exclusive use by its discoverer of any new or improved mode of production, is a species of monopoly, in the sense in which that word is conventionally used. To let a man have the entire benefit accruing from the employment of some more efficient machine, [139] or better process invented by him;

and to allow no other person to adopt and apply for his own advantage the same plan, they hold to be an injustice. Nor are there wanting philanthropic and even thinking men, who consider that the valuable ideas originated by individuals—ideas which may be of great national advantage—should be taken out of private hands and thrown open to the public at large. .... —And pray, gentlemen,—an inventor might fairly reply,—why may not I make the same proposal respecting your goods and chattels, your clothing, your houses, your railway shares, and your money in the funds? If you are right in the interpretation you give to the term 'monopoly,' I do not see why that term should not be applied to the coats upon your backs and the provisions on your dinner tables." See also Spencer, *The Principles of Ethics*, vol. II, Part IV, Ch. XIII, "The Right of Incorporeal Property." **TBD: ADD stuff from the recent 1981 book on liberty by alan Burris...** [↩]

21. Jeff Tucker assures me that Herbert was good on IP but I can find nothing in *The Right and Wrong of Compulsion by the State and Other Essays* [1885] definitive, though he has a bit of pro-IP-ish "libertarian creationism" in his comment "We claim that the individual is not only the one true owner of his faculties, but also of his property, because property is directly or indirectly *the product of* faculties, is inseparable from faculties, and therefore must rest on the same moral basis, and fall under the same moral law, as faculties. Personal ownership of our own selves and of our own faculties, necessarily includes personal ownership of property. As *property is created by faculties*, it would be idle, it would be a mere illusion, to speak of an individual as owner of his own faculties, and at same time to withhold from him the fullest and most perfect rights over his property, if such property has been rightfully acquired" [emphasis added] [↩]
22. Henry George on Intellectual Property and Copyright [↩]
23. See William Leggett on Intellectual Property; and Wendy McElroy, For Liberty, Life and Property....But Not The Ownership of Ideas [↩]
24. Böhm-Bawerk on Patent and Copyright [↩]
25. Molinari (and Tucker, and Mutualists) on IP; see also "Benjamin Tucker and the Great Nineteenth Century IP Debates in *Liberty* Magazine" (July 11, 2022). [↩]
26. According to a friend, "In his biography of Jefferson, he claims that Jefferson was against patents, and his phrasing makes it appear that he was against them, too. In his narrative about Jefferson's views, he refers to them as monopolies." [↩]
27. Human Action 3rd rev. ed. Chicago: Henry Regnery (1966), chap. 23, section 6, pp. 661–62; see also pp. 128, 364; see also Kinsella, "Mises on Intellectual Property" [↩]
28. Knight believed the patent system "is an exceedingly crude way of rewarding invention. Not merely do the consumers of the product pay, which is doubtless fair, but large numbers of other persons suffer who are prevented from using the commodity by the artificially high price. And as the thing works out, it is undoubtedly a very rare and exceptional case where the really deserving inventor gets anything like a fair reward. If any one gains, it is some purchaser of the invention or at best an inventor who adds a detail or finishing touch that makes an idea practicable where the real work of pioneering and exploration has been done by others. It would seem to be a matter of political intelligence and administrative capacity to replace artificial monopoly with some direct method of stimulating and rewarding research." *Risk, Uncertainty, and Profit*, "Part III, Chapter XII: Social Aspects of Uncertainty and Profit," p. 372 (1921). As noted by Bob Baxt and Henry Ergas, "Australia" country chapter, in R Ian McEwin, *Intellectual Property, Competition Law and Economics in Asia*, p. 99 & n9 (2011), this was "a view the Nobel laureate in economics, Kenneth Arrow, echoed, some 40 years later, in his classic article on the economics of research and development (R&D). ... Although often cited by those who support strong IPRs, suggesting that as with so much economic literature, it is far more often cited than read, Arrow's main conclusion is that 'for optimal allocation [of resources] to invention it would be necessary for the government or some other agency not governed by profit-and-loss criteria to finance research and invention.' K. Arrow, 'Economic Welfare and the Allocation of Resources to Invention' in *The Rate and Direction of Inventive Activity: Economic and Social Factors* (National Bureau of Economic Research, 1962) 623. [↩]
29. In Hazlitt's article "Patents and Monopoly," *New York Times*, December 14, 1938 (p. 24; uncredited), he seems slightly skeptical of patents. He acknowledges that the government's grant of patents helps create the monopolies that the

government then complains about. He also wonders if patents have really promoted progress, or whether perhaps their "abuse" has hindered progress. Still, he does not seem to favor abolition or to oppose patents on principle. And in his 1962 *National Review* review of Rothbard's MES, he criticizes Rothbard's "abstract doctrinaire logic" such as his "sharp contrast between copyrights and patents, and his implication that the former might well be granted in perpetuity and the latter not at all". He is right that Rothbard is wrong to imagine a sharp contrast between patent and copyright, and Hazlitt appears to oppose copyright in perpetuity (but not completely), and to oppose the abolition of patent law. Later he criticizes Rothbard for opposition to libel law (which very similar to IP law, in establishing intangible "reputation rights" [as trademark law also does]), and blackmail law, indicating Hazlitt favored established positive law, both common law (blackmail and libel) and statutory law (e.g. patent law). Hazlitt is very confused here, accusing Rothbard of being "misled by his epistemological doctrine of "extreme apriorism" into trying to substitute his own instant jurisprudence for the common law principles built up through generations of human experience"–since patent and copyright law were not based on gradually developed common law, but rather the result of state interference in human life and the market, and statutes such as the Statute of Anne 1710 [copyright] and the Statute of Monopolies 1623 [patent], and the patent and copyright clause in the US Constitution of 1789 and the patent and copyright statutes enacted immediately after by Congress. [↩]

30. "The Economic Theory Concerning Patents for Inventions,"*Economica,* New Series, 1, no. 1 (Feb., 1934). See also Robert Van Horn & Matthias Klaes, "Intervening in Laissez-Faire Liberalism: Chicago's Shift on Patents," in *Building Chicago Economics: New Perspectives on the History of America's Most Powerful Economics Program*: "Echoing the anti-patent concerns of U.S. political leaders and the U.S. Supreme Court were two future European members of the Mont Pèlerin Society, Arnold Plant[12] and Michael Polanyi.[13] Plant maintained that patents, like all forms of monopoly, were deleterious to society because they diverted resources from other forms of production that might be more beneficial to society. According to Plant, with a patent system in place, a certain combination of output would result – say, Combination A. With an open market price system in place and without a patent system, another combination of output would result – say, Combination B. Which combination was more generally useful? According to Plant, this could not be determined by any system of economic analysis. Thus, he trenchantly stated, "**the science of economics as it stands to-day furnishes no basis of justification for this enormous experiment in the encouragement of a particular activity by enabling monopolistic price control**" (51). In lamenting the economic troubles of England, Plant asked: "Can it be that the patent system is in part responsible for our present economic troubles?" (51) 14." Note 14: " In providing additional criticisms of the patent system, Plant's analysis included four noteworthy anti-patent claims. First, Plant observed that patents were unnecessary in some industries for the production of inventions. Without patents, the fashion industry burgeoned with a high rate of invention. Additionally, the creation of inventions in the field of medicine took place, partly due to altruistic motives and professional drive for repute. Second, according to Plant, the patent system only served the one who secured the patent, providing no financial reward to the numerous other participants in the invention process. Plant incisively stated, "Lotteries in open competition there may well be; but the lottery of the patent system awards but one prize, and that a monopoly, while those who subscribe most of its value may be precluded from qualifying for the prize" (46). Third, Plant asserted that patents prevented future discoveries because an inventor, fearing that he or she would transgress another's patent, would be deterred. Plant observed, "competitors instead of helping to improve the best, are compelled in self-preservation to apply themselves to the devising of alternatives which, though possibly inferior, will circumvent the patent" (46). Thus, for Plant, the patent system caused a mal-distribution of resources. Fourth, the patent system was no longer necessary to ensure that businesses did not conceal their inventions. Although the patent system might have had a beneficial role to play in the eighteenth century, when numerous small businesses tended to be individually owned, the patent system, according to Plant, had no equivalent role to play in the early twentieth century, which depended on large scale manufacture. For Plant, because of large-scale manufacture, protracted secrecy tended to be infeasible. Even though

there might be exceptions, such as a chemical process, Plant maintained, "such cases, if they indeed exist outside the pages of detective fiction and sensational literature, must surely be exceptional, and unlikely to be eradicated by the inducements of temporary patent production" (44)." Plant page references to this; Polanyi page references to Philip Mirowski, *The Effortless Economy of Science?* [↩]

31. Lionel Robbins on the Patent Monopoly [↩]
32. Leonard Read on Copyright and the Role of Ideas [↩]
33. see Hayek's Views on Intellectual Property; also Tucker, "~~Misesian vs. Marxian vs. IP Views of Innovation~~"; Tucker, "~~Hayek on Patents and Copyrights~~"; Salerno, ~~Hayek Contra Copyright Laws~~ [↩]
34. U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, *An Economic Review of the Patent System*, 85th Cong., 2nd Session, 1958, Study No. 15 (text excerpt) ["Report to the US congress from 1958, which also extensively narrates the history of the patent movement and of earlier economic research on this subject. Machlup, a renowned American economist of Austrian origin, is the first author of a large treatise on knowledge economics and other treatises which belong to the teaching repertoire of economics departments in universities. His report cites a wealth of historical and economic evidence to refute most of the reasoning used by lawyers to legitimate the patent system."]; Fritz Machlup & Edith Penrose, "~~The Patent Controversy in the Nineteenth Century~~," *Journal of Economic History* 10 (1950), p. 1 [↩]
35. LeFevre on Intellectual Property and the "Ownership of Intangibles" [↩]
36. KOL 037 | Locke's Big Mistake: How the Labor Theory of Property Ruined Political Theory; "The Intellectual Property Quagmire, or, The Perils of Libertarian Creationism" (Powerpoint; PDF version), Austrian Scholars Conference 2008 ~~Rothbard Memorial Lecture~~ (audio; ~~video~~; ~~Google Video version~~); Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and "Rearranging"; ~~Libertarian Creationism~~; Rand on IP, Owning "Values", and "Rearrangement Rights"; Locke, Smith, Marx and the Labor Theory of Value. [↩]
37. see Cordato and Kirzner on Intellectual Property [↩]
38. Kraft & Hovden claim Narveson is anti-IP but this is incorrect. In *The Libertarian Idea* he hints are being pro-IP ("Those who produce information produce a useful product, and it can be bought and sold, spawning its own particular technologies and organizational problems (copyright questions, for instance). p. 218"); see also Jan Narveson – A Defense of Intellectual Property Rights and "Privacy, Intellectual Property, and Rights." [↩]
39. See references in Remembering Tibor Machan, Libertarian Mentor and Friend: Reflections on a Giant . [↩]
40. see Mackaay, Ejan. "Economic Incentives in Markets for Information and Innovation." In "Symposium: Intellectual Property," *Harvard Journal of Law & Public Policy* 13, no. 3 (Summer 1990), at p. 869. [↩]
41. See Gary North on the 3D Printing Threat to Patent Law. [↩]
42. See KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished. [↩]
43. Brevets d'invention, droits de reproduction et propriété intellectuelle, Patents, Reproduction Rights and Intellectual Property [↩]
44. "Economic Incentives in Markets for Information and Innovation". See also ~~Legal Hybrids: Beyond Property and Monopoly?~~ and *Law and Economics for Civil Law Systems*, pp. 358 *et seq*. [↩]
45. David Friedman on Intellectual Property; also KOL377 | No Way Jose Ep. 140: David Friedman Debate Prep: Deontology vs. Consequentialism, Utilitarianism, Natural Rights, Argumentation Ethics, Intellectual Property; David Friedman on the "Problem" of Piracy; David Friedman on Copyright; David Friedman: Current Experiments in Self Publishing. [↩]
46. Replies to Neil Schulman and Neil Smith re IP; Kinsella v. Schulman on Logorights and IP; Schulman: Kinsella is "the foremost enemy of property rights" ; Query for Schulman on Patents and Logorights [↩]
47. Shughart's Defense of IP; Independent Institute on The "Benefits" of Intellectual Property Protection [↩]
48. See ch. 31 of *The Adventures of Jonathan Gullible*; and "Exercising the Mind: An open marketplace of ideas is the best mechanism for reaching the truth," *Honolulu Star-Bulletin*, November 3, 2002. [↩]
49. He's pro-defamation law and I was told he is also pro-IP; see facebook and twitter [↩]

50. Replies to Neil Schulman and Neil Smith re IP; Kinsella v. Schulman on Logorights and IP; Schulman: Kinsella is "the foremost enemy of property rights" ; Query for Schulman on Patents and Logorights [↩]
51. Ridley, *The Rational Optimist*, ch. 8: "there is little evidence that patents are really what drive inventors to invent. Most innovations are never patented. In the second half of the nineteenth century neither Holland nor Switzerland had a patent system, yet both countries flourished and attracted inventors. And the list of significant twentieth century inventions that were never patented is a long one. It includes automatic transmission, Bakelite, ballpoint pens, cellophane, cyclotrons, gyrocompasses, jet engines, magnetic recording, power steering, safety razors and zippers. By contrast, the Wright brothers effectively grounded the nascent aircraft industry in the United States by enthusiastically defending their 1906 patent on powered flying machines. In 1920, there was a logjam in the manufacture of radios caused by the blocking patents held by four firms (RCA, GE, AT&T and Westing house), which prevented each firm making the best possible radios. …"In the 1990s the US Patent Office flirted with the idea of allowing the patenting of gene fragments, segments of sequenced genes that could be used to find faulty or normal genes. Had this happened, the human genome sequence would have become an impossible landscape in which to innovate." See also *How Innovation Works: And Why It Flourishes in Freedom*, ch. 11, section "When the law stifles innovation: the case of intellectual property": "there is no evidence that there is less innovation in areas unprotected by patents. … none of the following technologies were patented in any effective way: automatic transmission, power steering, ballpoint pens, cellophane, gyrocompasses, jet engines, magnetic recording, safety razors and zippers. … All in all, the evidence that patents and copyrights are necessary for innovation, let alone good for it, is weak. There is simply no sign of a '**market failure**' in innovation waiting to be rectified by intellectual property, while there is ample evidence that patents and copyrights are actively hindering innovation. As Lindsey and Teles put it, the holders of intellectual property are 'a significant drag on innovation and growth, the very opposite of IP law's stated purpose'." [↩]
52. See discussion in my post "Aggression" versus "Harm" in Libertarianism; also J.C. Lester: "Against Against Intellectual Property: A Short Refutation of Meme Communism" [↩]
53. Independent Institute on The "Benefits" of Intellectual Property Protection. [↩]
54. Tabarrok: Patent Policy on the Back of a Napkin; Tabarrok: Defending Independent Invention; Tabarrok's *Launching the Innovation Renaissance*: Statism, not renaissance; Tabarrok on Ideas and Prosperity [↩]
55. See When Rights Collide: Principles to Guide the Intellectual Property Debate; also Reply to Adam Thierer on Net Neutrality and IP and Cato, Lessig, and Intellectual Property and Independent Institute on The "Benefits" of Intellectual Property Protection. [↩]
56. see Huemer vs. Epstein on Intellectual Property [↩]
57. KOL 038 | Debate with Robert Wenzel on Intellectual Property [↩]
58. KOL076 | IP Debate with Chris LeRoux ; Can you own ideas? Chris LeRoux debates Daniel Rothschild. [↩]
59. "Locke's Big Mistake: How the Labor Theory of Property Ruined Economics and Political Theory," *Liberty in the Pines* Conference (March 2013). [↩]
60. Silas Barta: The shortest, safest libertarian case [sic] for IP. Re his nyms, he once confirmed this to me: "I also post at these places. (Usual handle in parentheses.) Asymmetric information, Megan McArdle's blog (Person) Marginal Revolution (Person)
    Overcoming Bias (Silas) Kip Esquire's blog, A Stitch in Haste (Silas)
    econlog.econlib.org (none, banned) economiclogic.blogspot.com (johnsharp9)" [↩]

There's No Such Thing As a Free Patent

TAGS Legal SystemMonopoly and Competition

03/07/2005 Stephan Kinsella

The conventional defense of the patent system is that it is essential in order to stimulate creativity.[1] For example, in "Don't Believe the Hype" (Feb. 2005, *IP Law & Business*), patent attorneys John Benassi & Noel Gillespie conclude that our patent laws continue to "foster innovation." This is so even though many observers believe our patent system is "out of control and that overworked patent examiners are issuing overly broad patents."

Costs Must Be Considered

But the benefits that flow from the patent system are only half the story, since the system also comes with costs. Even if we are going to adopt a wealth-maximization criterion (which is, admittedly, problematic),[2] we must compare the costs to the benefits to know whether the system is worth having at all.

If costs are not taken into account, there are no limits to what could be done to encourage innovation. Some, for example, suggest replacing the patent system with a federal commission that gives taxpayer-funded rewards to inventors deemed worthy. "Under a reward system, innovators are paid for innovations directly by the government (possibly on the basis of sales), and innovations pass immediately into the public domain. Thus, reward systems engender incentives to innovate without creating the monopoly power of intellectual property rights."[3]

Other activists, from the

> free culture movement, cloak a radical agenda beneath their innocuous idea that 'information wants to be free.' They demand that nations (and even individual U.S. states) pass legislation requiring purchase of open-source software. They are uncomfortable with corporations directing investment in research and development and owning their innovations. . . . The activists thus want to radically change how pharmaceutical innovation is accomplished. They propose that governments should nationalize intellectual property, levy new taxes to fund R&D, and then incentivize R&D through prizes administered by new government-sponsored enterprises or, even better, international nongovernmental organizations (NGOs) staffed by technocrats unaccountable to voters.[4]

Transferring money from taxpayers to inventors would no doubt "foster innovation," but would the extra innovation thereby stimulated be worth the cost?

Patent rights could also be strengthened in order to provide an even greater stimulus for innovation. The patent term could be extended to 100 years, for example (some IP proponents, such as Galambos, actually favor a perpetual patent term).[5] The promise of four decades of additional monopoly profits would arguably stimulate even more innovation by pharmaceutical companies. Patent infringement could be made into a criminal offense, punishable by jail or even capital punishment; or treble damages, awarded now only in egregious cases of "willful infringement," could be awarded routinely. The scope of coverage of patent claims could be legislatively broadened to cover a greater range of "equivalents." Each of these changes, viewed in a vacuum, makes patents more valuable and thus establishes additional incentives to invest in R&D. Why not adopt all these innovation-encouraging measures, and more? Where is the stopping point?

If the patent system is to be a net benefit to society, the gains it provides (the extra wealth and innovations the system stimulates) should be greater than its costs, according to standard law and economics "wealth-maximization" reasoning. As Landes and Posner—deans of the law and economics approach—point out, innovators themselves engage in a similar calculus: "For a new work to be created *the expected return . . . must exceed the expected costs*."[6]

In other words, the theory is that the innovator will engage in innovating activity only when he believes he can reap a profit. And the very point of a patent system is to make it easier for inventors to earn a profit, so that more of them will invest time and resources trying to innovate.

Likewise, the entire patent system's "gains"—the extra wealth or innovation it stimulates—needs to be clearly greater than the costs of the system if the patent system is to be a net benefit to society. How we are to go about measuring such costs against the benefits, and include the opportunity costs of time, is a crucially important issue. But if one is going to advocate a system on the grounds that it is beneficial, one must attempt to account for costs as well.

What Costs Are There?

And there are clearly costs to the system. Indeed, some of the purported "benefits" cited by Benassi and Gillespie may really be costs. They note, for example, that venture capitalists insist on a strong patent portfolio when evaluating whether to invest in a company. But this is because, in part, patent portfolios are necessary to defend against other companies' portfolios. If there were no patent system, one would not need to defensively spend money building up a mountain of patents to use in counterclaims or cross-licensing negotiations.

The authors also acknowledge that, "Unfortunately, there are companies that make no products and whose only business is to acquire patents in order to enforce them against large industry segments." This may be "unfortunate" in the authors' eyes, but it is a predictable, unavoidable consequence of having a patent system. Such patent holders can no more be said to be "abusing" their rights than are other patent holders. In any event, this is also apparently a "cost" of the patent system, at least according to the authors.

Other costs can also be noted. Companies pay patent attorney salaries, patent filing and maintenance fees, and significant litigation costs (it can easily cost over a million dollars to defend from a patent infringement lawsuit, even if you win), as well as higher insurance premiums due to the risk of being involved in patent infringement litigation. Some patents that should not have been granted, and others whose coverage is ambiguous, plus the unknown existence of some hidden patent lurking in the thousands granted to date, pose significant uncertainty to companies, especially high-tech start-up companies who cannot afford to risk a patent infringement lawsuit from a more established company. They might not even be able to afford to pay tens of thousands of dollars to patent attorneys to examine and issue an opinion regarding every potential patent issue that arises. So the company either forges ahead, risking a lawsuit, or decides to avoid making the product out of fear of litigation.

Some even argue that innovation is diminished by a patent system: perhaps companies would have an even greater incentive to innovate if they could not rely on a near twenty-year monopoly.[7] Another cost arises from the fact that patents can be obtained only for "practical" applications of ideas, but not for more abstract or theoretical ideas. This skews resources away from theoretical R&D and toward practical gizmos and applications, which surely has some cost as well.[8] As Rothbard noted,

> It is by no means self-evident that patents encourage an increased absolute quantity of research expenditures. But certainly patents distort the *type* of research expenditure being conducted. . . . Research expenditures are therefore *overstimulated* in the early stages before anyone has a patent, and they are *unduly restricted* in the period after the patent is received. In addition, some inventions are considered patentable, while others are not. The patent system then has the further effect of artificially stimulating research expenditures in the *patentable* areas, while artificially restricting research in the *nonpatentable* areas.[9]

Plant, in his excellent paper, notes several costs of the patent system that are typically ignored by advocates of it. For example, he relates (p. 39) the theory of one I.K. Brunel who maintained that patent laws induce people to spend more time and effort trying to come up with patentable inventions, and relatively less time on making "improvements, and refinements of a non-patentable kind," thus wasting resources--and actually slowing down development because the workers are engaging not in the types of innovations they need for their product development but rather in things that satisfy the patent office.

As Julio Cole points out in his superb article:

> Apart from the considerable administrative costs and legal expenses associated with patent litigation, perhaps the most obvious economic cost of a patent system is that, in order to create incentives for the production of inventions that otherwise would not have been developed, patents create monopoly privileges over inventions that would have been developed even without the incentive. . . . The existence of patents also induces wasteful expenditure of resources by competitors trying to 'invent around the patent,' i.e., to develop competing products that are sufficiently differentiated so as not to infringe on an existing patent. [p. 89 & 92, footnotes omitted]

Cole also discusses other costs of the patent system, including the way that patents can actually hinder technical progress, such as in the case of Henry Ford and the Wright brothers. Cole also relates (p. 91) that "For nearly a quarter of a century . . . James Watt was able to prevent other engineers from constructing new types of steam engine, even under license from himself." At least one historian argues that the Industrial Revolution did not really take off until 1785, the year Watt's patent expired."

Undeniably, the very existence of a patent imposes significant costs on society.

Conclusion

To note that there are costs is not to claim that the patent system costs too much. In fact, there is no real way to accurately know what these costs are, which is why we should leave it to the market and to entrepreneurs themselves to assess and forecast costs and benefits, and pay the price or reap the reward for their judgment. A pure market in this case would be one that does not award a monopoly privilege to a person or institution merely because a paper is filed with the government.

In any event, it is incumbent on those who claim the patent system bestows benefits on society to be forthright in acknowledging the costs of obtaining the desired results. They should enumerate the costs, and the benefits, and explain why it is clear that the latter exceeds the former.

This is, unfortunately, something patent advocates never do. They simply assume that the amount of wealth or innovation or other social benefit proxy that the patent system facilitates is necessarily much greater than the (obviously non-zero) costs of such a system. Why this assumption? To my knowledge, studies have not conclusively established that the benefits of the patent system outweigh its costs.[10] It is just assumed. It should not be.

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1. The Constitution, Art. I, § 8, is based on such reasoning, in granting Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Another goal of the patent system is to disseminate knowledge that would otherwise be kept secret. The idea is that, instead of keeping an invention as a trade secret, the inventor, in exchange for the limited monopoly on the invention, makes the information about it public in a published patent, that others can learn from, even if they can't yet *use* the patented device or process.
2. See, e.g., the section on "Utilitarianism" in N. Stephan Kinsella, In Defense of Napster and Against the Second Homesteading Rule, September 4, 2000, *LewRockwell.com*; N. Stephan Kinsella, Against Intellectual Property, *Journal of Libertarian Studies*, Volume 15, no. 2 (Spring 2001): 1–53, at pp. 12–14.
3. See Steven Shavell & Tanguy Van Ypersele, Rewards Versus Intellectual Property Rights, *Journal of Law & Economics*, vol. XLIV (October 2001), p. 525.
4. Tom Giovanetti, "Intellectual property and its discontents," *Washington Times*, 14 Oct. 2004.
5. See the discussion of Galambos in Kinsella, Against Intellectual Property.
6. William M. Landes & Richard A. Posner, "An Economic Analysis of Copyright Law," *J. Legal Stud.* (June 1989) (emphasis added).
7. See especially the section "Costs of the Patent System" in Julio H. Cole, Patents and Copyrights: Do the Benefits Exceed the Costs?, *Journal of Libertarian Studies,* v. 15, no. 4 (Fall 2001), pp. 79–105 for further examples.
8. See on this Arnold Plant, "The Economic Theory Concerning Patents for Inventions," in Selected Economic Essays and Addresses (London: Routledge & Kegan Paul, 1974), p. 43 (originally published in *Economica*, New Series, vol. 1, no. 1, Feb., 1934, 30–51).
9. Murray N. Rothbard, *Man, Economy, and State*, scholar's ed'n (Auburn: Mises Institute, 2004), ch. 10, sec. 7.
10. See, e.g., Petra Moser, "How Do Patent Laws Influence Innovation? Evidence from Nineteenth Century World Fairs," NBER Working Paper 9099 (August 2003) (examines innovations exhibited at World's Fairs during the 19th century and concludes that countries with patent systems do not have a higher rate of innovation per capita, but that patents affect the industries in which different countries make their innovations); Cole, Patents and Copyrights: Do the Benefits Exceed the Costs?; Lawrence Lessig, *The Future of Ideas* (2001); Padraig Dixon and Christine Greenhalgh, The Economics of Intellectual Property: A Review to Identify Themes for Future Research (November 2002); Fritz Machlup, U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, *An Economic Review of the Patent System*, 85th Cong., 2nd Session, 1958, Study No. 15; Fritz Machlup and Edith Penrose, "The Patent Controversy in the Nineteenth Century," *Journal of Economic History* 10 (1950), p. 1; Roderick T. Long, "The Libertarian Case Against Intellectual Property Rights," *Formulations* 3, no. 1 (Autumn 1995); Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs," *Harvard Law Review* 84 (1970), p. 281; Wendy J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory," *Stanford Law Review* 41 (1989), p. 1343; and Jesse Walker, "Copy Catfight: How Intellectual Property Laws Stifle Popular Culture," *Reason* (March 2000). Other IP resources are found here.

Radical Patent Reform Is *Not* on the Way

TAGS Legal SystemMonopoly and CompetitionPhilosophy and MethodologyPrivate Property

10/01/2009 Stephan Kinsella

"Calls for abolition of the patent system — especially those coming from a principled, rights-based approach — are very unlikely to be adopted at the present time."
[This paper is the first of a two-part series. The concluding article is "Reducing the Cost of IP Law"]
Hardly a day passes when we do not hear of one patent abuse or another.[1] Ridiculous patents are issued or filed and companies are enjoined from selling their products. Judgments are issued, and settlements reached, for billions of dollars. (See the Appendix for examples of ridiculous patents and outrageous judgments.) Not surprisingly, there is a growing demand for reform of our patent system.[2]

Whether their demands are modest or radical, the reformers share the belief that the patent system is broken; has gotten out of hand; and is not in sync with our fast-paced, high-tech, open-sourced, digitized world — in short, that it needs to be fixed.

At first glance, it might appear that change is already under way. In recent years the Supreme Court has issued a spate of decisions cutting back patent protection or making it more difficult to obtain patents. One of the most significant cases, *KSR v. Teleflex*, raised the "obviousness" bar. This raised the standards for getting a patent, and also made it easier to challenge the validity of issued patents.[3]

In *eBay v. MercExchange*, the Court made it more difficult to get injunctions against the alleged infringer (alas, too late for poor BlackBerry). The *MedImmune* decision made it easier for licensees to challenge the validity of patents they had previously licensed. *Microsoft v. AT&T* restricted the global reach of US patent law.[4]

And the Court of Appeals for the Federal Circuit (CAFC) — the sole appellate court for patent cases since its creation in 1982 — changed the standard for "willful infringement" in the *Seagate* case, making it harder to obtain enhanced (treble) damages. Most recently, in *Quanta v. LG Electronics*, decided in June 2008, the Supreme Court refined the "patent exhaustion" doctrine to make it more difficult for patentees to extract royalties from multiple parties for the same device or process.[5]

The U.S. Patent & Trademark Office (PTO) has also entered the fray. In August 2007, the PTO released new rules for patent practice that limit how many times a patent application can be "renewed" and also limit the number of "claims" in a patent application (these rules were enjoined just before taking effect, due to a suit from British drug maker GlaxoSmithKline).[6]

Finally, Congress has been considering various amendments to the Patent Act.Download PDF[7] Possible changes include switching from a "first-to-invent" to a "first-to-file" system, reducing damage awards, reducing forum shopping, and making it easier to challenge issued patents.[8]

Plus Ça Change, Plus C'est La Même Chose

According to the organized patent bar and intellectual property (IP) advocates, these recent and proposed developments are "radical." In other words, they go too far.

Patent attorney John R. Harris, for example, ominously intones:

> The U.S. has the best patent system in the world. What I'm afraid of is that they are about to throw the baby out with the bathwater.… The new rules are radical. The new legislation is radical. They will cause fewer patents to be issued.[9]

But the truth is that none of the developments noted above are really that dramatic. Patent law is always evolving due to court decisions, new rules issued by the PTO, and new legislation from Congress. Consider this brief sample of notable events in the history of patent law:

Date	Patent Law Development
13.7 billion years ago	God invents the universe. He does this without permission of anyone else. He doesn't look in the Celestial Patent Office filings first to make sure he is in the clear.
1.9 million years ago	Grog invents using fire to cook food. Arrgg sees this and imitates it. Soon, the practice spreads. Ditto with living in caves, using spears to kill animals, building "houses," and dressing in cured animal hides. Nobody sues anybody. No patent system has been invented yet.
1474–1700s	Sovereigns grant exclusive rights (monopolies) as a way to raise money without having to raise taxes. Strangely, nobody gets a patent on the idea of granting monopolies.
1789	US Constitution authorizes Congress to grant to "Authors and Inventors the exclusive Right to their respective Writings and Discoveries" "for limited Times" in order "To promote the Progress of Science and useful Arts."
1790	First Patent Act.
1873	Patent exhaustion doctrine clearly established in *Adams v. Burke*.
1912	*Henry v. A.B. Dick Co.* confuses the exhaustion rule with the separate doctrine of "implied license."
1917	1912 decision (above) overruled by *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*
1930	*Popular Science Monthly* claims that the Patent Office "has become a national disgrace" because of the backlog of unprocessed patent applications. This complaint is still being made in 2009.
1942	*United States v. Univis Lens Co.* case harmonizes the exhaustion doctrine with the related law of contributory infringement.
1952	Congress significantly revises patent law, changing various aspects of settled law, e.g., in the areas of misuse and contributory infringement; it also codifies the exhaustion rule of *Univis*.[10]
1954	Congress amends patent law to allow patents on plants.
1966	*Graham v. John Deere* "clarifies" obviousness standards.
1978	Patent Cooperation Treaty enters into force.
1982	The Court of Appeals for the Federal Circuit (CAFC) is established and given exclusive appellate jurisdiction in patent cases. This leads to the unification of patent law and the strengthening of patents and patent protection.[11]

Date	Patent Law Development
1992	CAFC in *Mallinckrodt, Inc. v. Medipart, Inc.* *Download PDF* again conflates exhaustion and implied license doctrine as in the overruled 1912 case, *A.B. Dick*. Exhaustion doctrine to be modified yet again in 2008 *Quanta Computer v. LG Electronics* case (below).
1994	CAFC's *In re Donaldson* decision requires the "means-plus-function" test used during patent litigation to be applied by the PTO during patent prosecution as well.
1994–1995	Patent law is amended pursuant to GATT: patent terms changed from seventeen years from the date of issue to twenty years from date of filing. The right to file "provisional" patent applications is established.[12]
1995–1998	Revised PTO examination guidelines, and cases such as *Alappat* and *State Street*, make it easier to obtain patents on business methods as well as software and computer-implemented inventions.[13]
1996	In *Markman v. Westview Instruments*, Supreme Court declares that patent claim interpretation is a matter of law, not a question of fact; this leads to the "Markman hearings."
1997	35 USC 287(c) added to Patent Act Download PDF to exempt certain surgical methods from patent liability.[14]
1999	The Intellectual Property and Communications Omnibus Reform Act of 1999 enacts "most significant changes" in U.S. Patent law since the 1952 Patent Act, according to PTO Commissioner Dickinson. Changes include early publication of pending-patent applications and a limited first inventor (prior user) defense for prior users of business methods.
2002	*Festo* case revises the "doctrine of equivalents."
2006	*MedImmune* makes it easier for licensees to challenge the validity of patents. *eBay v. MercExchange* makes it more difficult to get injunctions against patent defendants.[15]
2007 (April)	*Microsoft v. AT&T* restricts the global reach of US patent law. *KSR v. Teleflex* tightens "obviousness" standards, raising the bar for obtaining a patent, and making it easier to challenge the validity of an existing patent.
2007 (August)	CAFC in *Seagate* changes the standard for "willful infringement," making it more difficult to obtain enhanced (treble) damages.
2007 (August)	PTO releases new rules for patent practice that limit how many times a patent application can be "renewed" and also limit the number of "claims" in a patent application.
2007 (September)	Congress poised to enact amendments switching from a "first-to-invent" to a "first-to-file" system, reducing damage awards, making it easier to challenge issued patents, and reducing forum shopping.
2007 (September)	*Comiskey* and *Nuitjen* cases make it more difficult to claim mere "signals" and also seem to choke back on software, internet, and business method patents.[16]

Date	Patent Law Development
2008 (June)	In *Quanta Computer v. LG Electronics*, the Supreme Court arguably overturns *Mallinckdrot* (1992) and clarifies the exhaustion doctrine yet again — making it more difficult for patentees to extract royalties from multiple parties for the same device or method.[17]
2008 (October)	The CAFC in *In re Bilski* further modifies the patentability test for software or business-method patents, partially overruling *State Street*.[18]

As can be seen, since the inception of modern US patent law in 1790, the field has been continually in flux. There is no reason to single out the last few years. Modern patent law has evolved for over two hundred years and will continue to do so. Indeed, frequent and arbitrary change in the law, and the uncertainty that this breeds, is common in state-run, legislation-dominated legal systems.[19] The fact that state law changes is not new.

But though various details of the patent system continue to morph pursuant to political pressures and legal trends, the essential aspects of the patent system have not changed at all: The scope of what is patentable has not shrunk appreciably. The term is still about seventeen years. Patents are still enforceable by injunction. The groundless presumption of validity is alive and well.

Patent defendants who win usually pay their own legal fees, as before. Defending patent lawsuits continues to be incredibly expensive. Lobbying goes on as before. Companies continue to need to obtain patents if only for defensive purposes.

Obviousness and novelty remain the standards for patentability — and these standards are still vague, nonobjective, and subject to unpredictable interpretation by an inept and bureaucratic government agency, by state courts, and by technically inept juries. And the patent system is still widely believed to be legitimate and necessary even while it is widely derided as seriously flawed.

"There is no reason to single out the last few years. Modern patent law has evolved for over 200 years and will continue to do so."
And so, for the foreseeable future, companies will continue to spend lots of money obtaining patents. And small businesses will still face the threat of patent-infringement lawsuits and court-ordered injunctions that could put them out of business.[20] And these suits will continue to cost literally millions of dollars to defend. "Bad" patents will keep being granted, and various patentability standards will always be murky, arbitrary, and uncertain.

This is not to say that recent changes will not be felt at all. Patent attorneys, for example, can expect to see more business as a result of all this legal turmoil.[21] (Why many of them are complaining about these developments is a mystery.)Download PDF

But other than more money being spent on patent attorneys and a relatively small, probably temporary, shift in the balance of power between patentees and alleged infringers, the patent system has not radically changed. All of the problems noted above stem from the basic nature of the patent system. They will not recede by merely tinkering with details and leaving the essential features of the system intact.[22]

Principle v. Pragmatism; Abolition v. Revision

What adjustments, then, should be made to our current patent laws? The answer to this question depends, in part, on one's basic approach to law. Most people with an opinion on IP policy — both pro and anti — have a *utilitarian* mindset. They favor or oppose various patent policies based on whether or not these policies produce more societal wealth, in the form of extra innovation worth more than the cost of the system.

Others favor or oppose patent rights on more principled or deontological (rights-based) grounds. Some of them, such as Ayn Rand, argue that patent rights are important property rights;[23] others maintain that patents should be abolished precisely because they *undercut* property rights.[24]

As for the latter position — yes, property rights are indeed undercut by patents. And even on utilitarian grounds, it could be argued that the patent system imposes an overall net cost on the economy,[25] and should therefore be abolished or radically curtailed. It is apparent, however, that the patent system is very entrenched, as is the wealth-maximization approach to policy making.

Calls for abolition of the patent system — especially those coming from a principled, rights-based approach — are very unlikely to be adopted at the present time. In my forthcoming paper, therefore, I recommend certain changes to the patent system short of abolition, assuming a general "costs-and-benefits" approach.

Accordingly, to determine what adjustments ought to be made to the patent system (again, putting arguments for abolition on principled grounds to the side), we need a sufficiently clear understanding of the nature and extent of the costs imposed by the system, as well as its alleged benefits. With this in mind, the forthcoming paper suggests a laundry list of obvious changes that should be made to the patent system to reduce its costs with only minimal impact on its purported advantages. Stay tuned.

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This paper is the first part of a two-part series. The concluding article is "Reducing the Cost of IP Law," *Mises Daily* (Jan. 20, 2010).

Appendix: Examples of Outrageous Patents and Judgments

Examples of (at least apparently) ridiculous patents and patent applications abound (more at PatentLawPractice):

- Amazon's "one-click" patent, asserted against rival Barnes & Noble;
- Cendant's assertion that Amazon violated Cendant's patent monopoly on recommending books to customers (since settled);
- The attempt of Dustin Stamper, Bush's Top Economist, to secure a patent regarding an application for a System And Method For Multi-State Tax Analysis, which claims "a method, comprising: creating one or more alternate entity structures based on a base entity structure, the base entity structure comprising one or more entities; determining a tax liability for each alternate entity structure and the base entity structure; and generating a result based on comparing each of the determined tax liabilities";
- Apple's patent application for digital Karaoke;
- the suit against Facebook by the holder of a patent for a "system for creating a community for users with common interests to interact in";
- the "absurdly broad patent [issued to Blackboard] for common uses of technology if that technology is employed in the context of education" (see also Patent Office Rejects Blackboard E-Learning Patent One Month After It Wins Lawsuit, *Techdirt* (Mar. 31, 2008);
- Compton's (now Encyclopedia Britannica's) patent that "broadly cover[s] any multimedia database allowing users to simultaneously search for text, graphics, and sounds — basic features found in virtually every multimedia product on the market";
- Carfax's patent on a "method for perusing selected vehicles having a clean title history";
- Acacia's patent for putting a unique transaction number on a receipt;[26]
- Pat. No. 6,368,227, covering swinging sideways on a swing;

The Supreme Court, in the 1882 case *Atlantic Works v. Brady*, 107 US 192, itself lists examples of patents issued to "gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge … the simplest of devices." These included

- a particular doorknob made of clay rather than metal or wood, where differently shaped doorknobs had previously been made of clay;
- making collars of parchment paper where linen paper and linen had previously been used;
- a method for preserving fish by freezing them in a container that operates in the same manner as an ice-cream freezer.
- rubber caps put on wood pencils to serve as erasers;
- inserting a piece of rubber in a slot in the end of a wood pencil to serve as an eraser;
- a stamp for impressing initials in the side of a plug of tobacco;
- a hose reel of large diameter so that water may flow through the hose while it is wound on the reel;
- putting rollers on a machine to make it movable;
- using flat cord instead of round cord for the loop at the end of suspenders;
- placing rubber hand grips on bicycle handlebars;
- an oval rather than cylindrical toilet paper roll, to facilitate tearing off strips.

Below are a few notable or recent examples of large, significant, troubling, or apparently outrageous injunctions, damages awards, and the like:

- Qualcomm has been enjoined from importing chips that help conserve power in cell phones (discussion; latest developments). See also Eric Bangeman, ITC to Bar Import of New Handsets in Patent Dustup, *ars technica* (June 7, 2007); Nokia's Patent-Licensing Case against Qualcomm Dropped by Dutch Court, *engadget* (Nov. 14, 2007); Broadcom Wins Major Injunction against Qualcomm, *engadget* (Dec. 31, 2007); ITC Upholds Ruling, Reiterates that Nokia Didn't Violate Qualcomm Patents, *engadget* (Feb. 29, 2008).
- Texas-Sized Patent Win, *Texas Lawyer* (Feb. 21, 2008). A New Jersey doctor was awarded $432 Million as a "reasonable royalty" against Boston Scientific for infringing his "Method and Apparatus for Managing Macromolecular Distribution."
- Smartphones Patented … Just About Everyone Sued 1 Minute After Patent Issued, *Techdirt* (Jan. 24, 2008).
- Farmer David Reaps What He Has Sown: A Patent Suit, *Patent Baristas* (Feb. 13, 2008) Even though "the practice of saving seeds after a harvest to plant the next season is as old as farming itself," patents prevent farmers from saving patented seeds.
- Apple, Starbucks Sued over Custom Music Gift Cards, *AppleInsider* (Feb. 20, 2008) A Utah couple sue Apple and Starbucks over their "'Song of the Day' promotion, which offers Starbucks customers a iTunes gift card for a complimentary, pre-selected song download." The suit is based on a patent on a "retail point of sale for online merchandising" which allows customers to buy a gift card from a brick-and-mortar store and then go home and redeem the card online.
- Apple Sued Over Caller ID on the iPhone, *Techdirt* (Feb. 27, 2008). The patent is on "matching up the phone number of an incoming call with a local contact database to display who is calling."
- The new 802.11n Wi-Fi standard (which promises to significantly increase Wi-Fi speed and range) is in jeopardy due to patent threats. See Bill Ray, Next Generation Wi-Fi Mired in Patent Fears, *The Register* (Sept. 21, 2007).
- SanDisk Sues 25 Companies for Patent Infringement: "Suits have been filed against 25 companies by the SanDisk corporation this week, as the company looks to stop businesses from shipping products it alleges are infringing on its work. SanDisk has filed suits against everyone from MP3 player manufacturers to USB hard drive creators. The list of defendants is staggering, and MacWorld notes if Sandisk succeeds it could have repercussions outside of the courtroom.… The court … complaints could affect the prices and availability of products made by companies targeted in the suit if SanDisk wins and the companies are barred from importing products into the U.S."
- Patent Office Upholds Tivo's "Time Warp" Patent, EchoStar Not so Happy, *engadget* (Nov. 29, 2007); see also *Tivo Inc. v. EchoStar Communications Corp.* (S. D. Tex., Dec. 2, 2006); and TiVo Wins on Appeal: Permanent Injunction against EchoStar to be Reinstated, *Patently-O* (Jan. 31, 2008).
- Jacqui Cheng, U R SUED: Patent Holding Company Targets 131 Companies over SMS patents, *ars technica* (Nov. 13, 2007).

- The International Trade Commission (ITC) may ban imports of many popular hard drives that "are alleged to infringe on patents owned by California residents Steven and Mary Reiber related to a 'Dissipative ceramic bonding tool tip.'" Jacqui Cheng, Hard Times for Hard Drives: US May Ban Popular Imports, *ars technica* (Oct. 11, 2007).
- The VoIP phone service Vonage may be put out of business by patents. Sprint recently won a patent case against Vonage in which $69.5 million was awarded in damages. Sprint had planned "to ask the court to permanently ban Vonage from using its patented technology," but the case was subsequently settled for $80 million. However, in a separate patent lawsuit between Verizon and Vonage, the jury found that Vonage had violated three Verizon patents, and awarded Verizon $58 million in damages plus ongoing royalties. Vonage claims it has developed workarounds for two of the patents. See Kim Hart, Sprint Wins Patent Case Against Vonage: Reston Firm Awarded $69.5 Million in Second Blow to Internet Phone Company, *Washington Post* (Sept. 26, 2007); Peter Svensson, Vonage Settles Patent Suit with Sprint, *BusinessWeek* (Oct. 8, 2007). Latest: Vonage Settles with Verizon, Owes Up to $117.5 Million; Vonage, Nortel Call a Truce — No Cash Changing Hands, *engadget* (Dec. 31, 2007).
- Kinsella, Revolutionary Television Design Killed by Patents (2007).
- BlackBerry's manufacturer, RIM, was forced to cough up $612.5 million after NTP used patent law to threaten to shut RIM down.
- Microsoft was on the receiving end of a $1.5 *billion* jury verdict for infringing an MP3 patent held by Alcatel-Lucent (which was recently overturned).
- After Kodak sought more than $1 billion in damages from Sun Microsystems for patent infringement, Kodak finally settled for $92 million. (And according to one colleague, the verdict resulted "in the immediate shutdown of Kodak's entire instant photography division, with the immediate loss of 800 jobs. And, some say, the eventual failure of Polaroid due to lack of any real competition to keep them on their toes!")
- In another recent case, Freedom Wireless obtained a $150 million damages award against Boston Communications Group, Inc., which at the time had revenues of only about $100 million. In this case, the judge also refused to stay the injunction issues against BCGI (and by extension, its customers) pending appeal.
- Smith International was forced to pay Hughes Tool Company $204.8 million for infringement upon Hughes's patent for an "O-ring seal" rock bit, which led to Smith filing for chapter 11 bankruptcy protection (this was in 1986, when $200 million was considered a large patent verdict).
- As of March 2003, the top 5 patent infringement damage awards ranged from $873 million (*Polaroid v. Kodak*, 1991) to $204.8 million (*Hughes Tool v. Smith International*, 1986). The top 5 patent settlements ranged from $1 billion to $300 million. Damage Awards and Settlements, *IP Today* (March 2003) Download PDF; see also Gregory Aharonian, Patent/Copyright Infringement Lawsuits/Licensing Awards. Sadly, a $200 million verdict seems normal nowadays. The recent $156 million patent-infringement verdict against AT&T, for example — which could possibly be trebled by the judge — now looks like small potatoes.
- Other recent cases include a $1.67 billion patent infringement verdict in favor of Johnson & Johnson against Abbott; a $400 million settlement paid to Abbot, by Medtronic, regarding stent devices; and a $716 million settlement paid to Johnson & Johnson by Boston Scientific (cardiac stents again).

Notes

[1] A patent is a state-granted legal right in an "invention," such as a device or process that performs a "useful" function. It is obtained by filing a "patent application" with the US Patent and Trademark Office (USPTO). The patent gives the patentee the right to exclude, i.e., to prevent others from practicing the patented invention.

[2] See, e.g., Rick Merritt, Countervailing Forces Propel Patent Reform, *EETimes* (Sept. 17, 2007); Patti Waldmeir, US Moves to Reform Patent Laws, *Financial Times* (Sept. 8, 2007); Executive Office of the President — Office of Management and Budget, Statement of Administration Policy: H.R. 1908 — Patent Reform Act of 2007 (2) (Sept. 6, 2007) Download PDF; "Patent Reform Act of 2009," *Patently-O* (March 3, 2009); "Patent Reform 2009: Reactionary Causes," *Patent Baristas* (March 3, 2009); Council on Foreign Relations, Reforming the U.S. Patent System: Getting the Incentives Right (2006); Adam B. Jaffe & Josh Lerner, *Innovation and Its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What to Do About It* (2004); also Josh Lerner, The U.S. Patent Game: How to Change It (2004); Greg Blonder, Cutting Through the Patent Thicket, *BusinessWeek* (Dec. 20, 2005); Reed

Hundt, Patently Obvious, *Forbes* (Jan. 30, 2006); James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* (Princeton University Press, 2008); Patent Reform is Not Enough; A Proposal for Software Patent Reform; Patent Reform for a Digital Economy Download PDF and Real Patent Reform Download PDF, Computer & Communications Industry Association; Declan McCullagh, Patent Reform: Who's On First?, *ZDNet News* (Sept. 13, 2005). Other groups advocating reform or highlighting abuse include Free Software Foundation; Business Software Alliance; Foundation for a Free Information Infrastructure; Progress & Freedom Foundation; League for Programming Freedom; Electronic Frontier Foundation; Software Freedom Law Center; Coalition for Patent Fairness; End Software Patents; and the U.S. Chamber of Commerce.

Groups opposing significant change (in particular opposing the raising of the "obviousness" bar by the Supreme Court in *KSR v. Teleflex*, which made it harder to get a patent and easier to challenge an issued patent) include, not surprisingly (1, 2), legal and business interests such as the American Bar Association (ABA), the American Intellectual Property Law Association (AIPLA), the Federal Circuit Bar Association, the Franklin Pierce Law Center Intellectual Property Amicus Clinic, Intellectual Property Owners Association, Pharmaceutical Research and Manufacturers of America, the Manufacturing Alliance on Patent Policy (MAPP), and a descriptively-named group of "Practicing Patent Attorneys." Download PDF

See also the list of various IP groups providing comments on the PTO's proposed new rules of patent practice.

[3] Raising the bar for obtaining patents, while making them harder to obtain in the first place, may also make future patents more difficult to challenge, once they survive the more stringent examination requirements.

[4] On the *Microsoft v. AT&T* case, see also Patent Law: Baby Steps — Update; Microsoft v. AT&T: Extraterritorial Enforcement of US Patents.

[5] See Mike Masnick, Supreme Court Says Patent Holders Can't Shake Down Entire Supply Chain, *techdirt* (June 9, 2008); Supreme Court Decides *Quanta v. LG Electronics*, U.S. (2008), *Patently-O* (June 9, 2008); Justin Levine, Supreme Court continues its positive trend with patent law, *Against Monopoly* (June 9, 2008); Supreme Court Reverses CAFC in Quanta: Method Patents Exhaustible, *Peter Zura's 271 Patent Blog* (June 9, 2008); also Greg Stohr & Susan Decker, Quanta-LG Case at U.S. Supreme Court May Limit Patent Royalties, *Bloomberg.com* (Jan. 16, 2008); Supreme Court to Decide Patent Exhaustion Case, *Patently-O* (Sep. 25, 2007); Kinsella, Patent Exhaustion, *Mises Blog* (Feb. 1, 2008).

[6] See Court Blocks PTO Rules on Eve of Effective Date; All Four Equitable Relief Factors Suggest Injunction, *Patently-O* (Oct. 31, 2007). For the latest in this saga, see Stephen Albainy-Jenei, *Tafas v. Doll: War Without End*, *Patent Baristas* (July 8, 2009); Marcia Coyle, DOJ Seeks Stay on Suit Against New Patent Rules, *National Law Journal* (July 28, 2009).

[7] For recent status of pending patent reform legislation, see Patent Reform Act of 2009, *Patently-O* (March 3, 2009); Reid: Patent Reform a Top Priority (Sort Of), *The 271 Patent Blog* (Jan. 22, 2008); also Patently-O Bits and Bytes No. 12, *Patently-O* (Feb. 15, 2008) ("IPO reports a strong likelihood that no action will take place in the Senate until April 2008. In the meantime, the Reform Act is in secret revision in Senator Leahy's office.").

[8] The Eastern District of Texas, in particular, has been a popular choice for patent litigation due to its "rocket docket" and patentee-friendly juries. See What Does Forum Shopping In The Eastern District Of Texas Mean For Patent Reform? Download PDF; Why Did Blackboard File in East Texas; Judge Blocks Dynamic Web Patent Troll's "Forum Shopping." The draft amendments would impose strong limitations on venue, which would hamper the ability of patent plaintiffs to sue in this district. See Senator John Cornyn Press Release, Cornyn Pledges to Fight for Fairness for Eastern District of Texas Courts (July 13, 2007).

[9] Katheryn Hayes Tucker, GCs Draw Line in the Sand Over Changes to Patent Law, *Daily Business Review* (December 13, 2007). Harris goes so far as to raise the possibility of a patent-reform-caused depression: "If we're about to go into a recession and all of a sudden you kill innovation in the country, we might not have a recession. We might have a depression." How Harris knows we have "the best patent

system" is not explained; it's commonly believed among patent attorneys, for example, that European Patent Office examiners are much better than ours. See also Dennis Fernandez, 5 Reasons You Should No Longer Bother Getting U.S. Patents, *Intellectual Property Today* (February 2008).

[10] See Quanta's brief Download PDF in the *Quanta Computer v. LG Electronics* case.

[11] See Scott Atkinson, Alan Marco & John L. Turner, Uniformity and Forum Shopping in US Patent Litigation (2006); Matthew D. Henry & John L. Turner, The Court of Appeals for the Federal Circuit's Impact on Patent Litigation (2005) Download PDF; Robert Hunt, Patent Reform: A Mixed Blessing For the U.S. Economy? (1999). Download PDF

[12] See Kinsella, GATT and its Impact on Patents (2005). Download PDF

[13] *State Street* was partially overruled in 2008; see discussion of *In re Bilski* case, below. See also Kinsella, Computer Software Patents Are On The Way, Download PDF *SHSL IP Report* (Fall 1995); Stephan Kinsella & Robert E. Rosenthal, A New Traffic Cop at Intersection of Patents and Financial Inventions, Download PDF *The Legal Intelligencer* (February 5, 1998).

[14] See Kinsella, How to Operate Within the Law: Patents on Medical Procedures, *The Legal Intelligencer* (September 3, 1998). Download PDF

[15] However, it is still possible to obtain patent injunctions. See, e.g., Transocean v. GlobalSantaFe (S. D. Tex. Dec. 27, 2006) (permanent injunction granted; leading to acquisition of defendant by plaintiff); and *Tivo Inc. v. EchoStar Communications Corp.* (S. D. Tex., Dec. 2, 2006) (injunction granted); TiVo Wins on Appeal: Permanent Injunction against EchoStar to be Reinstated, *Patently-O* (January 31, 2008). Both these cases are discussed in Robert H. Resis, Life after *eBay v. MercExchange* — The Strong Get Stronger, *Intellectual Property Today* (December 2007). For an example of an ongoing royalty awarded instead of a permanent injunction, see *Paice LLC v. Toyota Motor Corp.* (Fed. Cir. October 18, 2007). See also CAFC Approves Compulsory License (but calls it an "ongoing royalty"), *Patently-O* (October 19, 2007); Innogenetics: Forward Looking Damages Approved, *Patently-O* (January 21, 2008). For a more recent development in the eBay case, see MercExchange v. eBay: Injunction Denied Again, *Patenly-O* (December 18, 2007); MercExchange Saga Over: eBay Just Buys The Patents, *Techdirt blog* (February 28, 2008). Moreover, as injunctions become harder to obtain, patentees simply turn to the ITC. See Eric Bangeman, Permanent Injunctions Getting Scarce; Patent Holders Turn to ITC, *ars technica* (June 3, 2007).

[16] See discussion of *In re Bilski* case, below; Signal Claims Are Not Patentable: Nuijten Stands — Rehearing Denied, *Patently-O* (February 11, 2008).

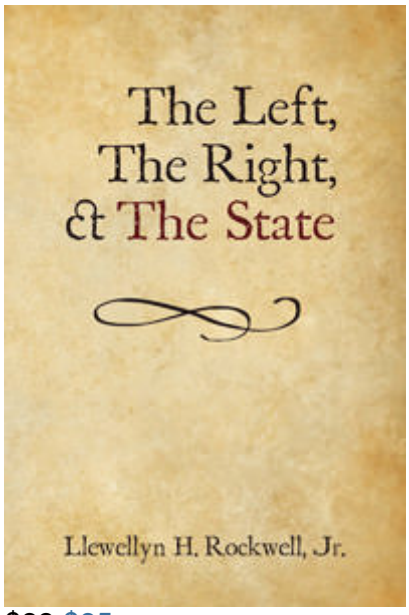
[17] See also Ladas & Parry, A Brief History of the Patent Law of the United States.

[18] The court here abandoned State Street's "useful, concrete, and tangible result" test for patentability and reaffirmed the "machine-or-transformation" test. Under this latter test, such a patent is valid only if (a) it is tied to a particular machine or apparatus, or (b) it transforms a particular article into a different state or thing. See "Appeals Court Smacks Down Software And Business Method Patents without Apparatus or Transformative Powers," *Patent Baristas* (October 31, 2008); *In re Bilski*: Patentable Process Must Either (1) be Tied to a Particular Machine or (2) Transform a Particular Article, *Patently-O* (October 30, 2008).

[19] See Kinsella, Legislation and the Discovery of Law in a Free Society (1995). Download PDF

[20] Such a threat was the reason RIM, BlackBerry's maker, paid $600 million to NTP even though NTP's patents were being re-examined by the PTO: RIM couldn't risk even a short-lived injunction. See also Patent Office Rejects Blackboard E-Learning Patent One Month After It Wins Lawsuit, *Techdirt* (March 31, 2008). Even after the *eBay* case, injunctions are still granted, as noted in endnote 15, above; or patent holders find alternative means of blocking competitors, such as ITC actions.

[21] Other than Seagate, which reduces the value of the lucrative "patent opinions" patent practitioners are often hired to write. On the uncertainty engendered by legal turmoil, see Kinsella, Legislation and the Discovery of Law in a Free Society. Download PDF



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[22] The process by which the patent law ebbs and flows, and continually changes, provoking cries of doom and disaster from biased, special-interest chicken littles, calls to mind an analysis by Llewellyn H. Rockwell, Jr., in his book *The Left, the Right, and the State* (Auburn, Alabama: Mises Institute, 2008), pp. xiii-xiv (emphasis added):

> What is the state? It is the group within society that claims for itself the exclusive right to rule everyone under a special set of laws that permit it to do to others what everyone else is rightly prohibited from doing, namely aggressing against person and property.
>
> Why would any society permit such a gang to enjoy an unchallenged legal privilege? Here is where ideology comes into play. The reality of the state is that it is a looting and killing machine. So why do so many people cheer for its expansion? Indeed, why do we tolerate its existence at all?
>
> The very idea of the state is so implausible on its face that the state must wear an ideological garb as means of compelling popular support. Ancient states had one or two: they would protect you from enemies and/or they were ordained by the gods.
>
> To greater and lesser extents, all modern states still employ these rationales, but the democratic state in the developed world is more complex. It uses a huge range of ideological rationales — parsed out between left and right — that reflect social and cultural priorities of niche groups, even when many of these rationales are contradictory.
>
> The left wants the state to distribute wealth, to bring about equality, to rein in businesses, to give workers a boost, to provide for the poor, to protect the environment.… The right, on the other hand, wants the state to punish evildoers, to boost the family, to subsidize upright ways of living, to create security against foreign enemies, to make the culture cohere, and to go to war to give ourselves a sense of national identity.…
>
> So how are these competing interests resolved? *They logroll and call it democracy*. *The left and right agree to let each other have their way, provided nothing is done to injure the interests of one or the other. The trick is to keep the balance.* Who is in power is really about which way the log is rolling. And there you have the modern state in a nutshell.

Likewise, the vested interests moan and caterwaul at the slightest change, thus making sure that serious, radical change is not even considered. This way, they keep the basic system intact.

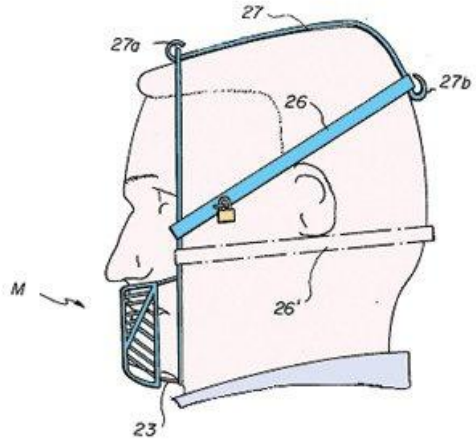
[23] See Ayn Rand, "Patents and Copyrights" in *Capitalism: The Unknown Ideal*, p. 131, 133; also Ayn Rand Biographical FAQ, sec. 5.2.2; Kinsella, Rand and Marx (2006).

[24] See Kinsella, *Against Intellectual Property;* idem, "The Case Against IP: A Concise Guide."

[25] See Kinsella, Yet Another Study Finds Patents Do Not Encourage Innovation, *Mises Blog* (July 2, 2009); Michele Boldrin & David K. Levine, *Against Intellectual Monopoly* (Cambridge University Press, 2008).

26. Apparently, Acacia has collected settlement amounts — rumored to be between $50,000 and $400,000 each — from a very long list of licensees.

Reducing the Cost of IP Law



TAGS Legal SystemMonopoly and CompetitionPhilosophy and MethodologyPrivate Property

01/20/2010 Stephan Kinsella

[This paper is the conclusion of a two-part series. The first article was "Radical Patent Reform Is Not on the Way."]

Anti-Eating Mouth Cage US Patent Issued in 1982

As I noted in Part 1, there is a growing clamor for reform of patent (and copyright) law, due to the increasingly obvious injustices resulting from these intellectual property (IP) laws.[1] However, the various recent proposals for reform merely tinker with details and leave the essential features of the patent system intact. Patent scope, terms, and penalties would still be essentially the same.

How should the IP system be reformed? For those with a principled, libertarian view of property rights, it is obvious that patent and copyright laws are unjust and should be completely abolished.[2] Total abolition is, however, exceedingly unlikely at present. Further, most people favor IP for less principled, utilitarian reasons. They take a wealth-maximization approach to policy making. They favor patent and copyright law because they believe that it generates net wealth — that the value of the innovation stimulated by IP law is significantly greater than the costs of these laws.[3]

What is striking is that this myth is widely believed even though the IP proponents can adduce no evidence in favor of this hypothesis. There are literally no studies clearly showing any net gains from IP.[4] If anything, it appears that the patent system, for example, imposes a gigantic net cost on the economy (approximately $31 billion a year, in my estimate).[5] In any case, even those who support IP on cost-benefit grounds have to acknowledge the costs of the system, and they should not oppose changes to IP law that significantly reduce these costs, so long as the change does not drastically reduce the innovation gains that IP purportedly stimulates. In other words, according to the reasoning of IP advocates, if weakening patent strength reduces costs more than it reduces gains, this results in a net gain.

In this paper I attempt to identify the most important changes that should be made to IP law to reduce its most egregious and significant costs, while not gutting its alleged innovation-stimulating effects. Keep in mind, however, that even the advocates of IP cannot show what its costs or alleged gains are; they provide no quantitative evidence but only intuition and qualitative reasoning. Thus, they cannot object if my suggestions also rely on common sense and extensive experience with the working of the existing IP system.

Moreover, given that virtually all empirical studies in this regard conclude that IP is either neutral or a net cost, the burden of proof should be on the IP advocate to show that a proposed change that clearly and significantly reduces costs should not be made. I will focus primarily on patent law, and also conclude more briefly with some proposed improvements to copyright and federal trademark law.

Costs and Benefits of IP Law

As noted above, the utilitarian or wealth-maximization arguments in favor of patent rights claim that a patent system is desirable because it does more good than harm — that it generates more wealth than it costs. The "wealth" purportedly generated is a result of the patent monopoly[6] providing an incentive to innovate, and to disseminate knowledge that would otherwise be kept secret.

The idea is that, instead of keeping an invention as a trade secret, the inventor, in exchange for the limited monopoly on the invention, makes the information about it public in a published patent that others can learn from, even if they can't yet *use* the patented device or process. And the promise of monopoly profits, or the reduction of free-rider effects, can incentivize innovation at the margins.[7]

But benefits are not enough. The standard argument for patents is that the system leads to a *net* benefit — that the benefits exceed the costs. While IP proponents may dispute the claim that a patent system produces no overall, unambiguous benefits to offset its costs (discussed further below), it cannot be denied that there *are* significant costs.

Note also that both costs and purported benefits are related to the "strength" of patent rights: the length of the *patent term*, the extent and type of *penalties* imposed on infringers, and the *scope* of patent rights. Stronger patents, according to the standard argument, will produce greater incentives to generate even more innovation-related wealth, but at increased cost. Conversely, weaker patents would impose fewer costs but would provide smaller incentives to disclose and innovate.

Patent proponents must, if only grudgingly, concede that diminishing returns are achieved at a certain point — that the "net" wealth produced by the patent system decreases as the marginal increase in costs exceeds the marginal increase in alleged benefits. Patent advocates, for example, do not advocate quintuple damages instead of treble damages, or capital punishment for willful infringement, or making the patent term 1,000 years, or increasing patent scope to include algorithms and abstract scientific discoveries. They implicitly believe that strengthening the patent system in this way would cost more than would be gained.

And yet patent advocates also resist reductions in patent strength, even though it is possible that the costs could fall more dramatically than the alleged benefits. Or, as one economist puts it, that we are "on the wrong side of the Laffer curve for innovation."[8]

The costs of the patent system are widespread. Ridiculous patents are issued or filed and companies are enjoined from selling their products. Judgments are issued and settlements reached for billions of dollars.[9]

Untold hundreds of millions of dollars are spent annually on patent programs, largely for defensive purposes — to dissuade competitors from bringing a patent infringement lawsuit for fear of being hit with a similar counterclaim. Often, dominant competitors sue each other, and then back down, settling with a huge cross-license to each other's patent portfolios. This gives them freedom to operate, but the threat to the smaller players remains.

Once again, as in the case of minimum-wage, social-security, and prounion laws, federal legislation works in favor of big business,[10] and small companies or independent inventors are left out in the cold at the mercy of million-dollar patent suits filed by the business oligarchs. Or after one company prevails in a patent suit against a competitor, the wounded victim succumbs and is absorbed by the victor.[11] Would that these millions of dollars could have been spent on salaries, R&D, equipment, or other capital investments instead, or simply been returned to shareholders in the form of dividends.

The possibility of being shut down by a competitor is a perennial threat to businesses, especially small companies, who cannot afford to spend millions of dollars defending a patent suit. High-tech startups are even more vulnerable: they often have very low cash or profits, making them even less able to defend a patent lawsuit; and because they use newer technology, they are also more likely to infringe patents. It is virtually impossible to be aware of all the patents that are out there, or that are about to emerge, or that have just been filed (and that are secret for 18 months after filing).

And even if one could identify all of the pertinent patents, there can be literally thousands of patent claims (the several defined inventions set forth in each patent that define the "metes and bounds" of protection granted by the patent) that could be a potential problem, and no definitive interpretation of any of them. Most claims have not been parsed by a court, and many are intentionally obscure or vague, having been drafted by highly skilled, crafty patent attorneys taking maximum advantage of ever-shifting, complex and arcane rules,[12] and having been approved by understaffed government patent examiners unable to find all the relevant prior art.

And so companies do what they can but, in the end, they often just forge ahead, risking a patent suit (after all, a patent infringement lawsuit is not the only risk that entrepreneurs face), hoping not to be noticed, or hoping to be successful enough to accumulate the war chest needed to fight a patent suit or to have acquired enough of a patent arsenal to fight back or ward off such an attack in the first place. In some cases, no doubt, the nascent business is never formed; the would-be entrepreneur, sensing a dangerous patent thicket, steers clear of a given technology or business — thus leaving it to the techno-oligarchs

(unseen costs are still costs, as Bastiat observed).[13] Or a given company sticks to its current lines of business, afraid to venture into a heavily patented area. And so on. So much for innovation or entrepreneurial risk.

So the costs of the patent system are obvious and huge, if not easily quantifiable. Patent proponents themselves have no idea what the exact costs, or purported benefits, of the patent system are; they have no idea what the *net* benefit of the patent system is, or whether there even *is* a net benefit. We can identify some of the costs, but not all of them. It is, in any event, certain that there *are* tremendous costs to individuals, businesses, and the economy in general.[14] As noted by Dell Inc., et al., in their *amicus curiae* brief to the Supreme Court in the *Quanta Computer v. LG Electronics* case,

> [Patent] rights are intended to encourage innovation but come at a significant cost to other market participants and are "restrictive of a free economy" (*United States v. Masonite Corp*.... (1942)). Indeed, this Court recently recognized that when patent rights are not appropriately defined, "patents might stifle, rather than promote, the progress of useful arts." *KSR Int'l Co. v. Teleflex Inc*.... (2007). [emphasis added]

And as pointed out by Allison *et al*.,

> Inventors come up with a new idea, hire a lawyer, write a patent application, spend years in the arcane and labyrinthine procedures of the U.S. Patent and Trademark Office (PTO), get a patent, and then … nothing. Ninety-nine percent of patent owners never even bother to file suit to enforce their rights. They spend $4.33 billion per year to obtain patents, but no one seems to know exactly what happens to most of them. Call it "The Case of the Disappearing Patents."[15]

One study suggests that American companies spend $11.4 billion a year on software patent litigation;[16] another conservatively estimates that "the economic losses resulting from the grant of substandard patents can reach $21 billion per year by deterring valid research with an additional deadweight loss from litigation and administrative costs of $4.5 billion annually."[17] I have estimated the *net* cost of the American patent system to be at least $31 billion annually.[18]

Other costs include

- "In Terrorem Effects" (deterring potential competitors or follow-on innovators from entering a field by the existence of patents owned by their competitors)
- "Holdup Licensing" (patent owners might try to game the system by seeking to license even clearly bad patents for royalty payments small enough that licensees decide it is not worth going to court, likely costing in the hundreds of millions of dollars)
- "Facilitating Collusion" (licensees might agree to pay royalties on patents they know are invalid as part of a scheme to cartelize an industry)[19]
- Causing consumers to absorb monopoly prices over "inventions" that were already effectively common knowledge
- Directing resources away from productive research and instead toward strategic accumulation of patents already filed over innovations already deployed
- Diverting resources to "defensive patenting" or securing offensive "blocking patents"
- Directing research away from areas of existing patents that should not have been granted

- Directing resources toward acquiring and enforcing substandard patents and collecting royalties rather than other, more-productive fields of economic activity.[20]

Some argue that the patent system actually reduces net innovation — that the costs of the patent system are not only greater than its benefits, but that the patent system imposes costs and also reduces innovation.[21] In other words, it is not only that the patent system imposes billions of dollars in costs, and that it is uncertain whether the extra innovation stimulated is worth more than this cost; it also seems likely that the patent system actually *stifles* and *impedes* innovation, adding injury to injury.

And this is just a smattering of the possible harms and costs of the patent system. If patent rights can be adjusted to significantly reduce these costs, without obviously reducing the benefits by a greater amount, then even utilitarian patent proponents should favor this change — unless they can demonstrate otherwise with sound reasoning or empirical data.

"Who can deny that, given the existing system, patent attorneys perform a valuable service? If we someday develop a cure for cancer, there will be no cancer doctors; this does not mean cancer specialists are not needed now, so long as there is cancer."

Most natural-rights patent advocates, such as Ayn Rand, also oppose patent rights of infinite duration or scope. They do not believe patents should last forever, or that capital punishment should be imposed for infringement, for example. Instead, they favor some finite duration and scope for patent rights — 17 or so years of enforceability, and so on. Now, if these limits are arbitrary, the "principled" patent proponent has little basis to oppose moving patent boundaries in one direction or the other — a 12- or 28-year patent term is just as good (and as arbitrary) as a 17-year term.[22] What inevitably happens is that the deontological or principled proponent of patent rights resorts to utilitarian standards to argue for drawing the line here as oppose to there. They, too, therefore, have no principled opposition to changes that significantly reduce the patent system's costs.

As for patent skeptics and opponents, they, too, will endorse changes to the patent system that unambiguously reduce its costs. My proposals should find favor in the eyes of those who would like to abolish patents altogether. Someone who wants the patent term reduced from seventeen to zero years will be in favor of reducing the term to twelve years, for example. The proposals herein are thus analogous to arguing for a lower tax rate, no matter what type of tax is in place — as opposed to proposing tinkering with the tax system to make it more "fair" or efficient.[23]

So, it is uncontroversial that patents should not be "too easy" to get, nor should they be "too strong." Even the Supreme Court, over a century ago, acknowledged that if patent monopolies are granted "for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures," then

> such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities lawsuits and vexatious accountings for profits made in good faith.[24]

In other words, it's a good thing if patent applicants face a high hurdle; if it's difficult to obtain a patent, fewer patents on "trifling devices" will be granted.

The Silent Bar

Some patent attorneys balk at such critiques of the patent system. They take it personally, as if their career choice is under attack. But they should not. Who can deny that, given the existing system, patent attorneys perform a valuable service?[25] By analogy, in a just society there would be no taxation, and thus no need for tax attorneys. But given the existence of taxation, tax attorneys provide a valuable service to there clients. If we someday develop a cure for cancer, there will be no cancer doctors; this does not mean cancer specialists are not needed now, so long as there is cancer. Nor are tax attorneys and oncologists expected to favor taxes or cancer.

Why, then, should patent attorneys be required to favor the current patent system as a policy matter, just because they are navigating the existing rules on behalf of their clients?[26] The problem is not what patent attorneys *do*; it's what they *favor*. Similarly, the problem with a protax tax attorney is not that he defends people from the IRS; it's that he advocates a tax system. And everyone would object to a cancer doctor working to cause more people to have cancer.

And are my cynical views about patents really that isolated among the patent bar? Sure, most patent lawyers give lip service to the idea that patents are "necessary" to "promote innovation." Yet almost none, in my experience, give any serious thought to this. Most, if they have any opinion at all, simply repeat the bromides they hear in law school and that courts and law professors repeat *ad nauseum* as if they are obvious, undisputed truths. Virtually all of them have been pickled in the wealth-maximization, law-and-economics ideas rife in law school. So they have a vague notion that the patent system is good because it encourages innovation. And innovation is a good thing, right? It adds value to the economy and improves our lives. *Ceteris paribus*, of course.

And there's the rub — the *ceteris paribus* "gotcha." Rarely do any patent advocates bother to ask whether the patent system's *costs* are greater than its alleged benefits.[27]

Talk to a typical patent practitioner: he will almost unfailingly state his support for the patent system and "the inventor." Innovation is good, he'll say; so of course it should be protected, encouraged, and stimulated. But drill a bit deeper, ask him if he has any reasons for this other than what he has heard others say, and he'll usually cave in, or change the subject. You quickly realize most of them just do not care. (It's sort of like asking a public-school teacher why she favors public education. She claims to be in favor of it, but is not interested in coming up with a non-self-serving justification for it.)

For this reason, perhaps, almost none of them are even *aware* that no one seems to have ever established that the purported benefits of patents are greater than their costs. They do not know that whenever any attempt is made to estimate the costs of the patent system and to compare them to its benefits, the study is either inconclusive or concludes that the patent system is a net loss to the economy.[28] They will reflexively repeat the standard propatent mantra if asked, but they really don't care, or know, whether these purported justifications make any sense.

In a way, it is refreshing that patent attorneys do not care whether the patent system is really justifiable. Tax attorneys defend victims of a rapacious state without necessarily defending taxes — or even having an opinion about it. If you hire a tax attorney, you want an effective one, not one who has the right policy views.

Likewise with patent attorneys. They are a conservative lot — most are engineers in a former life — and don't want to rock the boat. They don't need to come out with a sophisticated stance on patent policy in order to represent clients. They don't need to point out that the emperor has no clothes, or even figure this out in the first place. And clients really don't care about this any more than they care whether their advocates read comics in private or what church they attend. It's just not relevant.

Nevertheless, my experience would indicate that the propatent stance of the patent bar is not as uniform as surface appearances might indicate. To be sure, there are the expected, official, propatent comments by the "respectable," establishment IP advocacy groups — the ABA, the AIPLA, Intellectual Property Owners Association, the various "IPLAs" — PIPLA, HIPLA, NYIPLA — and so on.

But if you press your average practitioner when the senior partner's not listening, it's not hard to get him to admit he's just doing what he has to do to pay the mortgage. He doesn't care about the system's "legitimacy," and doesn't pretend to know much about it either, other than genuflecting when the IP priests tell him to. In fact, many display a refreshingly self-honest cynicism in this regard. It's the kind of thing that many in the profession know but can't say too loudly in polite company.

Take, for example, the results of this informal web poll I conducted a while back. The poll was circulated among both patent attorneys and libertarians (and others, such as Digg readers), in which 84 percent of respondents (at this writing) answered "Yes" to the question "Would you give up your right to sue others for patent infringement in exchange for immunity from all patent lawsuits?"

And consider the offhand comment in which a patent attorney admits, "Patents are intended to lure potential inventors into the business of innovation. The truth is, however, that very little is known about how patents really drive innovation." Consider also a poignantly honest admission that was made by a patent attorney in an email to me in response to a letter in the trade magazine, *IP Today*.[29] I had critiqued patent litigator Joseph Hosteny's defense of patent trolls — in particular his comment that "the patent system is necessary for there to be invention and innovation." I had written,

> There is … no conclusive evidence showing that the purported benefits of the patent system — extra innovation induced by the potential to profit from a patent; earlier-than-otherwise public disclosure of innovation — exceeds the significant and undeniable costs of the patent system.… Is the patent system "worth it"? Who knows? Apparently no one does. It seems to follow that we patent attorneys ought not pretend that we do.

In response I received an interesting email from a respected patent attorney, a senior partner in the IP department of a major national law firm who shall remain anonymous:

> Stephan, Your letter responding to Joe Hosteny's comments on Patent Trolls nicely states what I came to realize several years ago, namely, it is unclear that the U.S. Patent System, as currently implemented, necessarily benefits society as a whole. Certainly, it has benefited [Hosteny] and his [partners] and several of their prominent clients, and has put Marshall, Texas on the map; but you really have to wonder if the "tax" placed on industry by the System … is really worth it.[30]

It is my belief that there is at least tacit recognition by a nontrivial segment of the patent bar that they are participating in a scheme where wealth is transferred from "infringers" to "patentees," with the patent practitioners extracting a healthy handling fee. They have no idea whether this system is "good for" the economy or society as a whole, nor do they care, despite giving lip service to the propatent yada yada.

This does not imply that companies can afford not to fight within the rules of the current system. They have to acquire patents if only for defensive reasons: to ward off patent infringement suits from competitors.

But the question at hand is what kind of changes ought to be made to improve the situation. Anything that can reduce the risks and costs faced by entrepreneurs and businesses ought to be given serious consideration. Most of all, market actors need freedom to operate — freedom to engage in business without fear of competitors using the power of the state to hobble them or shut them down.

Typical Proposals for Reform

Before laying out my own proposed changes, it is illuminating to note the reform proposals typically advanced. For example, James Bessen and Michael J. Meurer, in their book *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* (Princeton, 2008), propose the following:

- "Make patent claims transparent."

- "Make claims clear and unambiguous by enforcing strong limits against vague or overly abstract claims."
- "Make patent search feasible by reducing the flood of patents."
- "Besides improving notice, we also favor reforms to mitigate the harm caused by poor notice. These include an exemption from penalties when the infringing technology was independently invented and changes in patent remedies that might discourage opportunistic lawsuits."

The group Public Knowledge proposes the following reforms to improve patent law and the patent-litigation process:

> - Raising the standard from determination of obviousness from the person having "ordinary skill" in the art to a person having "recognized skill" in the art.
> - Peer review of patent applications.
> - Permitting third parties to submit prior art, and rewarding them with fee reimbursement if successful.
> - Permitting post-grant review of patents by the USPTO prior to litigation.…
> - Removing the presumption of validity that issued patents enjoy.
> - Apportioning damages to be proportional to the value of the patent.
> - Allowing circuit courts other than the Federal Circuit to hear patent appeals.
> - Limiting litigation venues to those jurisdictions with a meaningful connection to one of the litigants.

Other proposals for reform abound.[31]

While some of these ideas would no doubt improve matters, most of them are at best minor, mere tinkering with the system. Making patent claims more "transparent" is a technical, elusive goal that still will not reduce the term or scope of patents, or the penalties imposed for infringement, for example. Of these suggestions, providing an independent inventor defense is best.

Proposed Improvements to Patent Law

Below are suggested reforms to the existing patent system that would, in my view, significantly reduce the costs and harm imposed by the patent system while not appreciably, or as significantly, reducing the innovation incentives and other purported benefits of the patent system. The changes proposed below are changes I believe would benefit high-tech companies as well as other companies that do not develop a great deal of patentable technology. I list these changes in generally descending order of importance.

Reduce the Patent Term

Companies face an immense patent thicket. In part this is due to the approximately 17-year patent term. It is not uncommon to come across patents issued 10 or 15 years earlier that pose a threat to one's business. Many of these patents should not have been issued. Appeals for "improving patent quality" are likely to be futile or of minimal effect, as are the calls for improving government "efficiency" by presidential candidates every four years.

"This does not imply that companies can afford not to fight within the rules of the current system. They have to acquire patents if only for defensive reasons. But the question at hand is what kind of changes ought to be made to improve the situation."

The patent term should be reduced to 5 or 7 years (from approximately 17–18 years now). (Amazon CEO Jeff Bezos actually proposes a 3–5 year term for business method and software patents.)[32] Such a reduction would eliminate a huge portion of the patent threat that entrepreneurs and companies face, drastically reducing the costs borne by companies. There would be fewer lawsuits and fewer threats, lower insurance premiums, and reduced patent license fees and royalties. (Note: it is true that products such as pharmaceuticals and medical devices may be delayed for years by the FDA approval process. However, at least some of the time lost can be added to the patent term, so that such products would still have a patent coverage period once the product receives regulatory approval.)

Yet there would still be an incentive to file patent applications to obtain a 5–7 year monopoly on one's idea. Would the incentive be reduced somewhat? Probably. But there is no reason to think the incentive would be drastically reduced, or that we would lose more marginal innovation and disclosure than would be saved.

Another twist would be to have a sliding scale, with longer terms granted for different types of subject matter (e.g., business methods, software, and pharmaceuticals). Such an approach would, obviously, be more complex and probably hopelessly unworkable. (See also the discussion of a petty patent system, below.)

Remove Patent Injunctions/Provide Compulsory Royalties

Paying royalties is one thing. This is similar to a tax. It impedes and puts a drag on efficiency. Worse still is the prospect of an injunction, which can simply shut a company down. Quite often this is what a competitor will seek. They do not want damages or money: they want to dominate the market and eliminate competition. Or the threat of injunction is used to basically wring money from an alleged infringer (e.g., the $600 million RIM (BlackBerry) had to pay, even though the patents were under appeal at the PTO, due to the threat of an injunction).

If the purpose of the patent system is to provide some incentive to innovators, then receiving a monetary payment should be sufficient. Patent injunctions should be abolished entirely. The only remedy should be an award of damages (for past infringement) or a compulsory license (ongoing royalties based on future "infringement").

This would prevent patentees from shutting down competitors. At most, they could impose a small "tax." Litigation costs, insurance premiums, and the ability of patentees to extract unreasonable royalties from alleged infringers would be radically curtailed. On the other hand, because patentees would still be able to seek reasonable royalties, there would still remain a substantial incentive to file for patents.

The compulsory licensing approach is not new. Some countries impose compulsory licensing on patentees who do not adequately "work" the patent.[33] The United States already provides for compulsory licensing in certain cases, as the US government threatened to do in the Cipro anthrax drug case.[34] Also, in the wake of the recent *eBay* case, some courts are awarding some form of ongoing royalty of compulsory license instead of an injunction. [35]

Royalty Cap/Safe Harbor

A variation of this approach would be to set a cap on the total amount of royalties that any one company would have to pay for compulsory patent royalties (at least, for a given product) — for example, 5 percent. Thus, if one is sued by 3 different patentees, at most he has to pay 5 percent royalties on sales. If too many patent vultures hound an innocent businessman, he could simply throw his hands up, deposit his 5 percent royalty with some escrow agent and let them fight it out.

Reduce the Scope of Patentable Subject Matter

Currently, patents can be obtained for a wide array of inventions: pharmaceuticals, and any type of "useful" apparatus or method, including software and business methods. This is due to the broad wording of Section 101 of the US Patent Act,Download PDF which has been construed to mean that the "statutory subject matter" includes "anything under the sun that is made by man."

Copyright already covers software. It should be excluded from the scope of patentable subject matter. Ditto "business methods." (Business and software patents are relatively new anyway, so that excluding them from the scope of patentable subject matter is only rolling the clock back a decade or two.) In fact, the example most often given to show that patents are needed is pharmaceuticals. So, let's eliminate patents for everything except pharmaceutical compounds — and reduce the term to 3–5 years. For a spoonful of sugar to help the medicine go down, the FDA should be abolished, and federal and state taxes and regulations eased.[36]

Provide for Prior-Use and Independent-Inventor Defenses

Under copyright law, someone who independently creates an original work similar to another author's original work is not liable for copyright infringement, since the independent creation is not a *reproduction* of the other author's work. Thus, as a defense a copyright defendant can try to show he never had access to the other's work.

Patents, however, are different. As long as someone is an actual inventor of an invention (he did not learn about it from someone else), and the invention was not publicly known, he can obtain a patent for it. Someone who previously invented the same thing and is using the idea in secret can actually be liable for infringing the patent granted to the second inventor. Also, if a later person independently invents the same idea that was previously patented by another, this is also no defense. Prior use, or independent invention, is not a general defense. There is currently only a very limited "prior user" right (or "first inventor defense"), available to those who commercially used a "business method" before someone else patented it. [37]

A defense should be provided for those who are prior users of, or who independently invent, an invention patented by someone else. This would greatly reduce the cost of the patent system since one difficulty faced by companies is that they do not know what patents they might infringe. If someone learns of an invention from another's patent, at least they are aware of the risk and can possibly approach the patentee for a license.

But quite often a company independently comes up with various designs and processes while developing a product, which designs and processes had been previously patented by someone else. If the goal of patent law is to reward invention, it should be sufficient to permit patentees to sue people who actually learned of the idea from the patent — just as copyright infringement exists when someone reproduced another's work but not when it is independently created.

One patent-reform bill originally proposed to broaden the existing prior-user defense by eliminating the business-method patent limitation so that users of all types of inventions would have been able to use the defense, but this was removed from later versions of the bill. A broad prior-user defense should be established, as well as an independent-inventor defense that even a later inventor could use. [38]

Instantly Publish All Patent Applications

Until 1999, patent applications remained secret until they issued. Thus arose the problem of "submarine patents": patents could remain pending in secret for decades — after industry had independently invented and widely adopted the technology — and then "emerge" like a submarine and extract heavy royalties from many companies. The 1995 amendments to patent law changed the patent term from 17 years from date issuance, to 20 years from the date of filing, to reduce this problem. And starting in 1999, US patent applications are now made public 18 months after filing, unless the applicant requests nonpublication and promises not to file the patent internationally.

Part of the "patent bargain" is that the state grants a limited monopoly to inventors in exchange for public disclosure of the invention. This is why patents are published. The publication of (most) patent applications at 18 months was an improvement, but should be changed to mandatory, instant publishing of all patent applications (with perhaps a minor delay for any national-security or foreign-filing-license clearance). This would help potential patent defendants by giving them more opportunity to be aware of potential patent threats a year and a half earlier. Patent applicants have to reveal their secrets at 18 months anyway, and are the ones requesting a state monopoly to use to sue people, so they have no grounds to complain about having to give a bit more fair notice to their potential victims.

Eliminate or Restrict Enhanced Damages

Under current law, if the patentee can prove the infringer "willfully" infringed, up to treble damages can be obtained. This is punitive. The patentee ought to be able to recover only actual damages, not three times that amount.[39]

Working/Reduction to Practice Requirement

Under current law, there is no requirement that an invention be actually reduced to practice before a patent is granted on it, or that it be "worked" after grant to maintain the patent in force. When a patent application is filed, this is considered to be a "constructive reduction to practice." It would make it more difficult to obtain frivolous patents if the inventor had to make an actual, working model of the invention — and if the patented invention had to be actually worked or used by the patentee to stay in force.

Provide for Advisory Opinion Panels

Under our current patent system, if a company becomes aware of patent that might be a problem, or is accused of infringing the patent, the company has only limited choices. It can ignore it, risking possible treble damages for willful infringement; it can try to negotiate a possibly expensive license, even though the patent's claims may be ambiguous or its validity doubtful; or it can pay $30,000 or more for a patent opinion that may not do much good anyway.

A cheaper, more streamlined option ought to be introduced to permit a more authoritative opinion to be obtained that helps nail down the scope of the patent's claims and whether or not the patent is valid. The UK introduced such a service a couple of years ago. Variations of this approach could be employed; as noted above, Public Knowledge proposes "peer review of patent applications," "permitting third parties to submit prior art, and rewarding them with fee reimbursement if successful," and "permitting post-grant review of patents by the USPTO prior to litigation."

Losing Patentee Pays

In the US system, a victorious defendant in a patent-infringement lawsuit usually still pays for his legal defense, which may run in the millions of dollars. The system should be changed so that a patentee who loses an infringement suit must pay the defendant's legal and other costs. The IPO recently proposed a loser-pays approach, but in my view, the defendant should never have to pay the fees of the patentee, since the defendant did not instigate the suit.

Expand Right to Seek Declaratory Judgments

Under current law, someone threatened with a patent lawsuit can bring a declaratory judgment (DJ) action to have a court decide the issue. The *MedImmune* decision made it easier for licensees to use a DJ action to challenge the validity of patents they had previously licensed. The Declaratory Judgment Act should be expanded to make it easier for potential infringers to bring an action against a patentee if there is any doubt by the potential infringer.

For example, if A is worried about violating B's patent, A could request B to provide a written exoneration statement that it does not intend to sue A or request a license for a given product. If B does this, B is estopped from ever suing A for patent infringement with respect to that product. If B refuses to provide the statement within 30 days, then A has a right to seek a DJ. Better yet — A provides B a description of its product and demands an exoneration statement; if B does not provide one, it releases its right to sue A. This would give B 30 days to decide whether to admit to A that it intends to sue. If B makes this admission, this triggers A's right to seek a DJ.

Exclude IP from Trade Negotiations

The United States routinely uses its international heft to coerce other states into adopting more draconian IP laws. This increases costs internationally for American and other companies.[40]

Other Changes

There are a host of changes that have been proposed. These include changing from a first-to-file to a first-to-invent system; reducing the scope of patent claims; [41] increasing PTO funding to "improve" the examination process; refining the criteria for injunctions to be granted; permitting postgrant challenge of patents or submission of prior art by third parties; implementing a "peer-to-patent" review system; and establishing a federal office to review PTO actions.[42] Some have suggested adopting a utility model or "petty patent" system, in which patent applications are examined only minimally and receive narrower protection; this type of IP right is already available in some countries. [43] Many of these proposals are aimed at "improving patent quality" or other dubious goals. These changes are, by and large, of either doubtful or trivial value.

Nevertheless, some fairly minor or technical, but largely positive, changes could also be made, which I list only briefly here:

- Increase the threshold for obtaining a patent [44]
- Increase patent filing fees to make it more difficult to obtain a patent
- Make it easier to challenge a patent's validity at all stages
- Require patent applicants to specify exactly what part of their claimed invention is new and what part is "old" (e.g., by the use of European-style "characterized in that "claims)
- Require patent applicants to do a search and provide an analysis showing why their claimed invention is new and nonobvious (patent attorneys really hate this one)
- Limit the number of claims
- Limit the number of continuation applications
- Remove the presumption of validity that issued patents enjoy
- Apportion damages to be proportional to the value of the patent

Copyright and Trademark

Of course, patent law is not the only area of IP law that could stand improvement. Examples of copyright[45] and trademark[46] abuse also abound. I will not discuss these matters in depth here, other than to briefly suggest a few proposals for reform.

Copyright

- Radically reduce the term, from life plus 70 years to, say, 10 years
- Remove software from copyright coverage (it's functional, not expressive)
- Require active registration and periodic re-registration (for a modest fee) and copyright notice to maintain copyright (today it is automatic, and it is often impossible to determine, much less locate, the owner), or otherwise make it easier to use "orphaned works"[47]
- Provide an easy way to dedicate works to the public domain — to abandon the copyright the state grants authors[48]
- Eliminate manifestly unjust provisions of the Digital Millennium Copyright Act (DMCA), such as its criminalization of technology that can be used to circumvent digital protection systems
- Expand the "fair use" defense and clarify it to remove ambiguity[49]
- Provide that incidental use (e.g., buildings or sculptures appearing in the background of films) is fair use
- Reduce statutory damages[50]

Trademark

- Raise the bar for proving "consumer confusion"
- Abolish "antidilution" protection
- In fact, abolish the entire federal trademark law, as it is unconstitutional (the Constitution authorizes Congress to enact copyright and patent laws, but not trademark law)

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This paper is the conclusion of a two-part series. The first article was "Radical Patent Reform Is Not on the Way."

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1. Kinsella, Radical Patent Reform Is *Not* on the Way, *Mises Daily* (Oct. 1, 2009).
2. See Kinsella, The Case Against IP: A Concise Guide, *Mises Daily* (Sept. 4, 2009).
3. Kinsella, There's No Such Thing As a Free Patent, *Mises Daily* (Mar. 7, 2005).
4. Kinsella, Yet Another Study Finds Patents Do Not Encourage Innovation, *Mises Blog* (July 2, 2009).
5. Kinsella, What Are the Costs of the Patent System? *Mises Blog* (Sep. 27, 2007).
6. See Kinsella, Are Patents "Monopolies"? *Mises Blog* (July 13, 2009).
7. See Kinsella, There's No Such Thing as a Free Patent; Corinne Langinier & GianCarlo Moschini, "The Economics of Patents: An Overview," Working Paper 02-WP 293, Center for Agricultural and Rural Development, Iowa State University (2002) (discussing benefits and costs of patents, including "patents can promote new discoveries" and "patents can help the dissemination of knowledge").
8. See Kinsella, Libertarian Favors $80 Billion Annual Tax-Funded "Medical Innovation Prize Fund," *Mises Blog* (Aug. 12, 2008).
9. See "Appendix: Examples of Outrageous Patents and Judgments," in Kinsella, Radical Patent Reform Is *Not* on the Way.
10. For a recent example, UPS is currently lobbying Congress to enact legislation that would redefine its rival, FedEx, as a trucking company rather than the airline it started out as in an attempt to make it easier for the Teamsters union to unionize FedEx drivers and raise their wage rates—and of course FedEx's cost structure. See Del Quentin Wilber & Jeffrey H. Birnbaum, Taking the Hill By Air and Ground: Shift in Congress Favors Labor, UPS Over FedEx, *Washington Post* (September 14, 2007). See also Murray N. Rothbard, Origins of the Welfare State in America, *Mises.org* (1996) ("Big businesses, who were already voluntarily providing costly old-age pensions to their employees, could use the federal government to force their small-business competitors into paying for similar, costly, programs…. [T]he legislation deliberately penalizes the lower cost, 'unprogressive,' employer, and cripples him by artificially raising his costs compared to the larger employer.… It is no wonder, then, that the bigger businesses almost all backed the Social Security scheme to the hilt, while it was attacked by such associations of small business as the National Metal Trades Association, the Illinois Manufacturing Association, and the National Association of Manufacturers. By 1939, only 17 percent of American businesses favored repeal of the Social Security Act, while not one big business firm supported repeal.… Big business, indeed, collaborated enthusiastically with social security."); Llewellyn H. Rockwell, Jr., "The Economics Of Discrimination," in *Speaking of Liberty* (2003), at 99 ("One way the ADA [Americans with Disabilities Act] is enforced is through the use of government and private 'testers.' These actors, who will want to find all the "discrimination" they can, terrify small businesses. The smaller the business, the more ADA hurts. That's partly why big business supported it. How nice to have the government clobber your up-and-coming competition."); Rothbard, *For A New Liberty* (2002), pp. 316 *et seq*.; Rothbard, *The Betrayal of the American Right*, 185-86 (2007) ("This is the general view on the Right; in the remarkable phrase of Ayn Rand, Big Business is 'America's most persecuted minority.' Persecuted minority, indeed! To be sure, there were charges aplenty against Big Business and its intimate connections with Big Government in the old McCormick *Chicago Tribune* and especially in the writings of Albert Jay Nock; but it took the Williams-Kolko analysis, and particularly the detailed investigation by Kolko, to portray the true anatomy and physiology of the America scene. As Kolko pointed out, all the various measures of federal regulation and welfare statism, beginning in the Progressive period, that Left and Right alike have always believed to be a mass movement *against* Big Business, are not only backed to the hilt by Big Business at the present time, but were originated by it for the very purpose of shifting from a free market to a cartelized economy. Under the guise of regulations "against monopoly" and "for the public welfare," Big Business has succeeded in granting itself cartels and privileges through the use of government."); Albert Jay Nock, quoted in Rothbard, *The Betrayal of the American Right*, 22 (2007) ("The simple truth is that our businessmen do not want a government that will let business alone. They want a government they can use. Offer them one made on Spencer's model, and they would see the country blow up before they would accept it."). See also Timothy P. Carney, *The Big Ripoff: How Big Business and Big Government Steal Your Money* (2006).
11. See, e.g., Transocean v. GlobalSantaFe (S.D. Tex. Dec. 27, 2006) (permanent injunction granted in favor of plaintiff leads to acquisition of defendant by plaintiff).
12. As the US Supreme Court has noted, "[t]he specification and claims of a patent… constitute one of the most difficult legal instruments to draw with accuracy …." *Topliff v. Topliff* (1892). While this would appear to be a compliment to the skills of patent practitioners, it is really a testament to the inherent subjectivity and ambiguity in patent law (and a bit of a commentary on the technical illiteracy of most attorneys — they're a bit overimpressed with engineer-attorneys: after all, they can actually do basic algebra!).
13. See Frederic Bastiat, "That Which is Seen, and That Which is Not Seen" (1850); also Jeff Tucker, Seen and Unseen Costs of Patents, *Mises Blog* (Jan. 29, 2009).
14. The US Constitution, Art. I, § 8, is based on such reasoning, in granting Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." As for costs, see note 29, above, and the references collected in the section "Studies on the Costs of the Patent System" in Kinsella, Revisiting Some Problems With Patents, *Mises Blog* (Aug. 2, 2007); Ronald Bailey, The Tragedy of the Anticommons: Do patents actually impede innovation?, *Reason* (Oct. 2, 2007); An Open Letter From Jeff Bezos On The Subject Of Patents (March 2000); "The Parade of Horribles" section of "Peer to Patent": Collective Intelligence and Intellectual Property Reform. See also Robert P. Merges & Richard R. Nelson, "On the Complex Economics of Patent Scope," 90 *Colum. L. Rev*. 839 (1990); Edmund W. Kitch, "The Nature and Function of the Patent System," 20 *J.L. & Econ*. 265 (1977); Mark Lemley,

"The Economics of Improvement in Intellectual Property Law," 75 *Tex. L. Rev*. 989, 1044–1051 (1997); Barnett, *Cultivating the Genetic Commons*.

15. John R. Allison, Mark A. Lemley, Kimberly A. Moore, R. Derek Trunkey, Valuable Patents. See also Mark A. Lemley, Rational Ignorance at the Patent Office, 95 *Northwestern U. L. Rev.* (2001).
16. "End Software Patents" Launches With Website and Report, *The 271 Patent Blog* (Feb. 28, 2008).
17. George S. Ford *et al*., Quantifying the Cost of Substandard Patents: Some Preliminary Evidence, Phoenix Center Policy Paper Number 30 (Sept. 2007) ("These estimates may be viewed as conservative because they do not take into account other economic costs from our existing patent system, such as the consumer welfare losses from granting monopoly rents to patent holders that have not, in the end, invented a novel product, or the full social value of the innovations lost."); see also The cost of substandard patents, *Technological Innovation and Intellectual Property blog* (Feb. 21, 2008) and How Much Harm Do Bad Patents Do To The Economy?, *Techdirt* (Feb. 25, 2008).
18. Kinsella, What are the Costs of the Patent System?.
19. Mark A. Lemley, Rational Ignorance at the Patent Office, 95 *Northwestern U. L. Rev.* (2001).
20. See The Cost of Substandard Patents.
21. See Kinsella, Patents and Innovation, *Mises Blog* (Mar. 7, 2008), Revisiting Some Problems with Patents, and What Are the Costs of the Patent System?
22. To be clear: the US patent term, prior to amendments to the Patent Act in 1995, was 17 years from the date the patent issued. After 1995, patents are enforceable after they are issued, until 20 years from the date the application was filed. Since patents typically take two or three years to issue, the effective term of patents is still about 17 years. See also C. Michael White, "Why a Seventeen Year Patent," 38 *J. Pat. Off. Soc'y* 839 (1956) (describing historical basis for seventeen-year term and proposing shortened terms).
23. On this see Llewellyn H. Rockwell, Jr., The Tax Reform Racket, observing that "The only tax plan anyone should trust is the most simple possible: the one that proposes to lower existing taxes." See also Rockwell, Diversions; Rothbard, The Consumption Tax: A Critique, *Power and Market*, and The Myth of Neutral Taxation; Laurence Vance, The Fair Tax Fraud and Flat Tax Folly.
24. *Atlantic Works v. Brady*, 107 US 192, 200 (1882).
25. See Kinsella, Patent Lawyers Who Don't Toe the Line Should Be Punished! *Mises Blog* (Sep. 29, 2009); idem, An Anti-Patent *Patent* Attorney? Oh my Gawd! *StephanKinsella.com* (July 12, 2009.
26. See Mike Masnick, Is It So Crazy For A Patent Attorney To Think Patents Harm Innovation?, *Techdirt* (Oct. 1, 2009) (discussed here).
27. See Kinsella, There's No Such Thing as a Free Patent.
28. See Kinsella, Yet Another Study Finds Patents Do Not Encourage Innovation; idem, Revisiting Some Problems With Patents; Barnett, *Cultivating the Genetic Commons*, p. 1008 ("There is little determinative empirical evidence to settle theoretical speculation over the optimal scope and duration of patent protection.") (citing D.J. Wright, "Optimal patent breadth and length with costly imitation," 17 *Intl. J. Industrial Org*. 419, 426 (1999)); Merges & Nelson, "On the Complex Economics of Patent Scope," pp. 868-70 (stating that most economic models of patent scope and duration focus on the relation between breadth, duration, and incentives to innovate, without giving serious consideration to the social costs of greater duration and breadth in the form of retarded subsequent improvement)); Tom W. Bell, Prediction Markets for Promoting the Progress of Science and the Useful Arts, 14 *G. Mason L. Rev.* (2006):
"But [patents and copyrights] for the most part stimulate only superficial research in, and development of, the sciences and useful arts; copyrights and patents largely fail to inspire fundamental progress.… Patents and copyrights promote the progress of the sciences and useful arts only imperfectly. In particular, those statutory inventions do relatively little to promote fundamental research and development …."

And see Thomas F. Cotter, "Introduction to IP Symposium," 14 *Fla. J. Int'l L*. 147, 149 (2002) ("Empirical studies fail to provide a firm answer to the question of how much of an incentive [to invent] is necessary or, more generally, how the benefits of patent protection compare to the costs."); Mark A. Lemley, Rational Ignorance at the Patent Office, 95 *Northwestern U. L. Rev.* (2001), at p. 20 & n. 74:

"The patent system intentionally restricts competition in certain technologies to encourage innovation. Doing so imposes a social cost, though the judgment of the patent system is that this cost is outweighed by the benefit to innovation.… There is a great deal of literature attempting to assess whether that judgment is accurate or not, usually without success. George Priest complained years ago that there was virtually no useful economic evidence addressing the impact of intellectual property.… Fritz Machlup told Congress that economists had essentially no useful conclusions to draw on the nature of the patent system."

See further Julie Turner, Note, "The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement," 86 *Cal. L. Rev*. 179, 186-89 (1998) (Turner is dubious about the efficacy of the patent system as a means of inducing invention, and would argue against having a patent system if this were its only justification); F.A. Hayek, *The Fatal Conceit: The Errors of Socialism* (U. Chicago Press, 1989), p. 36:

"The difference between [copyrights and patents] and other kinds of property rights is this: while ownership of material goods guides the use of scarce means to their most important uses, in the case of immaterial goods such as literary productions and technological inventions the ability to produce them is also limited, yet once they have come into existence, they can be indefinitely multiplied and can be made scarce only by law in order to create an inducement to produce such ideas. Yet it is not obvious that such forced scarcity is the most effective way to stimulate the human creative process. I doubt whether there exists a single great work of literature which we would not possess had the author been unable to obtain an exclusive copyright

for it; it seems to me that the case for copyright must rest almost entirely on the circumstance that such exceedingly useful works as encyclopedias, dictionaries, textbooks, and other works of reference could not be produced if, once they existed, they could freely be reproduced.… Similarly, recurrent re-examinations of the problem have not demonstrated that the obtainability of patents of invention actually enhances the flow of new technical knowledge rather than leading to wasteful concentration of research on problems whose solution in the near future can be foreseen and where, in consequence of the law, anyone who hits upon a solution a moment before the next gains the right to its exclusive use for a prolonged period. [citing Fritz Machlup, *The Production and Distribution of Knowledge* (1962)]"

See also Kinsella, Patents and Innovation (noting economic historian Eric Schiff's conclusion that when the Netherlands and Switzerland temporarily abolished their patent systems, they experienced *increased* innovation; Petra Moser's finding that countries without patent systems innovate just as much, if not more, than those with patent systems).

29. Elaboration in Kinsella, Miracle — An Honest Patent Attorney! *Mises Blog* (Sep. 7, 2006). It could be argued not only that the costs of the patent system are greater than its innovation-advancing benefits — but that it actually impedes innovation, so that a cost is being incurred to actually stifle innovation. See, e.g., Ronald Bailey, The Tragedy of the Anticommons: Do patents actually impede innovation?, *Reason* (Oct. 2, 2007); Barnett, *Cultivating the Genetic Commons*:
"Broadly defined patents appear likely to exacerbate considerably the accessibility costs that attend any system of property rights. Extending *any* form of patent protection to biotechnological innovations obviously increases development costs for subsequent researchers and, depending on patent scope and duration, may reduce or eliminate some researchers' incentives to improve upon existing innovations. This danger grows as patent size increases. If broad patents sufficiently inflate subsequent improvers' accessibility costs, patent protection would fail a net social benefit test, since it would *reduce* the total stream of innovative output that exists in a world without any patent protection at all."
30. Our anonymous correspondent continues:
"Of course, anyone can point to a few start-up companies that, arguably, owe their successes to their patent portfolios; but over the last 35 years, I have observed what would appear to be an ever increasing number of meritless patents, issued by an understaffed and talent-challenged PTO examining group, being used to extract tribute from whole industries. I have had this discussion with a number of clients, including Asian clients, who have been forced to accept our Patent System and the "taxes" it imposes on them as the cost of doing business in the USA. I wish I had the "answer". I don't. But going to real opposition proceedings, special patent courts with trained patent judges, "loser pays attorney fees" trials, retired engineers/scientists or other experienced engineers/scientists being used to examine applications in their fields of expertise by telecommuting from their homes or local offices throughout the Country, litigating patent attorneys providing regular lectures to the PTO examiners on problems encountered in patent infringement cases due to ineffective or careless examination of patent applications, and the appointment of actually qualified patent judges to the CAFC, may be steps in the right direction."

See Kinsella, Miracle — An Honest Patent Attorney!

31. See e.g., the Council on Foreign Relations study, "Reforming the U.S. Patent System: Getting the Incentives Right," at p. 33; the Innovation Alliance's suggestions for patent reform; Patent Reform Act of 2009, *Patently-O* (March 3, 2009); Patent Reform 2009: Reactionary Causes, *Patent Baristas* (March 3, 2009); also note 2 to Kinsella, Radical Patent Reform Is *Not* on the Way.
32. An Open Letter From Jeff Bezos On The Subject Of Patents (March 2000). See also C. Michael White, "Why a Seventeen Year Patent," *38 J. Pat. Off. Soc'y* 839 (1956) (describing historical basis for seventeen-year term and proposing shortened terms); Barnett, *Cultivating the Genetic Commons* ("There is little determinative empirical evidence to settle theoretical speculation over the optimal scope and duration of patent protection.") (citing D.J. Wright, "Optimal patent breadth and length with costly imitation," 17 *Intl. J. Industrial Org*. 419, 426 (1999); Merges & Nelson, "On the Complex Economics of Patent Scope," pp. 868–870 (stating that most economic models of patent scope and duration focus on the relation between breadth, duration, and incentives to innovate, without giving serious consideration to the social costs of greater duration and breadth in the form of retarded subsequent improvement)).
33. See, e.g., Mexico-Selected Compulsory Licensing, Government Use, and Notable Patent Exception Provisions — Mexico Industrial Property Law. In accordance with article 5.A.2 and 4 of the Paris Convention, the French Patent Law (Code de la Propriété Intellectuelle) provides five different reasons for compulsory licensing, including "Non working of invention during four years from filing" (see L. 613-11 to 14). See also similar provisions in Sections 13, 24 and 81 of the German Patent Law. English translations of many foreign laws may be found in WIPO's Collection of Laws for Electronic Access.
34. See Ciprofloxacin: the Dispute over Compulsory Licenses; Tom Jacobs, Bayer, U.S. Deal on Anthrax Drug, *Motley Fool* (Oct. 25, 2001). See also Kinsella, Brazil and Compulsory Licenses, *Mises Blog* (June 8, 2007); Kinsella, Condemning Patents, *Mises Blog* (Feb. 27, 2005).
35. See cases cited in note 15 to "Radical Patent Reform Is *Not* on the Way." See also Peter S. Menell, "Intellectual Property and the Property Rights Movement," *Regulation* (Fall 2007) (arguing that patent rights are unlike property rights and should not automatically receive the same protections as real property rights do, such as injunctions, exclusivity, and inviolability); Julie Turner, Note, "The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement," 86 *Cal. L. Rev*. 179, 186–89 (1998), arguing that

"the patent system should not benefit those who would use a patent solely as a barrier to entry, without intent to pursue commercialization of the underlying technology — entities which I will call "nonmanufacturing patent owners." While disclosure may have value, mere disclosure fails to justify the granting of a monopoly absent the patent owner's intent to commercialize the disclosed invention. As a result, the patent enforcement system should adopt a scheme whereby nonmanufacturing patent owners receive monetary relief equivalent to the "disclosure value" of their patents."

For more discussion of this issue, see Merges & Nelson, "On the Complex Economics of Patent Scope," at notes 6–7 and accompanying text ("All in all, the substantial amount of evidence now available suggests that compulsory patent licensing, judiciously confined to cases in which patent-based monopoly power has been abused … would have little or no adverse impact on the rate of technological progress ….") (quoting F.M. Scherer, *Industrial Market Structure and Economic Performance* 456–57 (2d ed. 1980)).

36. See Kinsella, Snarky IP Comment, StephanKinsella.com (Sep. 5, 2009) ("Hey, I know — let's trust the same government that imposes FDA costs, taxes, and regulatory roadblocks to set up a patent office to hand out patents to give you partial ownership of others' property to incentivize you just enough to overcome the costs they imposed on you on the first place with the FDA and taxes and regulations. Beautiful! And if that's not 'enough' incentive, establish a government panel of 'experts' to give you 'enough' of a reward paid by taxpayers. Beautiful! I like it!").
37. 35 USC § 273.
38. See Kinsella, Common Misconceptions about Plagiarism and Patents: A Call for an Independent Inventor Defense, *Mises Blog* (Nov. 21, 2009). The CFR study "Reforming the U.S. Patent System: Getting the Incentives Right" recommends a prior-user right be adopted; Bessen & Meurer, in *Patent Failure,* recommend an independent inventor defense.
39. The CFR study "Reforming the U.S. Patent System: Getting the Incentives Right" recommends making it more difficult to find willful infringement.
40. See Kinsella, IP Imperialism (Russia, Intellectual Property, and the WTO), *Mises Blog* (Sept. 22, 2006); idem, China, India like US Patent Reform, *Mises Blog* (Dec. 10, 2007).
41. See Merges & Nelson, "On the Complex Economics of Patent Scope" (arguing that excessively broad patents can impede progress and hinder or block subsequent innovation, especially in science-based industries). See also Julie E. Cohen & Mark A. Lemley, Patent Scope and Innovation in the Software Industry, *Cal. L. Rev*. (2001); Barnett, *Cultivating the Genetic Commons* (quoted in note 29 above).
42. See Peer-to-Patent Review system, *Patent Baristas* (Oct. 1, 2007); PatentFizz.com (allows public comments on patents). See also the proposals of Public Knowledge proposes "Peer review of patent applications," "Permitting third parties to submit prior art, and rewarding them with fee reimbursement if successful," and "Permitting post-grant review of patents by the USPTO prior to litigation."
43. See, e.g., Steve Seidenberg, Novel Ideas: PTO proposes a new suite of patent products to streamline applications, *InsideCounsel* (Jan. 2007); D.C. Toedt, "Reengineering the Patent Examination Process: Two Suggestions," 81 *J. Pat. & Trademark Off. Soc'y* 462 (1999): (suggesting the creation of a convertible "low end" patent (CLEP) and conducing patent examinations as administrative trials); and Dave A. Wyatt, A Radical View On The Future Of Substantive Patent Examination, Henry Goh Intellectual Property Updates (Q1, 2006).
44. Economists Michele Boldrin & David K. Levine suggest amending the patent law to reverse the burden of the proof on patent seekers by granting patents only to those capable of proving that
    - their invention has social value
    - a patent is not likely to block even more valuable innovations
    - the innovation would not be cost-effective absent a patent.

    See Cory Doctorow, "Economists call for patent and copyright abolition," *Boing Boing* (March 11, 2009); see also Boldrin & Levine's *Against Intellectual Monopoly* (2008).
45. See, e.g., RIAA Wants $1.5 Million Per CD Copied, *Slashdot* (Jan. 30, 2008); Ford Slaps Brand Enthusiasts, Returns Love With Legal Punch, *AdRants* (Jan. 14, 2008) (Ford Motor Company claims that they hold the rights to any image of a Ford vehicle, even if it's a picture you took of your own car); Jacqueline L. Salmon, NFL Pulls Plug On Big-Screen Church Parties For Super Bowl, *Washington Post* (Feb. 1, 2008) (NFL prohibits churches from having Super Bowl gatherings on TV sets or screens larger than 55 inches); Internet pirates could be banned from web, Telegraph (Feb. 12, 2008) (British proposal to punish individuals who illegally download music by banning them from the Internet); John Tehranian, Infringement Nation: Copyright Reform and the Law/Norm Gap, *Utah L. Rev*. (forthcoming; SSRN); Cory Doctorow, Infringement Nation: we are all mega-crooks, *Boing Boing* (Nov. 17, 2007); Court Says You Can Copyright A Cease-And-Desist Letter, *Techdirt* (Jan. 25, 2008); Kinsella, Battling the Copyright Monster, *Mises Blog* (June 19, 2006); *idem*, Copyright Kills Amazing Music Project, *Mises Blog* (Jan. 2, 2008); *idem*, "Fair Use" and Copyright, *Mises Blog* (Aug. 17, 2007); *idem*, Copyrights and Dancing, *Mises Blog* (Feb. 20, 2007); *idem*, The "tolerated use" of copyrighted works, *Mises Blog* (Oct. 27, 2006); *idem*, Copyright and Birthday Cakes, *Mises Blog* (June 16, 2005); *idem*, Heroic Google Fighting Copyright Morass, *Mises Blog* (June 2, 2005); *idem*, Copyright Gone Mad, *Mises Blog* (Apr. 14, 2005); *idem*, Copyright and Freedom of Speech, *Mises Blog* (Nov. 8, 2004). See also Joost Smiers & Marieke van Schijndel, Imagine a World Without Copyright, *International Herald Tribune* (Sat. Oct. 8, 2005); Jessica Litman, Revising Copyright Law for the Information Age, 75 *Oreg. L. Rev.* 19 (1996); Kinsella, Copyrights in Fashion Designs?, *Mises Blog* (Sep. 27, 2006); Kinsella, Britain's Copyright Laws, Based on a 300-Year-Old Statute, Desperately Need Reshaping for the Digital Age, *Mises Blog* (Nov. 2, 2006). For a humorous parody of copyright abuses by the RIAA, see CD Liner Notes of the Distant Present, *Something Awful* (Jan. 3, 2008).
46. See, e.g., Lou Carlozo, Teen's charity name draws the McIre of McDonald's, *Wallet Pop* (Jan. 17, 2010) (McDonadl's claims Lauren McClusky's use of "McFest" for the name of a series of charity concerts she puts on infringes its "McFamily" brand); Chip Wood, A Bully-Boy Beer Brewer, *Straight Talk* (Oct. 16, 2007); 9th Circuit Appeals Court Says Its Ok To Criticize Trademarks After All, *Against Monopoly* (Sept. 26, 2007); Kinsella, Trademarks and Free Speech, *Mises Blog* (Aug. 8, 2007); *idem*, Beemer must be next… (BMW, Trademarks, and the letter "M"), *Mises Blog* (Mar. 20, 2007); *idem*, Hypocritical Apple (Trademark), *Mises Blog* (Jan. 11, 2007); ECJ: "Parmesian" Infringes PDO for "Parmigiano Reggiano," *I/P Updates* (Feb. 27, 2008); Mike Masnick, Engadget Mobile Threatened For Using T-Mobile's Trademarked Magenta, *Techdirt* (Mar. 31, 2008).
47. See Kinsella, Improving Copyright Law: Baby Steps, *Mises Blog* (Feb. 24, 2005); Timothy Lee, Orphan Works Legislation Would Be A Small But Important Step Toward Copyright Reform, *Techdirt* (Apr. 29, 2008).

48. See Kinsella, "Copyright Is Very Sticky!" *Mises Blog* (Jan. 14, 2009).
49. See Kinsella, World's Fair Use Day, Mises Blog (Jan. 6, 2010); *idem*, "Fair Use" and Copyright; *idem*, The "Tolerated Use" of Copyrighted Works; *idem*, Copyright and Birthday Cakes; *idem*, Heroic Google Fighting Copyright Morass.
50. An example of an egregious award resulting from the current statutory damages scheme was the recent $220k verdict against Jammie Thomas for sharing 24 songs. The jury awarded $9,250 in statutory damages per song for 24 songs; it could have been up to $150,000 per song, or $3.6M. See Eric Bangeman, RIAA Trial Verdict Is In: Jury Finds Thomas Liable for Infringement, *ars technica* (Oct. 04, 2007).

The Overwhelming Empirical Case *Against* Patent and Copyright

by STEPHAN KINSELLA*on* OCTOBER 23, 2012

Below is collect a large number of quotes and citations related to the empirical case against patent and copyright; updated here from time to time. This was initially drawn from a draft paper, now published as "Law and Intellectual Property in a Stateless Society" in *Legal Foundations of a Free Society* (2023) (see Part III.A, "Utilitarianism"), but it has been expanded and is occasionally updated.

For a summary of some select quotes, see KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished; for a timeline showing key quotes and studies on the empirical case against IP, see Tabarrok, Cowen, and Douglass North on Patents.

But even if we assume that the IP system does stimulate some additional, valuable innovation, no one has established that the value of the purported gains is greater than the costs.[1] If you ask advocates of IP how they know there is a net gain, you get silence (this is especially true of patent attorneys). They cannot point to any study to support their utilitarian contention; they usually just point to Article 1, Section 8 of the Constitution (if they are even aware of this), as if the backroom dealings of politicians two centuries ago are some sort of empirical evidence in favor of state grants of monopoly privilege.

In fact, as far as I've been able to tell, *every* study that attempts to tally the costs and benefits of copyright or patent law concludes either that these schemes cost more than they are worth, or that they actually reduce innovation, or that the research is inconclusive. There are no studies unambiguously showing a net societal gain.[2] There are only repetitions of state propaganda.[3]

The Founders only had a hunch that copyrights and patents might "promote the Progress of Science and useful Arts"[4] —that the cost of this system would be "worth it." But they had no serious evidence. A century and a half later there was still none. As early as 1934, Arnold Plant expressed deep skepticism of patents: speaking of the patent system, he wrote:

> the science of economics as it stands to-day furnishes no basis of justification for this enormous experiment in the encouragement of a particular activity by enabling monopolistic price control.

And in an exhaustive 1958 study prepared for the U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, economist Fritz Machlup concluded:

> No economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss upon society. The best he can do is to state assumptions and make guesses about the extent to which reality corresponds to these assumptions. … If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one.[5]

And the empirical case for patents has not been shored up at all in the last fifty years. As George Priest wrote in 1986, "[I]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property."[6] Similar comments are echoed by other researchers. François Lévêque and Yann Ménière, for example, of the Ecole des mines de Paris (an engineering university), observed in 2004:

> The abolition or preservation of intellectual property protection is ... not just a purely theoretical question. To decide on it from an economic viewpoint, we must be able to assess all the consequences of protection and determine whether the total favorable effects for society outweigh the total negative effects. Unfortunately, this exercise [an economic analysis of the cost and benefits of intellectual property] is no more within our reach today than it was in Machlup's day [1950s].[7]

And see also:

> "we tend to agree with scholars such as those at NYU School of Law who see "**major gaps in our empirical understanding that impede effective policy analysis**" and a "need [for] a greater understanding of how law and policy affect innovation and creative production."[8]

More recently, Boston University Law School Professors (and economists) Michael Meurer and Jim Bessen conclude that on average, the patent system discourages innovation. As they write: "it seems unlikely that patents today are an effective policy instrument to encourage innovation overall" (p. 216). To the contrary, it seems clear that nowadays "patents place a drag on innovation" (p. 146). In short, "the patent system fails on its own terms" (p. 145).[9] See also p. 5: "Overall, the performance of the [U.S] patent system has rapidly deteriorated in recent years. By the late 1990s, the costs that patents imposed on public firms outweighed the benefits. This provides clear empirical evidence that the patent system is broken. . . . [O]ur analysis has relevance to innovation in other countries."

And in a more recent paper, economists Boldrin and Levine state:

> The case against patents can be summarized briefly: there is no empirical evidence that they serve to increase innovation and productivity, unless the latter is identified with the number of patents awarded – which, as evidence shows, has no correlation with measured productivity. This is at the root of the "patent puzzle": in spite of the enormeous increase in the number of patents and in the strength of their legal protection we have neither seen a dramatic acceleration in the rate of technological progress nor a major increase in the levels of R&D expenditure – in addition to the discussion in this paper, see Lerner [2009] and literature therein. As we shall see, there is strong evidence, instead, that patents have many negative consequences.[10]

See also Andrew Torrance: Patents and the Regress of Useful Arts:

> **Patent systems** are often justified by an assumption that **innovation will be spurred** by the prospect of patent protection, leading to the accrual of **greater societal benefits** than would be possible under non-patent systems. However, **little empirical evidence exists** to support this assumption. One way to test the hypothesis that a patent system promotes innovation is experimentally to **simulate the behavior of inventors and competitors** under conditions approximating **patent and non-patent systems**. Employing a multi-user interactive simulation of patent and non-patent (commons and open source) systems ("The Patent Game"), this study compares rates of innovation, productivity, and societal utility. ... Initial data generated using The

> Patent Game suggest that **a system combining patent and open source protection for inventions** (that is, similar to modern patent systems) **generates significantly lower rates of innovation** ($p<0.05$), **productivity** ($p<0.001$), and **societal utility** ($p<0.002$) than does a **commons system**. These data also indicate that there is no statistical difference in innovation, productivity, or societal utility between a pure patent system and a system combining patent and open source protection.

And:

> Plant is not the only responsible economic student of the subject to have raised important questions about the social value of intellectual property rights. Others have proposed systems of government prizes or rewards for creators of valuable intellectual property. **A better alternative**—given the danger that a rewards system would be hopelessly politicized, with grossly debilitating effects on economic efficiency, as well as likely to have misallocative effects similar to those created by enforcing intellectual property rights—**might be simply leaving the market for intellectual property to find its own way, as it did before there were enforceable rights to such property**.
>
> We cannot ignore such fundamental questions, because they bear on many of the issues of intellectual property law that we discuss. But neither can we answer them to our complete satisfaction. The economic case for abolishing intellectual property rights has not been made. But **neither economic theory nor empirical evidence enables a ringing endorsement of any complete body of intellectual property law other than trademark law**, which protects "property" in only an attenuated sense. We do, however, find pretty solid economic support for a degree of trade secrecy protection close to what we have and for a degree of copyright and patent protection as well, but possibly a lesser degree than we have.
>
> Given the emphases of the existing scholarly and popular literature concerned with intellectual property, it may come as a surprise to many readers that **the economic arguments that we make for intellectual property protection are not based primarily on a belief that without legal protection the incentives to create such property would be inadequate**. That belief **cannot be defended confidently on the basis of current knowledge**. The concerns we highlight have rather to do with such things as optimal management of existing stocks of intellectual property, congestion externalities, search costs, rent seeking, and transaction costs. — Landes & Posner, *The Economic Structure of Intellectual Property Law*.

The Founders' hunch about IP was wrong. Copyright and patent are not necessary for creative or artistic works, invention, and innovation. They do not even encourage it. These monopoly privileges enrich some at the expense of others, distort the market and culture, and impoverish us all.[11] Given the available evidence, anyone who accepts utilitarianism should be *opposed* to patent and copyright.[12]

Update: See:

- Jessica Litman, "The Public Domain," *Emory Law Journal* 39 (1990): 965, 997–98, characterizing as an "unruly brawl" debate among economists about copyright's effects and concluding that in general "empirical data are not only unavailable, but are also literally uncollectible."
- Alfred C. Yen, "Restoring the Natural Law: Copyright as Labor and Possession," *Ohio State Law Journal* 51 (1990): 517, 542–43: "[T]he empirical information necessary to calculate the effect of

copyright law on the actions of authors, potential defendants, and consumers is simply unavailable, and is probably uncollectible."

- Roberto Mazzoleni & Richard Nelson, "Economic Theories about the Benefits and Costs of Patents," *Journal of Economic Issues*, vol. 32, issue 4 (1998): 1031–1052 (pdf): "What are the social benefits and costs of awarding patents for inventions? Many economists and patent lawyers seem to think that the answer to this question is simple and settled, at least theoretically. In this paper, we discover that the answer certainly is not simple and currently not well settled. There are a number of different theories that give different answers and only limited knowledge of where these different theories apply."
- Heller, M. A., and R. S. Eisenberg. 1998. "Can Patents Deter Innovation? The Anticommons in Biomedical Research." *Science* 280 (5364): 698–701. doi:10.1126/science.280.5364.698.: "... more intellectual property rights may lead paradoxically to fewer useful products for improving human health .... Building on Heller's theory of anticommons property (3), this article identifies an unintended consequence of biomedical privatization:[13] a proliferation of intellectual property rights upstream may be stifling life-saving innovations further downstream in the course of research and product development."
- Julio H. Cole, "Patents and Copyrights: Do the Benefits Exceed the Costs?", *J. Libertarian Stud.* 15, no. 4 (Fall 2001): 79–105:
  - "from the very beginning [of the US], there was never any real consensus as to the benefits of adopting a patent system" p. 84
  - "there is not much agreement among economic historians as to the importance of patents to the Industrial Revolution. T.S. Ashton thought that patents were unimportant: "It is at least possible that with out the apparatus of the patent system, discovery might have developed quite as rapidly as it did." Joel Mokyr expresses a similar view: "A patent system may have been a stimulus to invention, but it was clearly not a necessary factor." p. 86
- Michael H. Davis, Patent Politics (2004), p. 343 & n.25:

> Although patent law claims to separate those advances that innovators would not have made without additional special skill from those that proprietors would have made in any event by rewarding only those distinctive "inventors," most commentators agree that patent law can only identify those advances innovators would not have made quite as quickly. Much evidence indicates that inventions proceed apace, irrespective of legal rules.25 Other evidence indicates that, regardless of the incentives, many inventions will not arise **until the time is right**.26
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> 25. See Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980). See also *National Wire Bound Box Co. v. Healy*, 189 F. 49 (7th Cir. 1911) for this proposition:
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> > An invention is not something that, but for the particular inventor or inventors, would not have been. Inventions come along as the discovery of gas deposits come[s] along-the contribution of some particular person to the world's knowledge —but if not by that person, then, in the course of time, and **usually in a very short time, by some one else**. ...
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> 26. British science historian James Burke has explored this idea elegantly by tracing the interdependent relationships between diverse technological advances.

- Michael H. Davis, Patent Politics (2004), p. 348: "evidence indicates that the patent monopoly actually slows the pace of invention, at least in some industries."
- Michael J. Meurer & Craig Allen Nard, "Patent Policy Adrift in a Sea of Anecdote: A Reply to Lichtman," 93 *Geo. L.J.* 2033, 2034 & n.7 (2005), citing Wesley M. Cohen, Richard R. Nelson &

John P. Walsh, "Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Firms Patent (Or Not)" (Nat'l Bureau of Econ. Research, Working Paper No. 7552, 2000) as evidence that "patent protection plays a relatively modest incentive role in most industries"). (quoted in Maggie Wittlin, Lisa Larrimore Ouellette & Gregory N. Mandel, "What Causes Polarization on IP Policy?," *UC Davis L. Rev.* 52, no. 2 (2018): 1193–1241 [PDF])

- Eric E. Johnson, "Intellectual Property and the Incentive Fallacy," 39 *Fla. St. U. L. Rev.* 623, 624 (2012): "Without anyone really noticing it, the primary rationale underpinning intellectual property law **has become hollow**. New strains of thinking in the fields of economics, psychology, and business-management studies **now debunk the long-venerated idea** that legal authority must provide some **artificial inducement** to artistic and technological progress."
- Courtesy of Andrew Torrance, mentioned in his 2011 Open Science Summit talk,[14] a quote from this book: *Patents in the Knowledge-Based Economy*, Cohen & Merrill, eds. (2003) (Google books):

> There are theoretical as well as empirical reasons to question whether patent rights advance innovation in a substantial way in most industries. ...The literature on the impact of patents on innovation must be considered emergent. One reason is that the effect of patent policy has many dimensions ... and these continue to challenge scholars both theoretically and empirically.

- *Innovation in America: The Role of Copyrights, Hearings Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 15 (2013) (statement of the Computer & Communications Industry Association) [See docs here, to-wit: Hearing Record: Hearing Transcript [PDF]] (see my post USPTO/Commerce Dept. Distortions: "IP Contributes $5 Trillion and 40 Million Jobs to Economy"), claiming that the study "actually suggested that IP-intensive industries are having a *decreasing* impact on the U.S. economy." (according to Maggie Wittlin, Lisa Larrimore Ouellette & Gregory N. Mandel, "What Causes Polarization on IP Policy"). The CCIA statement states: "the role of copyright in promoting innovation is extremely difficult to quantify. Although encouraging the creation of works is the Constitutional purpose of copyright, economists have few tools to determine how much innovative activity is attributable to copyright as opposed to other factors, such as competition and the desire for reputational benefit. This inability to quantify the true impact of copyright on innovation makes it difficult for policymakers to make an informed decision on the optimal levels of copyright protection."
- Mark A. Lemley, "IP in a World Without Scarcity," 90 *N.Y.U. L. Rev.* 460, 507 (2015): "The Internet certainly undermines the logic of IP as an incentive to commercialize works once they are created, but **it may also undermine the classic theory of IP as an incentive to create**."
- Mark A. Lemley, "Faith-Based Intellectual Property," 62 *UCLA L. Rev.* 1328, 1335 (2015): "it is far from clear that IP is doing the world more good than harm."
- Amy Kapczynski, "The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism," 59 UCLA L. Rev. 970, 977 (2012): "the contemporary field of information economics itself offers no clear endorsement of IP."
- Julie Samuels [holder of the Mark Cuban Chair to Eliminate Stupid Patents at the Electronic Frontier Foundation], "Patent Trolls Hurt Innovation," POLITICO (Mar. 6, 2013): "we have a consensus in the tech community: The patent system has started to impede, rather than incentivize, innovation."
- Executive Office of the President, *Patent Assertion and U.S. Innovation* [report prepared by the President's Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy]: patent trolls "have had a negative impact on innovation and economic growth."

- Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions," 51 *Wm. & Mary L. Rev.* 513, 517-18 (2009): "[w]hat empirical evidence exists does not engender confidence that increases in copyright protection spur creativity."
- Julie E. Cohen, "Copyright as Property in the Post-Industrial Economy: A Research Agenda," 2011 *Wis. L. Rev.* 141, 143: "[e]verything we know about creativity and creative processes suggests that copyright plays very little role in motivating creative work."
- see also Jessica Silbey, *The Eureka Myth: Creators, Innovators, and Everday Intellectual Property* 2 (2015): concluding from interviews with people in creative industries that copyright incentives play a minor role
- Diane Leenheer Zimmerman, "Copyrights as Incentives: Did We Just Imagine That?" [online] 12 *Theoretical Inquiries L.* 29, 47 (2011): "The work of scholars who study innovation and creativity, if accurate, renders questionable the assertion that the degree to which people are willing to devote themselves to creative pursuits depends primarily, or even significantly, on the promise of a potential pot of economic rewards."
- Eric Johnson: "Intellectual property law has long been justified on the belief that external incentives are necessary to get people to produce artistic works and technological innovations that are easily copied. This Essay argues that this foundational premise of the economic theory of intellectual property is wrong. Using recent advances in behavioral economics, psychology, and business-management studies, it is now possible to show that **there are natural and intrinsic motivations that will cause technology and the arts to flourish even in the absence of externally supplied rewards, such as copyrights and patents**." (see Intellectual Property's Great Fallacy)
- Aarthi S. Anand, "'Less is More': New Property Paradigm in the Information Age?", *Duke Law & Tech. Rev.* 11, no. 1 (2012): 65–144: "evidence of growth in the commercial software industry without intellectual property protection. Between 1993 and 2010, the software industry in India emerged as the fastest growing in the world, accounting for $76 billion in revenues by 2010. In the same time period, the software industry in India remained unaffected by changes in intellectual property protection for software. By demonstrating industry growth without strong intellectual property protections, the Indian data fills the critical gap in American literature."

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Update: See also: The EU Suppressed a 300-Page Study That Found Piracy Doesn't Harm Sales (9/21/17); What the Commission found out about copyright infringement but 'forgot' to tell us.

Heidi L. Williams, How Do Patents Affect Research Investments? (Jan. 2017):

> "To summarize, evidence from patent law changes has provided little evidence that stronger patent rights encourage research investments.... The patent system is a widely-used policy lever attempting to better align the private returns to developing new technologies with the social value of those inventions. The past few decades have seen the development of large academic literatures in a variety of fields – including economics, law, and strategy, among others – investigating various aspects of the patent system. However, surprisingly little research has focused on empirically estimating the key parameters needed to evaluate the social costs and social benefits of the patent system. A half-century ago, Penrose (1951) and Machlup (1958) argued that insufficient empirical evidence existed to make a conclusive case either for or against patents. Today, I would argue that given the limitations of the existing literature **we still have essentially no credible empirical** evidence on the seemingly simple question of whether stronger patent rights – either longer patent terms or broader patent rights – encourage research investments into developing new technologies. While researchers have recently begun to make progress on the more limited question

> of how patents on existing technologies affect follow-on innovation (Galasso and Schankerman, 2015; Sampat and Williams, 2015), evidence on the overall effects of patents on research investments are needed as one input into optimal patent policy design.

Petra Moser, Patents and Innovation in Economic History (Feb. 2016): "when patent rights have been too broad or strong, they have actually discouraged innovation"

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[**Update**: See also Hon. Maureen K. Ohlhausen, "Patent Rights in a Climate of Intellectual Property Rights Skepticism," *Harv. J. L. & Tech.*, 30, no. 1 (Fall 2016 [pdf]): 1–51, pp. 8–9:

> Respected economists Michele Boldrin and David Levine find "no evidence that intellectual monopoly achieves the desired purpose of increasing innovation," describe IP rights as an "unnecessary evil," and call for the patent system's abolition.38 Economist Adam Jaffe and Harvard Business School professor Josh Lerner call the patent system "broken."39 Law professors Michael Meurer and James Bessen think it "unlikely that patents today are an effective policy instrument to encourage innovation overall."40 As for encouraging ideas, the *Economist* wrote that "[t]oday's patent systems are a rotten way of rewarding them."41 Indeed, the magazine appeared to embrace the notion that "society as a whole might even be better off with no patents than with the mess that is today's system."42 In law professor Thomas Cheng's view, theory and empirical studies "firmly refute[] the notion that patent protection is necessary for securing innovation."43 Richard Stallman argues that "patent law should be abolished."44 The Electronic Frontier Foundation's view is that the "patent system is broken" and "it's time to start over."45
>
> The chorus of criticism goes on. Attorney William Hubbard argues that "patent protection in the United States should be weakened."46 The Hon. Richard A. Posner sees "serious problems with our patent system."47 A leading authority on patent law, Mark Lemley, has proclaimed the existence of a "patent crisis."48 A renowned economist, Carl Shapiro, believes that the "patent system . . . provides excessive rewards to patent holders . . . reduc[ing] economic efficiency by discouraging innovation."49 Even Google, which secured more than 2,500 patents in 201450, has sometimes poured cold water on the importance of IP rights. Its general counsel, Kent Walker, has opined that a "patent isn't innovation. It's the right to block someone else from innovating" and that "patents are not encouraging innovation."51 Although outright elimination of the patent regime is an outlier view, many commentators believe that society ought to jettison patents in particular fields of invention such as computer software, business methods, and genetics.52 Even some who have defended the status quo have done so reluctantly.53]

Brink Lindsey & Steven M. Teles, *The Captured Economy: How the Powerful Enrich Themselves, Slow Down Growth, and Increase Inequality* (2017):

> "IN OUR ROGUES' GALLERY OF case studies, copyright and patent laws are the wolves in sheep's clothing.
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> … copyright and patent laws are regulatory responses to what economists call "**market failure**." … [This is] a plausible argument with only one problem: **the facts on the ground don't provide much support for it**. The market failure theory suggests that vulnerability to copying and imitation creates serious disincentives for would-be artists and inventors, such that only exclusive

> rights over reproduction and use can create the proper incentives for cultural production and technological innovation. Yet we regularly see robust, ebullient creativity and innovation even where intellectual property protections are absent or increasingly porous. **The empirical evidence that intellectual property rights stimulate creative expression and innovation is remarkably weak**.
>
> "Even if innovation can sometimes thrive in the absence of patents, it may still be the case that patent protection boosts overall levels of innovative activity and thus stimulates technological progress. After all, the extra returns accruing to inventors because of the temporary patent monopoly can be seen as a subsidy for innovative activity, and when you subsidize something you generally get more of it. Despite what would seem like a powerful incentive, **economists have struggled to find evidence of patent law's positive effects**, in either the United States or elsewhere. Josh Lerner undertook an impressively comprehensive survey, examining 177 different changes in patent policy across 60 countries over a 150-year period. His striking finding was that **changes to strengthen patent protection didn't even lead to increased patenting**. "This evidence," he concludes, "suggests that these policy changes did not spur innovation." Meanwhile, a study of the 1988 Japanese patent law reform found no evidence that this strengthening of intellectual property protection increased either R&D spending or innovative output. A study of Canadian manufacturing found that firms that use the patent process intensively are no more likely to produce innovations than those that don't. Here in the United States, where patent protections have been broadened and strengthened significantly since the 1980s, one survey of the results led to this muddled conclusion: "Despite the significance of the policy changes and the wide availability of detailed data relating to patenting, **robust conclusions regarding the empirical consequences for technological innovation of changes in patent policy are few**.7 [7. Adam B. Jaffe, "The U.S. Patent System in Transition: Policy Innovation and the Innovation Process," *Research Policy* 29 (2000): pp. 531–77.]
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> ... The evidentiary record on patents is thus mixed. Some findings describe positive effects, yes, but **there is no convincing confirmation that patent systems as a whole work as intended**. Overall, we find ourselves agreeing with the assessment offered nearly 60 years ago by the economist Fritz Machlup, a pioneer in the study of the emerging information economy. "If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one," Machlup wrote. "But since we have had a patent system for a long time, it would be irresponsible, on the basis of our present knowledge, to recommend abolishing it."
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> ... The copyright and patent laws we have today therefore look more like **intellectual monopoly** than intellectual property. They do not simply give people their rightful due; on the contrary, they **regularly deprive people of their rightful due**. If there is a case to be made for the special privileges granted under these laws, it must be based on utilitarian grounds. As we have already seen, **that case is surprisingly weak**, and **utterly incapable of justifying the radical expansion in IP protection that has occurred in recent years**. Therefore, **it is entirely appropriate to strip IP protection of its sheep's clothing and to see it for the wolf it is, a major source of economic stagnation and a tool for unjust enrichment**."

Matt Ridley, *How Innovation Works: And Why It Flourishes in Freedom* (2021), ch. 11, section "When the law stifles innovation: the case of intellectual property":

> "there is no evidence that there is less innovation in areas unprotected by patents. … none of the following technologies were patented in any effective way: automatic transmission, power steering, ballpoint pens, cellophane, gyrocompasses, jet engines, magnetic recording, safety razors and zippers. … All in all, the evidence that patents and copyrights are necessary for innovation, let alone good for it, is weak. There is simply no sign of a '**market failure**' in innovation waiting to be rectified by intellectual property, while there is ample evidence that patents and copyrights are actively hindering innovation. As Lindsey and Teles put it, the holders of intellectual property are 'a significant drag on innovation and growth, the very opposite of IP law's stated purpose'."

See also Ridley, *The Rational Optimist* (2010), ch. 8:

> "there is little evidence that patents are really what drive inventors to invent. Most innovations are never patented. In the second half of the nineteenth century neither Holland nor Switzerland had a patent system, yet both countries flourished and attracted inventors. And the list of significant twentieth century inventions that were never patented is a long one. It includes automatic transmission, Bakelite, ballpoint pens, cellophane, cyclotrons, gyrocompasses, jet engines, magnetic recording, power steering, safety razors and zippers. By contrast, the Wright brothers effectively grounded the nascent aircraft industry in the United States by enthusiastically defending their 1906 patent on powered flying machines. In 1920, there was a logjam in the manufacture of radios caused by the blocking patents held by four firms (RCA, GE, AT&T and Westing house), which prevented each firm making the best possible radios. …"In the 1990s the US Patent Office flirted with the idea of allowing the patenting of gene fragments, segments of sequenced genes that could be used to find faulty or normal genes. Had this happened, the human genome sequence would have become an impossible landscape in which to innovate."

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As for studies trying to estimate the optimal patent and copyright terms, see my post Optimal Patent and Copyright Term Length.

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For other compilations of some of this evidence, see:

- Tabarrok, Cowen, and Douglass North on Patents
- KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished (Presentation Notes)
- Tabarrok, Cowen, and Douglass North on Patents

For some additional relevant posts, see the material collected at Selected Supplementary Material for Against Intellectual Property, and other posts, e.g.:

- Costs of the Patent System Revisited;
- "Patent Trolls" Cost Productive Companies $29 Billion in 2011, Stall Innovation, and Hurt Small Businesses;
- Patent Trolls Cost The Economy Half A Trillion Dollars since 1990;
- Cost to Google to Pre-Screen YouTube Videos to Prevent Copyright: $37 Billion Per Year;

- Software Industry Needs 6 Million Patent Attorneys and $2.7 trillion per year to avoid infringing software patents;
- Death by Copyright-IP Fascist Police State Acronym;
- SOPA is the Symptom, Copyright is the Disease: The SOPA Wakeup Call to Abolish Copyright;
- Where does IP Rank Among the Worst State Laws?;
- Patent vs. Copyright: Which is Worse?;
- Masnick on the Horrible PROTECT IP Act: The Coming IPolice State;
- Copyright and the End of Internet Freedom.

1. See Boldrin & Levine, *Against Intellectual Monopoly*; and my post Yet Another Study Finds Patents Do Not Encourage Innovation. [↩]
2. Yet Another Study Finds Patents Do Not Encourage Innovation. [↩]
3. Update: There are some ridiculous claims, such as this one: USPTO/Commerce Dept. Distortions: "IP Contributes $5 Trillion and 40 Million Jobs to Economy", which simply claims, with no basis, that IP should get the credit for the productivity of industries that *use* IP.

   And see also Stephen Haber, "~~Patents and the Wealth of Nations~~," 23 *Geo. Mason L.Rev.* 811 (2016). I haven't had time to do a more comprehensive critique yet, but a few comments now from my initial quick read of the article. First–it's interesting that the author admits his work is funded by large corporations which rely heavily upon IP law as part of their business models, though the author strains to argue that his work is not influenced by this: "To ensure academic freedom and independence, both PCI and IP^2, along with all work associated with them, have only been supported by unrestricted gifts. All such work, including this paper, reflects the independent views of the authors as academics. Some major donors have included Microsoft, Pfizer, and Qualcomm." Hmm, gee, I wonder why companies that depend on copyright (Microsoft) and patents (the others) would support the work of obviously pro-IP advocacy groups, "Hoover Institution's Working Group on Intellectual Property, Innovation, and Prosperity (IP^2)" and the earlier group that IP^2 succeeded, "the Hoover Project on Commercializing Innovation (PCI)." I wonder if they would give "unrestricted gifts" to pro-free market groups that point of the harm and dangers caused by IP law? To ask is to answer.

   The way pro-IP groups fund and distort "free market" thinkers to support their agendas and business models reminds me, by the way, of the time Cato, another "respectable" "libertarian" groups funded by mainstream donors, and large corporations, had some scholars opposing *free trade* in the name of patent rights, probably to please pharmaceutical donors. Basically, they opposed drug reimportation (i.e., FREE TRADE) because this might undermine the ability of pharmaceutical and other patent-law dependent donors to extract monopoly prices from Medicare or whatever. Mossoff basically admits this at one point in his response to Sammeroff, when he says that price controls in other countries mean that American pharmaceutical companies can't make "enough profit" in those other countries to "recoup their costs" (and we all know that the whole purpose of a free market, capitalist system, is to guarantee that people can recoup their costs!! If you can't "recoup your costs," then what's the point of living??). In any case, note that Cato's pharmaceutical donors include Eli Lilly & Company, Merck & Company and Pfizer, Inc. Hmmm, Pfizer, dependent on pharma patents, donates to both Cato (whose scholars sacrificed their traditional preference for free trade for the ability of patentees to use monopoly patent grant privileges to extract ransom payments from victims of their patent monopoly). Hmmm. Pfizer a donor of Cato, when it turns against free trade and favors pharma patents and opposes drug reimportation. Pfizer, when it funds Moser's two pro-IP groups to produce pro-IP conclusions. Hmm. Mossoff is at George Mason, funded by the Kochs, who are mainstream-conservative and the occasionally allow the pro-IP Randroids in the door. Hmm. Mossoff gets in yet another debate on IP and promotes the work of Haber ... which was funded by Pfizer, and which was published in the journal of Mossoff's own law school, the Koch-funded George Mason. Hmm. Mossoff starts or joins or co-founds tons of blatantly-pro-IP committees or groups like "Senior Fellow at the Hudson Institute, where he is also Chair of the Forum for

Intellectual Property, and he is a Visiting Intellectual Property Fellow at the Heritage Foundation. He was appointed to the Board of Directors of the Center for Intellectual Property Understanding in January 2020. He is a member of the Intellectual Property Rights Policy Committee of ANSI and he has served as Chair and Vice-Chair of the Intellectual Property Committee of the IEEE-USA, on which he remains a member in good standing." (from his G.Mason faculty listing); and he's also (according to his online cv) the founder of "**Center for the Protection of Intellectual Property**, Antonin Scalia Law School, Co-Founder, Director (differing roles), and Senior Scholar, 2012-2019". I mean look at the name! ""Center for the Protection of Intellectual Property"! wow, what an objective group looking for the truth! And so he worms his way into all these groups to try to push the IP agenda, while trying to cast IP rights as "just property rights" or "natural rights" and then pushing the agenda of a few other scholars who are also subsidized by the same donors, such as this Haber fellow. Whose "credentials" include other obviously blatantly pro-IP groups (see above), also funded by Pfizer, as well as other IP parasites like Microsoft and Qualcomm.

In any case — the support of patents even by some libertarians has led them to oppose reimportation–that is, to oppose free trade–e.g., Cato's Doug Bandow, Richard Epstein, and Michael Kraus. See my posts Intellectual Property and Think Tank Corruption and Palmer on Patents; also Ideas Are Free: The Case Against Intellectual Property; Drug Reimportation; ~~Cato on Drug Reimportation~~; and ~~Patents, Prescription Drugs, and Price Controls~~.

In any case… Haber's argument basically appears to be this: we are wealthy because of the specialization of labor, which can only emerge when there are well protected property rights. Fair enough. But then he argues that this be true of "all" or "other" "types" of "property rights," such as "intellectual property." This is basically simply question-begging; just because proponents of patent and copyright law defend these monopoly privilege statutes by calling them "intellectual property" does not mean that the reasoning above with respect to classical property rights is analogous. After all, one could find any legal system or institution and label it a "property" right–for example, having a property right in social security payments, or have a property right in other human beings, i.e. chattel slavery–and then simply say that the normal defense of classical property rights must apply to these systems as well!

Haber also erroneously states: patents are "not, as some IP critics maintain, a grant of monopoly. Rather, it is a temporary property right to something that did not exist before that can be sold, licensed, or traded." This is incorrect, for a number of reasons. First, it is not a property right; calling it a property right does not make it so; it certainly does not justify it. Property rights are not temporary. Second, even if the patent system required the "something" that is patented to be something that "did not exist before," there is no guarantee that the standards of patent law or the examiners of the patent office will only result in patents for things that "did not exist before". Examiners are incompetent and even if they were not, they are unable to do a comprehensive search to be sure that the invention is truly novel. Third, in most patent systems, and since Obama's America Invents Act, the US patent system, the inventor need not be the first to invent the patented invention, but rather, the first to file. And there is no requirement that the invention "did not exist before," since it may well be already invented but simply kept secret by some previous inventors. Fourth, almost all innovations are incremental and come about only when preceding inventions set the stage and make it possible; and also, when this happens, the invention is usually inevitable and indeed, most patented inventions were being worked on independently at the same time by a number of researchers and innovators, e.g., automobiles, the light bulb, airplanes, and so on–much like Leibniz and Newton came up with the calculus nearly simultaneously yet independently, and much like Menger, Jevons and Walrus with the marginal revolution in economics. And finally, *even if* a patentee came up with an invention that "did not exist before", this still does not justify the state granting him an artificial monopoly privilege that protects him from the consequences (namely: emulation and competition) of his decision to make his invention public (usually by selling products embodying the design, which others can then learn from).

This paper is full of absurd arguments, such as "Patentees can either get a royalty equal to some percentage of output, or they can get zero; others have the choice between paying a royalty equal to some percentage of their output or bearing the costs of inventing around a patent. Writing a contract to license the patent therefore makes both parties better off." So the law gives a patentee an unjust right to control others' property–in essence, a negative servitude, as I've argued here–and he uses this to force others to pay a ransom to him in order to use their own property as they see fit. Yes, *given* that these victims can be extorted by the patentee, they see it in the interest to pay the ransom. This does not prove that both parties are better off, any more than a wealthy father paying a ransom to his child's kidnapper is "better off" because of the kidnapping!

Or: "In fact, if someone actually had a technology for which there were no substitutes and which could not be reverse engineered by a third party at a lower cost than the research and development ("R&D") and other costs already incurred by the inventor, he would not patent it at all! He would instead take advantage of his proprietary knowledge to dominate the market. The result would be a monopoly—but it would have nothing to do with patents." This implies that monopolies are possible on the free market, which is false (see on this Rothbard in Man, Economy and State; Hoppe in Theory of Socialism and Capitalism; D.T. Armentano's work on antitrust law, etc.); all the while denying that monopolies arise from patent grants which are clearly grants of monopoly privilege. Hell, the modern patent system *comes from* the English *Statute of Monopolies* in 1623! In the most recent Supreme Court decision about patents, the opening line admits this… It is widely recognized by even proponents of patents, by courts, and it's part of the very history, that it's a grant of monopoly privilege. See here.

So then Haber continues: "The fact that patents are property rights means that they can serve as the basis for the web of contracts that permits individuals and firms to specialize in what they do best." It's not a "fact" that patents "are property rights"; it's just a conclusion, and a way of trying to claim that patent rights are *justified*, simply because they exist; so it's just question-begging.

The author also writes that his paper "examines the economic history of the British patent system during the Industrial Revolution and the phenomenal growth story of the United States, whose constitutionally required patent system found enthusiastic support in the early U.S. judiciary." But the patent system is *not* "constitutionally required". The Constitution authorizes, but does not require, Congress to enact patent law.

Also somewhat amusing is that the author cites and relies on Petra Moser's paper "How Do Patent Laws Influence Innovation? Evidence from Nineteenth Century World Fairs," in support of his argument. He writes: "What would have happened in the absence of the British patent system? Would England and Scotland industrialized, and if so, how would that process of industrialization have been different? Obviously, historians cannot go back in time and do a randomized control trial—assigning a patent system to one part of Britain and no patent system to another. The work of economic historian Professor Petra Moser, however, allows us to do the next best thing. Moser looks at the products exhibited at the World Exhibitions of the late nineteenth century and asks whether the presence or absence of patent systems across countries affected the types of industries that emerged. **She finds that countries that either lacked patent systems entirely or that had weakly enforced patents tended to focus on a small set of industries that depended on technologies that could not be backward engineered**, such as the manufacture of scientific instruments. Those countries lagged Britain and the United States, the two countries with the strongest patent protection, in the development of a broader set of industries, such as machinery, whose technologies could be backward engineered, and thus required patents in order to flourish. **The implication is that had Great Britain not had a patent system, the growth of key industries, particularly those that required steam engines and mechanized production, would have been stunted**." (emphasis added)

In other words, he leaves the impression that Moser's work support his thesis. However, from her own abstract: "This paper introduces a new internationally comparable data set that permits an empirical investigation of the effects of patent law on innovation. The data have been constructed from the catalogues of two 19th century world fairs: the Crystal Palace Exhibition in London, 1851, and the Centennial Exhibition in Philadelphia, 1876. They include innovations that were not patented, as well as those that were, and innovations from countries both with and without patent laws. **I find no evidence that patent laws increased levels of innovative activity** but **strong evidence** that patent systems **influenced the distribution of innovative activity** across industries. Inventors in countries without patent laws concentrated in industries where secrecy was effective relative to patents, e.g., food processing and scientific instruments. These results suggest that introducing strong and effective patent laws in countries without patents may have stronger effects on **changing the direction of innovative activity than on raising the number of innovations**." (emphasis added)

In other words, Moser does not believe patents increase innovation on net but merely distort and skew research–a point others have made, such as Plant and Rothbard. See, e.g., Arnold Plant, "The Economic Theory Concerning Patents for Inventions," p. 43. As Rothbard writes (Man, Economy, and State, pp. 658–59): "It is by no means self-evident that patents encourage an increased absolute quantity of research expenditures. But certainly patents distort the type of research expenditure being conducted. . . . Research expenditures are therefore overstimulated in the early stages before anyone has a patent, and they are unduly restricted in the period after the patent is received. In addition, some inventions are considered patentable, while others are not. The patent system then has the further effect of artificially stimulating research expenditures in the patentable areas, while artificially restricting research in the nonpatentable areas." See also Milton Friedman on the Distorting Effect of Patents.

Needless to say, arguing that patents distort innovation is not an argument for patents! See also Petra Moser, Patents and Innovation in Economic History (Feb. 2016): "when patent rights have been too broad or strong, they have actually discouraged innovation". So Moser apparently believes stronger patents discourage innovation (the opposite of Haber's claim that "the weight of the evidence supports the claim of a positive causal relationship between the strength of patent rights and innovation— and thus, economic growth"), and that patents change the direction of innovation, i.e. they skew and distort innovation.

See also "Absurd Arguments for IP" and "There are No Good Arguments for Intellectual Property". [↩]

4. *U.S. Const*., Art. I, Sec. 8, Cl. 8. For more background on the origins of copyright in America, see references in note 53, *supra* [The Stop Online Piracy Act (SOPA), recently defeated by a widespread Internet-based outrage, is a good example of a threat to freedom of expression in the name of copyright law. See Stephan Kinsella, SOPA is the Symptom, Copyright is the Disease: The SOPA Wakeup Call to Abolish Copyright, *The Libertarian Standard* (Jan. 24, 2012). Regarding the origins of copyright, see Michele Boldrin & David K Levine, *Against Intellectual Monopoly* (2008), ch. 2, againstmonopoly.org; Eric E. Johnson, "Intellectual Property's Great Fallacy" (2011) ("The monopolies now understood as copyrights and patents were originally created by royal decree, bestowed as a form of favoritism and control. As the power of the monarchy dwindled, these chartered monopolies were reformed, and essentially by default, they wound up in the hands of authors and inventors."); Tom W. Bell, *Intellectual Privilege: A Libertarian View of Copyright*.] [↩]
5. Fritz Machlup, *An Economic Review of the Patent System* 79-80 (1958), c4sif.org/resources [↩]
6. George Priest, "What Economists Can Tell Lawyers About Intellectual Property," 8 *Res. L. & Econ*. 19 (1986). [↩]
7. François Lévêque & Yann Ménière, *The Economics of Patents and Copyrights* 102 (2004). [↩]
8. "Innovation Law & Policy Empirical Research Initiative," *NYU L. Engelberg Ctr. on Innovation L. & Policy*, quoted in Maggie Wittlin, Lisa Larrimore Ouellette & Gregory N. Mandel, "What Causes Polarization on IP Policy?," *UC Davis L. Rev*. 52, no. 2 (2018): 1193–1241, 1209 [PDF]. [↩]

9. James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* (2008, excerpts available at researchoninnovation.org/dopatentswork/). [↩]
10. Boldrin and Levine: The Case Against Patents. [↩]
11. See, e.g., Stephan Kinsella, "Leveraging IP," *Mises Economics Blog* (Aug. 1, 2010); and *idem*, "Milton Friedman on the Distorting Effect of Patents," *C4SIF Blog* (July 3, 2011). [↩]
12. Another problem with the wealth-maximization approach is that it has no logical stopping point. If adding (and increasing) IP protection is a cost worth paying to stimulate additional innovation and creation over what would occur on a free market—that is, if the amount of innovation and creation absent IP law is *not enough*, then how do we know that we have enough now, under a system of patent and copyright? Maybe the penalties or terms should be increased: impose capital punishment, triple the patent and copyright term. And what if there still is not enough? Why don't we expropriate taxpayer funds and set up a government award or prize system, like a huge state-run Nobel prize with thousands of winners, to hand out to deserving innovators, so as to incentivize even more innovation? Incredibly, this has been suggested, too—even by Nobel Prize winners and libertarians. See Stephan Kinsella, "$30 Billion Taxfunded Innovation Contracts: The 'Progressive-Libertarian' Solution," *Mises Economics Blog* (Nov. 23, 2008). [↩]
13. Sic. It is perverse to refer to the granting of anti-competitive monopoly privileges by the state as "privatization". [↩]
14. See KOL101 | The Future (the End?) of Intellectual Property (Open Science Summit, 2011). [↩]

Legal Scholars: Thumbs Down on Patent and Copyright

by STEPHAN KINSELLA*on* OCTOBER 24, 2012

There has long been skepticism about state-granted "intellectual" monopoly privileges among economists, and even this is growing in recent decades. See, e.g., my posts The Overwhelming Empirical Case *Against* Patent and Copyright, The Four Historical Phases of IP Abolitionism, and The Origins of Libertarian IP Abolitionism. As a sampler (more detail in the first link above):

> Fritz Machlup, 1958:
>
> > No economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss upon society. The best he can do is to state assumptions and make guesses about the extent to which reality corresponds to these assumptions. ... If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one.
>
> François Lévêque and Yann Ménière (Ecole des mines de Paris, 2004):
>
> > The abolition or preservation of intellectual property protection is ... not just a purely theoretical question. To decide on it from an economic viewpoint, we must be able to assess all the consequences of protection and determine whether the total favorable effects for society outweigh the total negative effects. Unfortunately, this exercise [an economic analysis of the cost and benefits of intellectual property] is no more within our reach today than it was in Machlup's day [1950s].
>
> Boston University Law School Professors (and economists) Michael Meurer and Jim Bessen concluded (2008) that on average, the patent system discourages innovation. As they write: "it seems unlikely that patents today are an effective policy instrument to encourage innovation overall" (p. 216). To the contrary, it seems clear that nowadays "patents place a drag on innovation" (p. 146). In short, "the patent system fails on its own terms" (p. 145).
>
> And in a recent draft paper (2012), economists Michele Boldrin and David Levine state:
>
> > The case against patents can be summarized briefly: there is no empirical evidence that they serve to increase innovation and productivity, unless the latter is identified with the number of patents awarded—which, as evidence shows, has no correlation with measured productivity. This is at the root of the "patent puzzle": in spite of the [enormous] increase in the number of patents and in the strength of their legal protection we have neither seen a dramatic acceleration in the rate of technological progress nor a major increase in the levels of R&D expenditurein addition to the discussion in this paper, see Lerner [2009] and literature therein. As we shall see, there is strong evidence, instead, that patents have many negative consequences.

What about lawyers and legal scholars? Among practicing lawyers, the most vociferous ones on IP policy tend to be those who know a bit about patent or IP law. They tend to be practitioners who are naturally biased toward supporting this system; it pays the bills. So it's no surprise most IP practitioners come up with arguments in favor of patent or copyright, when pressed; but they argue like lawyers, which is to say: like advocates pressing a case, instead of scholars or scientists trying to find the truth. Their arguments are typically consequentialist or utilitarian, though empty of data and without serious or scholarly rigor. So of course we have a slew of IP apologists and shills—patent lawyers like Dale Halling,[1] Gene Quinn,[2] Lawrence Ebert,[3] and John Harris.[4] They rarely put forward any serious argument; they might as well say, "we make money from this system and like it!" Which is hard to disagree with, but is … not an argument for maintaining the IP system.

Still, despite the pressure on IP specialists to toe the line, most never try to justify it, many realize that arguments in favor of it are flawed,[5] and a brave few actually come out openly in opposition.[6]

As Wendy J. Gordon notes, "IP theorizing was sparse in legal academia until the second half of the twentieth century."[7] But that has changed. And among those law professors and legal scholars looking into the normative or policy basis of IP, there seems to be a growing number who are deeply suspicious of patent and copyright and who favor drastic scaling back of these laws if not outright abolition. Such as those on the following, non-comprehensive, list (I have bolded the ones that appear to be the most radical—who are for IP abolition or something close to it):

- patent attorney, legal scholar **Stephan Kinsella** ('nuff said);
- Chapman law professor **Tom Bell**;[8]
- Virginia law professor Chris Sprigman and UCLA law professor Kal Raustiala;[9]
- Stanford law professor Mark Lemley;[10]
- Law professor Eric Johnson;[11]
- The aforementioned BU law professor James Bessen and BU law lecturer Michael Meurer;[12]
- Harvard law professor Lawrence Lessig;[13]
- Santa Clara law professor Eric Goldman;[14]
- Attorney, legal scholar, and philosophy professor **David Koepsell**;[15]
- U Kansas law professor Andrew Torrance;[16]
- UC-Irvine law professor Bill Tomlinson;[17]
- Attorney and legal scholar **Jacob Huebert**;[18]
- Columbia law professor Eben Moglen;[19]
- Tulane law professor Glynn Lunney;[20]
- Michigan law professors Michael A. Heller and Rebecca S. Eisenberg;[21]
- BU law professor Wendy J. Gordon;[22]
- Supreme Court Justice Stephen Breyer;[23]
- Berkeley law professor Talha Syed[24]
- Berkeley law professor Peter Menell
- Attorney and legal scholar **Timothy Sandefur**.[25]

(If anyone knows of any notable anti-IP or IP-skeptical legal scholars I have left off this list, please let me know.)

[**Update**: See also Hon. Maureen K. Ohlhausen, "Patent Rights in a Climate of Intellectual Property Rights Skepticism," *Harv. J. L. & Tech.*, 30, no. 1 (Fall 2016 [pdf]): 1–51, pp. 8–9:

> Respected economists Michele Boldrin and David Levine find "no evidence that intellectual monopoly achieves the desired purpose of increasing innovation," describe IP rights as an "unnecessary evil," and call for the patent system's abolition.38 Economist Adam Jaffe and Harvard Business School professor Josh Lerner call the patent system "broken."39 Law professors Michael Meurer and James Bessen think it "unlikely that patents today are an effective policy instrument to encourage innovation overall."40 As for encouraging ideas, the *Economist* wrote that "[t]oday's patent systems are a rotten way of rewarding them."41 Indeed, the magazine appeared to embrace the notion that "society as a whole might even be better off with no patents than with the mess that is today's system."42 In law professor Thomas Cheng's view, theory and empirical studies "firmly refute[] the notion that patent protection is necessary for securing innovation."43 Richard Stallman argues that "patent law should be abolished."44 The Electronic Frontier Foundation's view is that the "patent system is broken" and "it's time to start over."45
>
> The chorus of criticism goes on. Attorney William Hubbard argues that "patent protection in the United States should be weakened."46 The Hon. Richard A. Posner sees "serious problems with our patent system."47 A leading authority on patent law, Mark Lemley, has proclaimed the existence of a "patent crisis."48 A renowned economist, Carl Shapiro, believes that the "patent system . . . provides excessive rewards to patent holders . . . reduc[ing] economic efficiency by discouraging innovation."49 Even Google, which secured more than 2,500 patents in 201450, has sometimes poured cold water on the importance of IP rights. Its general counsel, Kent Walker, has opined that a "patent isn't innovation. It's the right to block someone else from innovating" and that "patents are not encouraging innovation."51 Although outright elimination of the patent regime is an outlier view, many commentators believe that society ought to jettison patents in particular fields of invention such as computer software, business methods, and genetics.52 Even some who have defended the status quo have done so reluctantly.53]

Unfortunately, most of these scholars are mired in an empiricist-positivist-monist-utilitarian mindset. But they manage to lean in the right direction anyway. Most impressive.

Interestingly, the two notable exceptions to this trend that come to mind and who are pro-IP, are libertarian law professor Richard Epstein[26] and Objectivist Adam Mossoff.[27] But this, too, shall pass. As Thomas Paine wrote: "a long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason."

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1. See Shughart's Defense of IP, Dispatch from the Open Science Summit: Citizen Science, Microfinanced Research, Patent Trolls, and Pharma Prizes, and Thomas Jefferson's Proposal to Limit the Length of Patent and Copyright in the Bill of Rights; also other posts here. [↩]
2. See here and Gene Quinn the Patent Watchdog. [↩]
3. IPBiz's Ebert: Kinsella way off on patent reform. [↩]
4. Another Reason to Reform Patent Law: Touch Off A Recession! . [↩]
5. See Miracle–An Honest Patent Attorney! [↩]
6. See Patent Lawyers Who Oppose Patent Law. [↩]
7. Wendy J. Gordon, "Intellectual Property". [↩]
8. Tom W. Bell, *Intellectual Privilege: A Libertarian View of Copyright*; and my posts Tom W. Bell on Intellectual Property and Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and "Rearranging". [↩]

9. See The Knockoff Economy: How Copying Benefits Everyone, Reason.tv; Christopher Sprigman on creativity without copyright. [↩]
10. Mark Lemley: The Very Basis Of Our Patent System... Is A Myth; 90+ Internet law and IP law professors sign anti-PROTECT-IP letter... [↩]
11. Intellectual Property's Great Fallacy . [↩]
12. James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* (2008, excerpts available at researchoninnovation.org/dopatentswork/); see also Bessen's Research on Software Patents. [↩]
13. ~~*The Future of Ideas*~~ (2001 [↩]
14. See my post, Intellectual Property's Great Fallacy. [↩]
15. See resources here. [↩]
16. See Open Science Summit 2011: IP and the New Mercantilism: Panel: "The Future (the End?) of 'Intellectual Property'"; Andrew Torrance: Patents and the Regress of Useful Arts; see also the 2003 National Academies report on intellectual property; the full citation and quotation is in the introduction Torrance's paper Patents and the Regress of Useful Arts, which characterize evidence linking IP and innovation as "emergent"—this is from the National Academies. [↩]
17. Andrew Torrance: Patents and the Regress of Useful Arts; Torrance & Tomlinson, Patents and the Regress of Useful Arts. [↩]
18. Jacob Huebert, The Fight against Intellectual Property. [↩]
19. See Eben Moglen and Leftist Opposition to Intellectual Property. [↩]
20. Copyright: The New Mercantilism. [↩]
21. ~~Can Patents Deter Innovation? The Anticommons in Biomedical Research~~ [↩]
22. Wendy J. Gordon, "Intellectual Property"; "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory," *Stanford Law Review* 41 (1989). [↩]
23. the "case for copyright protection is weak". Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs" (1970). [↩]
24. See his publications page; also my IP debate with him at KOL253 | Berkeley Law Federalist Society: A Libertarian's Case Against Intellectual Property [↩]
25. Timothy Sandefur, "A Critique of Ayn Rand's Theory of Intellectual Property Rights," *Journal of Ayn Rand Studies* 9:1 (Fall 2007), pp. 139-61. [↩]
26. See Richard Epstein's *Takings* Political Theory versus Epstein's Intellectual Property Views; Classifying Patent and Copyright Law as "Property": So What?'; Pro-IP Libertarians Upset about FTC Poaching Patent Turf; Richard Epstein on 'The Structural Unity of Real and Intellectual Property'"; The Structural Unity of Real and Intellectual Property (video); The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary. Unfortunately, the support of patents even by some libertarians has led them to oppose reimportation–that is, to oppose free trade–e.g., Cato's Doug Bandow, Richard Epstein, and Michael Kraus. See my posts Ideas Are Free: The Case Against Intellectual Property; Pilon on Patents; Drug Reimportation; ~~Cato on Drug Reimportation~~; and Patents, Prescription Drugs, and Price Controls. [↩]
27. Objectivists: "All Property is Intellectual Property"; Classifying Patent and Copyright Law as "Property": So What?; Mossoff: Patent Law Really Is as Straightforward as Real Estate Law. [↩]

The Patent, Copyright, Trademark, and Trade Secret Horror Files

by STEPHAN KINSELLA*on* FEBRUARY 3, 2010

As noted ~~here~~, "Ayn Rand's newsletters used to end with a "Horror File" of monstrous but true quotations."

Along those lines, it's time to collect some choice trademark horror stories in one place. The main post will be here, on the Mises Blog, but I'll cross-post the initial post here too. But look there for updates (or to add suggestions in the comments). (Update: I might as well also list here similar examples from patent, copyright, and even trade secret. See below.)

Trademark

As noted in Trademark versus Copyright and Patent, or: Is All IP Evil?, it's not only patent and copyright that are unlibertarian and unjust. Modern trademark law is as well. I deal with tradmark rights on pp. 58-59 of *Against Intellectual Property*, and also in some detail in Reply to Van Dun: Non-Aggression and Title Transfer (esp. pp. 59-63). In my view, extensions of trademark law–rights against "trademark dilution" and cybersquatting, etc.–are obviously invalid. Further, federal trademark law is problematic since it is not authorized in the Constitution.

But even if federal trademark law were abolished, as well as modern extensions such as rights against trademark dilution, even common law trademark is problematic, for three primary reasons. First, it is enforced by the state, which gets everything wrong. Second (see First), the test of "consumer confusion" is usually applied ridiculously, treating consumers like indiscriminating idiots. Third, and worst of all, the right at issue is the right of the *defrauded consumer*, not the competitor. Trademark law ought to be reformed by abolishing the right of trademark "owners" to sue "infringers" (except perhaps as proxy for customers, when consent can be presumed or proved–as I discuss in this interview: Free Talk Live Interview on Reducing IP Costs (Jan. 20, 2010)), and treating this as a case of the customer's right to sue a vendor who defrauds him as to the nature of the good purchased. Some might argue that this is only a minor change, but it is not: such a change would make it clear that "knockoffs" are usually not a violation of anyone's rights: the buyer of a $10 "Rolex" is almost never defrauded–he knows what he's getting. Yet by giving an enforceable trademark right to the user of a mark, he can sue knockoff companies even though their customers are not defrauded and in fact are perfectly happy to buy the knockoff products.

The other fallacy is the view at work here that there is no such thing as reputation, or even identity, absent trademark law. But this is incorrect. Of course people and firms can have reputations even if trademark law is nonexistent. All that is required is that people be able to *identify* other people and firms, and *communicate*. Pro-trademark arguments often implicitly assume that this is not possible, absent state-enforced trademark law, which is ridiculous.

In any event, on to a collection of trademark outrages for the horror files (some of these are also listed in Reducing the Cost of IP Law):

- Court Orders Dean Guitars to Stop Production of Various Models After Losing Legal Battle Against Gibson
- Court Says U Of Southern California Only One Who Can Use USC; Sorry U Of South Carolina
- Who Dat? America's National Football League causes outrage over catchphrase ban
- What's Next–Trademarking Language? Don't be *Ridiculous*!
- South Butt David versus North Face Goliath
- Lou Carlozo, Teen's charity name draws the McIre of McDonald's, *Wallet Pop* (Jan. 17, 2010) (McDonadl's claims Lauren McClusky's use of "McFest" for the name of a series of charity concerts she puts on infringes its "McFamily" brand)
- Budweiser trademark dispute (see also Chip Wood, A Bully-Boy Beer Brewer, *Straight Talk* (Oct. 16, 2007))
- 9th Circuit Appeals Court Says Its Ok To Criticize Trademarks After All, *Against Monopoly* (Sept. 26, 2007)
- Kinsella, Trademarks and Free Speech, *Mises Blog* (Aug. 8, 2007)
- *idem*, Beemer must be next... (BMW, Trademarks, and the letter "M"), *Mises Blog* (Mar. 20, 2007)
- *idem*, Hypocritical Apple (Trademark), *Mises Blog* (Jan. 11, 2007)
- ECJ: "Parmesian" Infringes PDO for "Parmigiano Reggiano," *I/P Updates* (Feb. 27, 2008)
- Mike Masnick, Engadget Mobile Threatened For Using T-Mobile's Trademarked Magenta, *Techdirt* (Mar. 31, 2008)

Patent

Taken (in part) from my article Radical Patent Reform Is *Not* on the Way, Appendix: Examples of Outrageous Patents and Judgments:

Examples of (at least apparently) ridiculous patents and patent applications abound (more at ~~PatentLawPractice~~):

- Epson boobytrapped its printers
- Amazon's "one-click" patent, asserted against rival Barnes & Noble;
- Cendant's assertion that Amazon violated Cendant's patent monopoly on recommending books to customers (since settled);
- The attempt of Dustin Stamper, Bush's Top Economist, to secure a patent regarding an application for a System And Method For Multi-State Tax Analysis, which claims "a method, comprising: creating one or more alternate entity structures based on a base entity structure, the base entity structure comprising one or more entities; determining a tax liability for each alternate entity structure and the base entity structure; and generating a result based on comparing each of the determined tax liabilities";
- Apple's patent application for digital Karaoke;
- the suit against Facebook by the holder of a patent for a "system for creating a community for users with common interests to interact in";
- the "absurdly broad patent [issued to Blackboard] for common uses of technology if that technology is employed in the context of education" (see also Patent Office Rejects Blackboard E-Learning Patent One Month After It Wins Lawsuit, *Techdirt* (Mar. 31, 2008);
- Compton's (now Encyclopedia Britannica's) patent that "broadly cover[s] any multimedia database allowing users to simultaneously search for text, graphics, and sounds — basic features found in virtually every multimedia product on the market";
- Carfax's patent on a "method for perusing selected vehicles having a clean title history";
- Acacia's patent for putting a unique transaction number on a receipt;[26]

- Pat. No. 6,368,227, covering swinging sideways on a swing;

The Supreme Court, in the 1882 case *Atlantic Works v. Brady*, 107 US 192, itself lists ~~examples of patents~~ issued to "gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge ... the simplest of devices." These included

- a particular doorknob made of clay rather than metal or wood, where differently shaped doorknobs had previously been made of clay;
- making collars of parchment paper where linen paper and linen had previously been used;
- a method for preserving fish by freezing them in a container that operates in the same manner as an ice-cream freezer.
- rubber caps put on wood pencils to serve as erasers;
- inserting a piece of rubber in a slot in the end of a wood pencil to serve as an eraser;
- a stamp for impressing initials in the side of a plug of tobacco;
- a hose reel of large diameter so that water may flow through the hose while it is wound on the reel;
- putting rollers on a machine to make it movable;
- using flat cord instead of round cord for the loop at the end of suspenders;
- placing rubber hand grips on bicycle handlebars;
- an oval rather than cylindrical toilet paper roll, to facilitate tearing off strips.

Below are a few notable or recent examples of large, significant, troubling, or apparently outrageous injunctions, damages awards, and the like:

- In Stent Patent War, Boston Scientific Caves (Again), Agrees to Pay Johnson & Johnson $1.725 Billion to Settle Three Cases;
- Qualcomm has been enjoined from importing chips that help conserve power in cell phones (discussion; latest developments). See also Eric Bangeman, ITC to Bar Import of New Handsets in Patent Dustup, *ars technica* (June 7, 2007); Nokia's Patent-Licensing Case against Qualcomm Dropped by Dutch Court, *engadget* (Nov. 14, 2007); Broadcom Wins Major Injunction against Qualcomm, *engadget* (Dec. 31, 2007); ITC Upholds Ruling, Reiterates that Nokia Didn't Violate Qualcomm Patents, *engadget* (Feb. 29, 2008).
- Texas-Sized Patent Win, *Texas Lawyer* (Feb. 21, 2008). A New Jersey doctor was awarded $432 Million as a "reasonable royalty" against Boston Scientific for infringing his "Method and Apparatus for Managing Macromolecular Distribution."
- Smartphones Patented ... Just About Everyone Sued 1 Minute After Patent Issued, *Techdirt* (Jan. 24, 2008).
- Farmer David Reaps What He Has Sown: A Patent Suit, *Patent Baristas* (Feb. 13, 2008) Even though "the practice of saving seeds after a harvest to plant the next season is as old as farming itself," patents prevent farmers from saving patented seeds.
- Apple, Starbucks Sued over Custom Music Gift Cards, *AppleInsider* (Feb. 20, 2008) A Utah couple sue Apple and Starbucks over their "'Song of the Day' promotion, which offers Starbucks customers a iTunes gift card for a complimentary, pre-selected song download." The suit is based on a patent on a "retail point of sale for online merchandising" which allows customers to buy a gift card from a brick-and-mortar store and then go home and redeem the card online.
- Apple Sued Over Caller ID on the iPhone, *Techdirt* (Feb. 27, 2008). The patent is on "matching up the phone number of an incoming call with a local contact database to display who is calling."
- The new 802.11n Wi-Fi standard (which promises to significantly increase Wi-Fi speed and range) is in jeopardy due to patent threats. See Bill Ray, Next Generation Wi-Fi Mired in Patent Fears, *The Register* (Sept. 21, 2007).

- SanDisk Sues 25 Companies for Patent Infringement: "Suits have been filed against 25 companies by the SanDisk corporation this week, as the company looks to stop businesses from shipping products it alleges are infringing on its work. SanDisk has filed suits against everyone from MP3 player manufacturers to USB hard drive creators. The list of defendants is staggering, and MacWorld notes if Sandisk succeeds it could have repercussions outside of the courtroom.... The court ... complaints could affect the prices and availability of products made by companies targeted in the suit if SanDisk wins and the companies are barred from importing products into the U.S."
- Patent Office Upholds Tivo's "Time Warp" Patent, EchoStar Not so Happy, *engadget* (Nov. 29, 2007); see also *Tivo Inc. v. EchoStar Communications Corp.* (S. D. Tex., Dec. 2, 2006); and TiVo Wins on Appeal: Permanent Injunction against EchoStar to be Reinstated, *Patently-O* (Jan. 31, 2008).
- Jacqui Cheng, U R SUED: Patent Holding Company Targets 131 Companies over SMS patents, *ars technica* (Nov. 13, 2007).
- The International Trade Commission (ITC) may ban imports of many popular hard drives that "are alleged to infringe on patents owned by California residents Steven and Mary Reiber related to a 'Dissipative ceramic bonding tool tip.'" Jacqui Cheng, Hard Times for Hard Drives: US May Ban Popular Imports, *ars technica* (Oct. 11, 2007).
- The VoIP phone service Vonage may be put out of business by patents. Sprint recently won a patent case against Vonage in which $69.5 million was awarded in damages. Sprint had planned "to ask the court to permanently ban Vonage from using its patented technology," but the case was subsequently settled for $80 million. However, in a separate patent lawsuit between Verizon and Vonage, the jury found that Vonage had violated three Verizon patents, and awarded Verizon $58 million in damages plus ongoing royalties. Vonage claims it has developed workarounds for two of the patents. See Kim Hart, Sprint Wins Patent Case Against Vonage: Reston Firm Awarded $69.5 Million in Second Blow to Internet Phone Company, *Washington Post* (Sept. 26, 2007); Peter Svensson, Vonage Settles Patent Suit with Sprint, *BusinessWeek* (Oct. 8, 2007). Latest: Vonage Settles with Verizon, Owes Up to $117.5 Million; Vonage, Nortel Call a Truce — No Cash Changing Hands, *engadget* (Dec. 31, 2007).
- Kinsella, Revolutionary Television Design Killed by Patents (2007).
- BlackBerry's manufacturer, RIM, was forced to cough up $612.5 million after NTP used patent law to threaten to shut RIM down.
- Microsoft was on the receiving end of a $1.5 *billion* jury verdict for infringing an MP3 patent held by Alcatel-Lucent (which was recently overturned).
- After Kodak sought more than $1 billion in damages from Sun Microsystems for patent infringement, Kodak finally settled for $92 million. (And according to one colleague, the verdict resulted "in the immediate shutdown of Kodak's entire instant photography division, with the immediate loss of 800 jobs. And, some say, the eventual failure of Polaroid due to lack of any real competition to keep them on their toes!")
- In another recent case, Freedom Wireless obtained a $150 million damages award against Boston Communications Group, Inc., which at the time had revenues of only about $100 million. In this case, the judge also refused to stay the injunction issues against BCGI (and by extension, its customers) pending appeal.
- Smith International was forced to pay Hughes Tool Company $204.8 million for infringement upon Hughes's patent for an "O-ring seal" rock bit, which led to Smith filing for chapter 11 bankruptcy protection (this was in 1986, when $200 million was considered a large patent verdict).
- As of March 2003, the top 5 patent infringement damage awards ranged from $873 million (*Polaroid v. Kodak*, 1991) to $204.8 million (*Hughes Tool v. Smith International*, 1986). The top 5 patent settlements ranged from $1 billion to $300 million. Damage Awards and Settlements, *IP Today* (March 2003)
  Download PDF
  ; see also Gregory Aharonian, Patent/Copyright Infringement Lawsuits/Licensing Awards. Sadly, a

$200 million verdict seems normal nowadays. The recent $156 million patent-infringement verdict against AT&T, for example — which could possibly be trebled by the judge — now looks like small potatoes.

- Other recent cases include a $1.67 billion patent infringement verdict in favor of Johnson & Johnson against Abbott; a $400 million settlement paid to Abbot, by Medtronic, regarding stent devices; and a $716 million settlement paid to Johnson & Johnson by Boston Scientific (cardiac stents again).

Copyright

Some of these are also listed in Reducing the Cost of IP Law:

- Disney makes day care centers remove Mickey Mouse murals (2)
- Miles Davis Tattoo Suit Pits Copyright Against Body Autonomy; A Photographer Is Suing Tattoo Artist Kat Von D After She Inked His Portrait of Miles Davis on a Friend's Body; Guy Who Did Mike Tyson's Tattoo Sues Warner Bros. For Copyright Infringement; Maori Angry About Mike Tyson's Tattoo Artist Claiming To Own Maori-Inspired Design
- RIAA Wants $1.5 Million Per CD Copied, *Slashdot* (Jan. 30, 2008);
- Ford Slaps Brand Enthusiasts, Returns Love With Legal Punch, *AdRants* (Jan. 14, 2008) (Ford Motor Company claims that they hold the rights to any image of a Ford vehicle, even if it's a picture you took of your own car);
- Jacqueline L. Salmon, NFL Pulls Plug On Big-Screen Church Parties For Super Bowl, *Washington Post* (Feb. 1, 2008) (NFL prohibits churches from having Super Bowl gatherings on TV sets or screens larger than 55 inches);
- Internet pirates could be banned from web, Telegraph (Feb. 12, 2008) (British proposal to punish individuals who illegally download music by banning them from the Internet); John Tehranian, Infringement Nation: Copyright Reform and the Law/Norm Gap, *Utah L. Rev*. (forthcoming; SSRN);
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- Cory Doctorow, Infringement Nation: we are all mega-crooks, *Boing Boing* (Nov. 17, 2007);
- Court Says You Can Copyright A Cease-And-Desist Letter, *Techdirt* (Jan. 25, 2008);
- Kinsella, Battling the Copyright Monster, *Mises Blog* (June 19, 2006);
- *dem*, Copyright Kills Amazing Music Project, *Mises Blog* (Jan. 2, 2008);
- *idem*, "Fair Use" and Copyright, *Mises Blog* (Aug. 17, 2007);
- *idem*, Copyrights and Dancing, *Mises Blog* (Feb. 20, 2007);
- *idem*, The "tolerated use" of copyrighted works, *Mises Blog* (Oct. 27, 2006);
- *idem*, Copyright and Birthday Cakes, *Mises Blog* (June 16, 2005);
- *idem*, Heroic Google Fighting Copyright Morass, *Mises Blog* (June 2, 2005);
- *idem*, Copyright Gone Mad, *Mises Blog* (Apr. 14, 2005);
- *idem*, Copyright and Freedom of Speech, *Mises Blog* (Nov. 8, 2004).

See also:

- Joost Smiers & Marieke van Schijndel, Imagine a World Without Copyright, *International Herald Tribune* (Sat. Oct. 8, 2005);
- Jessica Litman, Revising Copyright Law for the Information Age, 75 *Oreg. L. Rev*. 19 (1996);
- Kinsella, Copyrights in Fashion Designs?, *Mises Blog* (Sep. 27, 2006);
- Kinsella, Britain's Copyright Laws, Based on a 300-Year-Old Statute, Desperately Need Reshaping for the Digital Age, *Mises Blog* (Nov. 2, 2006).

- For a humorous parody of copyright abuses by the RIAA, see CD Liner Notes of the Distant Present, *Something Awful* (Jan. 3, 2008).

Trade Secret

Even trade secret law, the least objectionable of the four main types of IP, has been corrupted by the state.

- Silicon Valley cops raid Gizmodo editor's home, take four computers
  - IP Means you MUST Buy that iPhone

[Mises; AM]

Absurd Arguments for IP

by STEPHAN KINSELLA*on* DECEMBER 10, 2010

From Mises blog. Archived comments below.

I've noted before "There are No Good Arguments for Intellectual Property," and I've begun to collect some of the sillier arguments I've heard for IP. Here are a few:

1. "Thank goodness the Swiss did have a Patent Office. That is where Albert Einstein worked and during his time as a patent examiner came up with his theory of relativity." —Patent attorney Gene Quinn
2. "It is true that other means exist for creative people to profit from their effort. In the case of copyright, authors can charge fees for reading their works to paying audiences. Charles Dickens did this, but his heavy schedule of public performances in the United States, where his works were not protected by copyright, arguably contributed to his untimely death." —Willliam Shughart[1]
3. If you are not for IP, you must be in favor of pedophilia. —Sasha Radeta
4. If you oppose IP, you are advocating slavery. —Wildberry
5. "Patents are the heart and core of property rights." —Ayn Rand
6. Song piracy and file-sharing are the cause of stage collapses at concerts. (Insurers blame stage collapse on copyright piracy)
7. Postwar Japan prospered because it had a patent system; countries with the most IP are the most prosperous; America's prosperity and growth since its inception is due to its patent and copyright systems (typical correlation is causation fallacy)
8. IP contributes $5 trillion to the economy (because industries that IP is inflicted on generate $5T).
9. Because you "can" treat IP as a form of property, it's okay to do so (no offense, chattel slaves)
10. a confused anarcho-socialist argument that "intellectual ownership" is needed, even though property rights are generally bad, to reward "the individual who laboured to discover," but *not* "the owner of the idea itself, being an abstract piece of property". Hunh? (The Worst Argument for IP Ever?)
11. Copyleft advocates are like homophobic, anti-gay marriage bigots (some commentor at Techdirt)
12. "To make a distinction between things which are ownable or not ownable with the difference being whether they're constructed out of molecules or pixels is to create a new kind of apartheid, in which some kinds of property are just niggers." —J. Neil Schulman
13. If IP isn't legitimate, then it's okay to steal other people's babies.
14. Without IP you can't have money: "Cool, so money can't exist right? Since banks don't have copyright for the cash they print, anyone can print any form of cash, thus destroying the economy.... cool story bro" —"sunny vegas" on Youtube comments

Update: See Intellectual Nonsense: Fallacious Arguments for IP (Libertopia 2012).

Independent Institute on The "Benefits" of Intellectual Property Protection

by STEPHAN KINSELLA*on* FEBRUARY 15, 2016

[**Update**: See also Shughart's Defense of IP (Jan. 29, 2010); Disinvited From Cato; Cato on IP; James Stern: Is Intellectual Property Actually Property? [Federalist Society No. 86 LECTURE]; More defenses of IP by the Federalist Society.]

As an increasing number of libertarians nowadays are aware or sense, intellectual property is utterly incompatible with private property rights and libertarian principles. In fact, it is one of the most insidious and harmful of statist policies.[1] Ever since the advent of the Internet, which has magnified the costs of IP and made them more apparent, causing libertarians to turn their attention thereto, more and more libertarians are coming to oppose IP. Virtually all anarchist-libertarians, left-libertarians, and Austrian libertarians, and a growing number of minarchists, oppose IP, and in increasing numbers.[2]

Yet there remain stubborn holdouts: primarily Randians, older generation minarchists, novelists and other authors who think their livelihood depends on copyright, and a few others financially dependent on IP who want to preserve their gravy train. Some libertarian think tanks, like the Mises Institute or FEE, are anti-IP or at least feature anti-IP writers. But other libertarian think tanks continue to cling to IP in one form or another, either defending it, or having endless panels and conferences about how to "reform" IP, but never to abolish it. For example, see the recent Cato event Intellectual Property and First Principles, featuring four panelists, two strongly in favor of IP and none calling for IP abolition (despite the fact that IP abolition pioneer Tom Palmer is a former Cato guy). The Independent Institute is another libertarian think tank that seems to never feature anti-IP writers, only defenders of IP. For example, as I've noted before, Independent Institute senior fellow William Shughart, in "Ideas Need Protection: Abolishing Intellectual-property Patents Would Hurt Innovation: A Middle Ground Is Needed" (archive), has embarrassingly argued:

> Granting a **temporary monopoly** to the rare breakthrough is necessary, therefore, to provide its inventor with an opportunity to earn a return on the investment that led to the new idea – and to encourage additional such investments. Such protection is especially important in the pharmaceutical industry, where, in its absence, new drugs could be duplicated by competitors, and the incentive to invest would disappear, stifling the discovery process.
>
> To paraphrase the late economist Joan Robinson, **patents and copyrights slow down the diffusion of new ideas for a reason**: to ensure there will be more new ideas to diffuse.

And in the Winter 2015 issue of the Institute's journal, *Independent Review*, we have a pro-patent article, Seeking the Patent Truth: Patents Can Provide Justice and Funding for Inventors, by Arthur M. Diamond Jr.[3]

See also Lessig, "Cato'$ Late$t" (criticizing the pro-IP views of Adam Thierer in Howard Dean's Plan for the Internet: Collectivism In, Property Rights Out; see mention of Lessig's comments in Julian

Sanchez, Tech Throwdown, and my post Cato, Lessig, and Intellectual Property), where he says "Of course I'm all for more balance in "intellectual property." Not a good look, Lessig.

And now we have yet another pro-IP piece from II, "The Benefits of Intellectual Property Protection," by John R. Graham (Feb. 15, 2016). Graham writes:

> If there is one thing about which libertarians are never likely to agree, it is whether intellectual property—patents, copyrights, trademarks, and trade secrets—should receive the same legal protection as physical property.

This is simply a false assertion. As noted above, libertarians are now predominately anti-IP and more and more of us move in this direction. This in fact seems to be one issue that we are in fact likely to agree on, unlike, say, abortion or minarchy. In my own libertarian lifetime I can hardly recall seeing such progress on a previously murky or contested issue.

> Without wading too deep into the philosophical debate, but showing my colors as an IP advocate, let me share some new research published by the U.S. Chamber of Commerce's Global Intellectual Property Center (GIPC) on the benefits of legal protection of intellectual property.

In just one sentence, there are least three things to comment on. First: how can one comment on a supposedly contested libertarian normative issue, while explicitly refraining from engaging in "the philosophical debate"? Sounds like trying to have one's cake and eat it too—or an abdication of responsibility. One should not weigh in on such an important issue, taking a normative position, without taking or having an argument for a normative or philosophical stance. Second, the author admits he is an IP advocate—though he doesn't say why (perhaps because of his ~~connections to medical/pharmaceutical industries~~, which are typically strongly anti-competition, I mean, pro-patent). One can only imagine he thinks his bread is buttered somehow by the IP system. That may be well and good, but it is not an argument. I'm an IP lawyer but I oppose IP, so it is possible to have some integrity. Third: he just launches into "research" as if this is how this issue is to be decided. Not everyone is a utilitarian or empiricist, nor do all of us trust data from advocacy groups.

Graham then launches into a discussion of the U.S. Chamber of Commerce's "research." This reminds a bit of the utterly bogus US Commerce Department report "Showing Intellectual Property-Intensive **Industries** Contribute $5 Trillion, 40 Million Jobs to US Economy".[4] This argument, of course, makes the mistake of equating correlation with causation, just as similar arguments for IP do, such as: Postwar Japan prospered because it had a patent system; countries with the most IP are the most prosperous; America's prosperity and growth since its inception is due to its patent and copyright systems.

Regarding the U.S. Chamber of Commerce study, Graham says:

> Published on February 10, *Infinite Possibilities* ranks 38 countries by 30 indicators of strength of IP protection. The indicators measure both law *and* enforcement: Countries which do not enforce IP rights, despite the letter lf the law, are marked down. Most of the indicators are straight forward: Longer patent, copyright, or trademark terms are better; strong enforcement mechanisms are better; and treaty obligations protecting intellectual property invented in other countries are better.

> The report does not attempt to determine causality between strong IP protection and social or economic outcomes. Indeed, 30 indicators are likely far too many to use for such an analysis. Nevertheless, the report does determine a number of positive correlations between strong IP protection and a number of other beneficial indicators. For example, the correlation between countries' scores and
>
> - access to venture capital is 0.81;
> - number of researchers in research and development is 0.80;
> - access to the latest technologies is 0.83;
> - access to video-on-demand and streaming TV is 0.64;
> - private sector spending on research and development is 0.75;
> - share of workforce in high-value, knowledge-intensive services.
>
> I could go on, but I am sure you get the drift. Some libertarian critics complain that IP protection is the *result* of innovation, not its *cause*; and the legal framework is a consequence of rent-seeking rather than the government's desire to promote innovation.
>
> This chicken-and-egg question may be beside the point: It is very difficult to envision innovation continuing at the current rate if innovative industries lose the protections for which they advocate. *Infinite Possibilities* shows there are no innovative and prosperous countries today that do not have strong IP protections.

One's jaw has to drop at how bad this argument is. Graham *admits* that the "report **does not attempt to determine causality** between strong IP protection and social or economic outcomes." But, it "does determine a number of **positive correlations** between strong IP protection and a number of other beneficial indicators." In other words, he admits that the report does not attempt to show causality, that it only shows correlation. *Yet then* he simply asserts, "It is very difficult to envision innovation continuing at the current rate if innovative industries lose the protections for which they advocate." Um. But this is the pro-IP premise, which is simply not supported by the study, since it does not even purport to demonstrate causation.

As for this being a "chicken-and-egg" question: not so. As I have noted, the empiricist-utilitarian approach is unprincipled and bankrupt. But, given the available evidence, anyone who accepts utilitarianism should be *opposed* to patent and copyright.[5]

In any case, what do these weird "arguments" for IP have to do with liberty, human freedom, private property rights, and the rule of law? So *what* if a certain government policy might "promote innovation"? Since when was *that* the purpose of law, justice, and property rights? Utilitarian libertarians just launch into discussions about empirical benefits of various state policies, as if that is *relevant* to justice. These libertarians have lost their mooring, and their principles.

The Independent Institute should be ashamed for repeatedly promoting the evil, statist idea of intellectual property—especially in the name of liberty and free markets.

Update: More from Shughart, ~~Aug. 12, 2019~~:

William Shughart•~~8 hours ago~~• edited
Authors of textbooks (among which I count myself) are paid royalties only on sales during (roughly) the first six months after publication. Once new texts enter the used book market, all of the revenue goes to used-book dealers, including college bookstores. In consequence, authors (and publishers) have strong incentives to market revised editions (often only with cosmetic changes), or to use cheap bindings that fall apart quickly, to undercut the used-book market and collect royalties for another six months or so.

Consider, in contrast, the authors and publishers of music, which through an organization called ASCAP, earn royalty income every time a copyrighted song is played or replayed (on the radio or in live performance). If textbook authors and publishers also could benefit from resales, existing editions would remain in print for much longer and their prices would not rise as rapidly, would remain stable, or perhaps even fall over time.

Recall Ronald Coase's conjecture that a monopolist of a perfectly durable good has no option other than to sell the good at a price equal to marginal cost.

•

Stephan Kinsella ~~William Shughart~~ •~~5 hours ago~~

It is amazing that you promote copyright and patent, from an ostensibly liberal point of view. This is horrible and confused. You are wrong about IP and about its compatibility with free markets and liberalism. Patent and copyright are utterly evil and anathema to free markets. Anyone promoting free markets, human liberty, competition, human progress, etc., should see that. Shughart, you've written explicitly in defense of IP law before. Shame. For shame. As you wrote: "Granting a temporary monopoly to the rare breakthrough is necessary, therefore, to provide its inventor with an opportunity to earn a return on the investment that led to the new idea – and to encourage additional such investments. Such protection is especially important in the pharmaceutical industry, where, in its absence, new drugs could be duplicated by competitors, and the incentive to invest would disappear, stifling the discovery process.

To paraphrase the late economist Joan Robinson, patents and copyrights slow down the diffusion of new ideas for a reason: to ensure there will be more new ideas to diffuse."

We libertarians are NOT AGAINST the "diffusing" or spreading of "new ideas". We oppose patent and copyright law. They are both abominations. It is sad you don't know this, and it is also too bad the author didn't bring in copyright law in his analysis of textbook pricing.

http://c4sif.org/2016/02/in...

Update: According to a friend, in a recent Russ Roberts EconTalk podcast (Oct. 2019, interview with Susan Houseman), Roberts said "I don't care so much whether our trading partners follow free trade. I do care if they steal our intellectual property." (01:09:38) Sigh.

1. "Where does IP Rank Among the Worst State Laws?"; "Masnick on the Horrible PROTECT IP Act: The Coming IPolice State"; "Copyright and the End of Internet Freedom"; "Death by Copyright-IP Fascist Police State Acronym"; "SOPA is the Symptom, Copyright is the Disease: The SOPA Wakeup Call to Abolish Copyright". [↩]

2. See "The Death Throes of Pro-IP Libertarianism," "The Four Historical Phases of IP Abolitionism", "The Origins of Libertarian IP Abolitionism". [↩]
3. **Update**: See also the excerpt below from Lawrence Lessig, in his article Copyright's First Amendment, 48 UCLA Law Review 1057 (2001). It is a mystery to me why people think of Lessig as some copyright maverick. Lessig is no friend of liberty or opponent of copyright; see Tim Lee and Lawrence Lessig: "some punishment" of Swartz was "appropriate". And here he is praising a famous pro-copyright piece by Melville B. Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press," 17 *UCLA L. Rev. 1180* (1969-1970). Lessig gushes, "There are few essays in the field of legal science that have had as profound an impact on the law as this-not just among academics, but among courts as well." Well, sure, the Court adopted some of Nimmer's argument. Bravo. But Nimmer's argument is bereft of any principles; it's just clever legal-positivist bullshit that tries to find clever legal tricks to "balance" the "interests" of copyright versus the opposing "interests" of free speech—by making the perverse argument that copyright actually *promotes* free speech. (To be clear, Copyright is Unconstitutional, and in any case, it is surely wrong and evil.) Here is Lessig paraphrasing the "brilliance" of copyright scholar Nimmer:

> "There are few essays in the field of legal science that have had as profound an impact on the law as this-not just among academics, but among courts as well. And I take it that no one was surprised when the U.S. Supreme Court, just as this essay turned fifteen, embraced the central insight in Nimmer's analysis to explain the puzzle that Nimmer set himself to solve.
>
> That puzzle was this: How is it that a constitution could protect "freedom of speech" from the abridgment by Congress, and yet give Congress the power to grant monopolies over speech?2 What consistency could there be between the command not to control, and the power to give authors almost a century of control? What interpretation of freedom of speech made this control make sense? What understanding of this system of control—copyright—makes this constitutional freedom possible?
>
> In *Harper* & Row, *Publishers,* Inc. *v. Nation Enterprises,* the Supreme Court gave us a theory. Or better, they gave us Nimmer's theory, now backed with the force of law. Said the Supreme Court, following Nimmer (and citing him twenty-seven times), this alleged contradiction was apparent, not real. Copyright did not *abridge* speech, because without copyright, a great deal of speech would not exist. Copyright, through its limited protection of authors, creates an incentive to produce speech that otherwise would not exist. It functions, as the Court said, as an "engine of free expression,"4 fueling the creation of what otherwise would not be created.
>
> Copyright does this, no doubt, by **limiting some speech**. But **it limits some speech so that other speech might be created**. Just as the Constitution itself limits democracy so that democracy might be more free, as Rebecca Tushnet has written, **copyright limits some speech so that other speech might be produced.** Thus, there is no first amendment "abridgment" when the baseline is properly set. [↩]

4. See USPTO, "IP Contributes $5 Trillion and 40 Million Jobs to Economy"; USPTO/Commerce Dept. Distortions: "IP Contributes $5 Trillion and 40 Million Jobs to Economy" . [↩]
5. Legal Scholars: Thumbs Down on Patent and Copyright"; "The Overwhelming Empirical Case *Against* Patent and Copyright". [↩]

"Oh yeah? How would like it if I copy and publish your book under my name?!": On IP Hypocrisy and Calling the Smartasses' Bluffs

by STEPHAN KINSELLA*on* JANUARY 3, 2013

A Romanian translation of my monograph *Against Intellectual Property*, *Împotriva Proprietăţii Intelectuale*, was recently published. It was with my blessing, but my permission was not needed, since I had released it under a Creative Commons-Attribution Only (CC-BY) license. I would release it under CC0 if this was possible and legally effective. But it's not. (See Let's Make Copyright Opt-OUT; Copyright is very sticky!)

Quite often some IP proponent will try the smartass retort, "Oh yeah? Well if you don't believe in copyright I guess you won't mind if I slap my name on your book and make a million bucks selling it, hunh?!" I mean, if the book would sell that well, why haven't I made a million on it.... Why does the pirate think he can profit where I couldn't? These retorts are never serious, and never coherent. Some of them imply the author is a hypocrite for merely having a copyright in his work, even though it's automatic and impossible to get rid of. Some of them imply it's hypocritical even to sell one's book if one does not believe in copyright, even if the author doesn't mind others copying it. They seem to think that if they just make this challenge, they can prove that copyright is justified. It's bizarre. Others argue that I'm a hypocrite because I'm a patent lawyer, and oppose IP—and that if N. Stephan Kinsella is a hypocrite, why, that proves that IP is valid! QED! (See Patent Lawyers Who Don't Toe the Line Should Be Punished!; Rothbard on Lawyers, Accountants, Locks and Safes–and patent lawyers?; Are anti-IP patent attorneys hypocrites?; An Anti-Patent Patent Attorney? Oh my Gawd!; The Most Libertarian IP Work.)

The latest example of the smart-ass approach involves the aforementioned Romanian translation. Someone took the translation, stripped off my name, and reposted it on another site, with an Intel-Inside like logo saying "Commie Inside." Below is the first part of it, with automatic translation from Google Translate:

> Against intellectual property

> Today I translated this pamphlet in support of communism. You can contact me at the address communistinside@privateproperty.org for account details where you can make cash donations (fiat), the physical address where you can send donations and more money (gold), or the destination bitcoin 48NDR15end1glt6flnXfty2isd3LZw4jmK2saQ, noting that when bitcoin system will be broken and their infinite replication will be possible, funds will return to your property (to everyone), obviously the quotations bitcoin today (12/30/2012). Text can be purchased in physical form extremely rare autographed poster for $ 100 (one hundred) RON (edition 2012), Euro, U.S. Dollars $ $ $, Swiss francs or gold grams choice, do not offer credit . I thank Karl Marx brother Groucho idea and for a sense of humor. This text is original.

He seems to think he will anger me by taking my name off, by asking for donations, by calling me a commie, and by dishonestly stating that his "text is original." Why would I care? Do as you please, Mr. Pro-IP Romanian. I'm happy to call your bluff. I hope you make some money off of this, but I doubt you will. All you did was impose a cost on yourself (time, effort) for no purpose whatsoever, since you made no point at all, and put forth no coherent defense of IP whatsoever. If you are trying to show what horrible things would happen in a copyright-free world … you failed, because this harms no one.

This is not the first time something similar has happened. For example, as I noted in Russell Madden's "The Death Throes of Pro-IP Libertarianism",

> One "Russel Madden" emailed me the following article, with the note, "SURE. NO SUCH THING AS INTELLECTUAL PROPERTY…" The title of Mr. Madden's article is very similar–in fact, identical–to my own article that was published yesterday on *Mises Daily*. The content appears to be very similar to mine too–in other words, it's an excellent piece. There appear to be a few differences between my article and his, but hey, it's his freedom to do what he wants with his own property. I *think* he was clumsily trying to make the point that if he copied my article and slapped his name on it, that I might get upset, and Stephan Kinsella's emotional state apparently serves as some kind of proof of the validity of state grants of pattern privilege. Or something. Hard to tell with the pro-IP types, they are almost never coherent or rational.
>
> And Mr. Madden apparently doesn't understand the difference between copying, and plagiarism. Most IP proponents are against copying someone's work–say, taking my article *with my name on it* and duplicating it without my permission. They are not so worried about "plagiarism," which is a

> different thing altogether. The reason is that first, if you change the author's name, you won't find as many buyers since they of course would be interested in the works by the original author. Mr. Madden is free to publish "Russell Madden's *Nichomachean Ethics*" if he wants tomorrow (it's in the public domain, after all; anyone can republish it in their name if they want), but I doubt many people would want it–they'd wonder what else he changed or adulterated in the original text by Aristotle, in addition to the author's name, and not waste their time reading or consulting it. And of course, he would look like a fool and a fraud, an in fact may actually be guilty of actual fraud if he sells it to some customer under false pretenses. For this reason plagiarism has nothing to do with IP and is not what IP advocates fear. They don't fear plagiarism, they fear complete duplication. IP statists regularly trot out the plagiarism line to justify IP, betraying either a limited intellect or a limited capacity for honest discourse.
>
> In any case, I wrote Mr. Madden back as follows (slightly revised):
>
> > Very nice! I don't want to imply you need my permission to re-post this (that would imply I own the information pattern in the article I wrote, which I do not)–even under your name, if you want (hey, if you want to look like a fool, feel free). But if you would like my permission, you have it. I do not mind at all. Do WHATEVER YOU WANT with it. Repost it under my name. Repost it under your name. Repost it with no author name on it. Modify and and repost it under your name. Put 5 typos in it. HAVE AT IT. My own article is still up at Mises.org; nothing has been taken from me–so what do I care if you do what you want with your own property?
> >
> > INTELLECTUAL FREEDOM!!
>
> Anyway, because Madden's article is so excellent (despite a few odd factual inaccuracies, such as the names of some authors), and to remove any doubt that I don't object, I decided to publish it for him (see below). Game, set, match.

Another example is in the comments thread to a Mises blog post, ~~The Socialism of Agri-Patents~~, where a nym, hayeksheroes (~~March 7, 2011 at 11:51 am~~) wrote:

> I just downloaded Jeffrey's book, Bourbon before Breakfast. I think I'll make a copy and re-title it, Whisky before Le petit déjeuner. You'll be able to get a copy for $10.00 on Amazon. That's a 50% lower than Tucker's book.

In response, Doug French, then the President of the Mises Institute, called his bluff, replying (~~March 7, 2011 at 1:20 pm~~):

> Go for it. See if you can make the numbers work.

Of course it was never done. These guys are never serious. When you call their bluff, they slink away.

Another example can be found in the comments thread to another Mises blog post, where one "DensityDuck" (July 19, 2011 at 6:05 pm) said:

> "Think about what he is saying: it's too risky to go into a given business because someone else might compete with you. "

> Hey, I got an idea. I'll take all of your columns, put my name on 'em, then publish them as an ebook. I don't plan to give you any credit of any kind. I'm sure you won't mind; after all, you yourself say that one of the risks of business is that someone might compete with you!

In my reply, I said:

> This stupid nonserious gadfly move is old–you guys get PWNed every time. Watch:
> "Think about what he is saying: it's too risky to go into a given business because someone else might compete with you."
>
> Hey, I got an idea. I'll take all of your columns, put my name on 'em, then publish them as an ebook. I don't plan to give you any credit of any kind. I'm sure you won't mind; after all, you yourself say that one of the risks of business is that someone might compete with you!

Actually, whether I "mind" or not is irrelevant. If I have a nice hardware store and you open up a nicer one across the street I might "mind," but so what?

The question is whether this would violate my property rights–and it does not. If I reveal information to the world I cannot whine if people use it.

(And as a matter of fact, though it is irrelevant, I would not mind at all. If you want to look like a fool by being a plagiarist, people will soon realize you are just silly. However if you put MY name on them, I would probably thank you and might buy a few to give to friends and relatives as gifts.)

(As a matter of fact my material, such as Mises articles, is generally published under CC-BY which means you are already licensed by me to use it however you wish–you can re-sell it, make derivative works, etc; the only restriction is you have to give attribution but that is not my wish, that is the only reliable CC license that is available; if I could release it to the public domain I would, if I thought CCo was reliable I would use that. So just to be clear: I hereby give you a license to do whatever you want with any of my Mises columns to which I hold copyright. Put your name on it, if you want–but since you are a nym here and afraid to even use your real name here, I somehow doubt you will. Do it under DensityDuck if you want–I dare you.

Of course—he never did take up the dare.

Later on in the thread, DensityDuck makes the "make a million dollars" "argument" (July 20, 2011 at 12:58 pm):

> So…you *wouldn't have a problem* if I made the "Density Duck Writes Crazy Shit About IP" ebook? You'd just figure that if I could rip off all of Kinsella's shit and make a million dollars, then that's only what I deserve for being such a good competitor? Even though I didn't add a *damn thing* to the world's creative wealth?

As others on the thread (including me) replied:

> Jonathan M.F. Catalán July 20, 2011 at 1:03 pm

Please, go ahead and do it. This is the worst kind of response to these types of posts. People make the same point, but we never see any reproductions of the texts in questions (despite the "threats").

Stephan Kinsella July 20, 2011 at 1:18 pm

it's not wrong. easy.

DD5 July 20, 2011 at 4:05 pm

Why is it always so easy, apparently according to you pro-IP guys, to "make a million dollars" off copying materials of others, as if the original thinkers never thought of the idea of making the million dollars themselves, or they are too incompetent to figure out a way themselves. It's always the copycat who is the brilliant businessman making all the money without any effort.

And as Peter Surda (July 20, 2011 at 5:49 pm) wrote (quoting DensityDuck):

> "Hey, I got an idea. I'll take all of your columns, put my name on 'em, then publish them as an ebook."
>
> I think you missed the glaring counterproductivity of such an approach: you would be promoting the anti-IP position in your own name.
>
> Sometimes one's opponents just shoot themselves in the foot.

In any case, the whole idea behind these trolls' challenges is preposterous. There are several points to note here. First, they often conflate plagiarism with copying and emulating. But plagiarism and copyright infringement are not the same and do not imply the other. If I publish the Bible or Aristotle's Nichomachean ethics tomorrow under my name, it is not copyright infringement, but it is a type of plagiarism. But who would it hurt, other than me? I would be seen as a fool. At most, plagiarism is potentially a type of contract breach (e.g., a student in a university who agrees not to plagiarize), or maybe a type of fraud—if you mislead your customer as to who wrote the book he is buying. But how likely is this anyway? Nelson DeMille publishes his latest novel, *The Panther*; his fans gobble it up. If someone else published a duplicate of it under their name, why would DeMille's fans want to buy it, even at a cheaper price? If the pirate is willing to change the author's name, who knows what else he might have fiddled with.

On the other hand, if someone wants to remix or rewrite an existing book, or make a sequel to it—say, *Atlas Shrugged*, or *Gone with the Wind*, or *Catcher in the Rye*—so what? (For more on how the law handled this in the latter two example, see The Patent, Copyright, Trademark, and Trade Secret Horror Files and ~~Book Banning Courtesy of Copyright Law~~; see also *Atlas Hefts*: The Sequel!) I might want to read someone's sequel to *Lord of the Rings* or *Atlas Shrugged*, or perhaps a rewrite of the book with a different spin or literary style. As long as the new author is honest about what he has done, whose rights has he violated? No one's.

And most cases of copyright infringement are not plagiarism: if I distribute a copy of the Lord of the Rings movies, I don't claim to be the author.

In addition, just as there is a first-mover advantage for any entrepreneur who comes to market with a new product, the same is true of products that are in some ways more easily imitated, like books or music or movies or even new inventions and technical innovations. One reason for this is that there are so many new artistic and technical creations introduced every year, it is impossible and expensive for pirates to copy them *all*; they must discriminate and choose the popular ones to knockoff, emulate, or compete with. But that means pirates have to sit back and wait to see which products, music, books, etc., are popular, before they know which ones to try to knock off. Which means, by the time you know which things are worth copying, they have already made a lot of money—that's how you know they are popular.

Update: Another example, on Robert Wenzel's blog, "Economic Policy Journal" (whatever that title means): A "Bullshit" Response from Jeffrey Tucker; see also Wenzel's post Mises Institute: Do As They Say, Not As They Do? and my post Wenzel on Copyright and Patent.

Intellectual Property Rights as Negative Servitudes

by STEPHAN KINSELLA*on* JUNE 23, 2011

[From the Mises Blog; archived comments below. See also "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward", the section "*IP Rights as Negative Easements*".]

As I noted in *AIP*, "ownership of an idea, or ideal object, effectively gives the IP owners a property right in *every* physical embodiment of that work or invention."

It occurred to me the other day that the best way to classify the legal nature of intellectual property rights such as patent and copyright is the civil law doctrine of *negative servitudes (easements)*. Patent and copyright permit the holder of these rights to prohibit certain uses of their own property. For example, in the case of patents, NTP, by virtue of its patents, could prohibit RIM from making Blackberry smartphones (using its own property, even its own designs)–and could use this veto-right to ~~extract $600M~~ from RIM to permit RIM to use its own property as it wanted to. And Genzyme can prevent competitors from making a drug similar to Fabrazyme, because of its patent monopoly (because it's a life-saving drug in short supply, this is helping to kill people). In the case of copyright, for example, J.D. Salinger, author of *Catcher in the Rye*, convinced U.S. courts to ban the publication of a novel called *60 Years Later: Coming Through the Rye*." And in Canada, when a grocery store in Canada mistakenly sold 14 copies of a new Harry Potter book a few days before its official release, a judge "ordered customers **not to talk about the book**, copy it, sell it **or even read it** before it is officially released at 12:01 a.m. July 16" (on both cases, see *Atlas Hefts*: The Sequel!).

In all these cases, the patent or copyright holder obviously has a legal veto over certain uses others may make of their own property (their smartphones, their bodies, their paper and ink, their books).

This is strikingly similar to what is called a negative servitude in civil law jurisdictions such as Louisiana, and to what is called a negative or appurtenant easement in the common law. See the definitions below, taken from my *Louisiana Civil Law Dictionary* (with Gregory Rome, forthcoming 2011, Quid Pro Books) (entries to the Louisiana Civil Code articles cited below can be found online ~~here~~):

> **Negative servitude**. A *predial servitude* "impos[ing] on the owner of the *servient estate* the duty to abstain from doing something on his estate." ~~La. C.C. art. 706~~.

> **Predial servitude**. A "charge on a *servient estate* for the benefit of a *dominant estate*." ~~La. C.C. art. 646~~. The two estates must be owned by different owners. Predial servitudes are either *apparent* or *nonapparent*. Similar to an *appurtenant easement* at common law.

> **Dominant estate**. The land that enjoys the benefits of the charge placed on a *servient estate* by a *predial servitude*. See ~~La. C.C. art. 646~~, ~~647~~.

> **Servient estate**. The land burdened by a *predial servitude*. See ~~La. C.C. art. 646~~.

> **Apparent servitude**. A *predial servitude* that is perceivable by "exterior signs, works, or constructions," e.g., a road or a window in a common wall. ~~La. C.C. art. 707~~.

> **Nonapparent servitude**. A *predial servitude* without any outward sign of its existence, e.g., building restrictions. ~~La. C.C. art. 707~~.

> **Conventional servitude**. A servitude established by contract. See ~~La. C.C. art. 654~~.

> **Personal servitude**. "A charge on a *thing* for the benefit of a person." ~~La. C.C. art. 534~~. The three major personal servitudes are *usufruct*, *habitation*, and *rights of use*.

The common law concept of *appurtenant easement* is similar. It's defined at law.com as follows:

> *appurtenant easement*: adj. pertaining to something that attaches. In real property law this describes any right or restriction which goes with that property, such as an easement to gain access across the neighbor's parcel, or a covenant (agreement) against blocking the neighbor's view. Thus, there are references to appurtenant easement or appurtenant covenant.

The common law equivalent of a negative servitude would be be a negative easement (like a restrictive covenant).

These legal concepts apply to immovable property or realty such as land, but the essence is that a negative easement gives the owner of one estate the right to force the owner of the servient estate to abstain from doing something. Such property rights are perfectly legitimate if established voluntarily, by convention or agreement (see ~~La. C.C. art. 708~~). But it is obvious that giving someone a negative servitude would be a taking of some of the property rights of the owner of the servient estate–a redistribution of property. If B gets a veto right over how A uses his property, this is legitimate only if A voluntarily agrees to it.

Now the parallels between patent and copyright and negative servitudes should be obvious. The concept does not apply exactly: first, negative servitudes apply to land (immovable or realty), not movable property or personalty, while patent and copyright apply to all types of corporeal property: to how one may use his immovable property (land and factories) and well as movable property (computer, paper, and even one's own body). Further, while a negative servitude is a predial servitude that gives the veto right to whoever owns a given tract of land known as the dominant estate, patent and copyright give the veto right to a designated IP holder; so in this respect, patent and copyright are more like a personal than a predial servitude. The positive law does not have an exact parallel to categorize IP in terms of servitudes precisely because the state grants IP rights and considers them valid, and to treat them as servitudes would make it obvious that they are illegitimate since they are not voluntarily agreed to.

Finally, it is also clear that IP is more like a nonapparent than an apparent servitude since there is no outward sign (on one's body or property) that one is unable to use it in ways prohibited by the holder of the patent or copyright.

The best way, then, to categorize patent and copyright legally would be to view them as *nonapparent negative personal servitudes*: a nonapparent charge on a servient estate (that is, the land, personal

property, or body of some person) for the benefit of the holder of a patent or copyright, where the charge imposes on the owner of the servient estate the duty to abstain from doing something on or with his property/estate.

In other words, it is quite clear that patent and copyright divest owners of property (and self-owners of their bodies) of some of their property rights by assigning to IP holders a negative personal servitude that was never purchased by the holder or contractually or voluntarily sold by the original owner. This helps make it clear that IP robs people of property rights.

[Update: Unlike normal negative servitudes, which are contractually granted by the owner of the burdened or servient estate, and which are thus *consensual*, the negative servitudes created by IP are not granted by the consent of the owner of the servient estate, and thus they may be more fully classified as ***nonapparent, non-consensual negative servitudes***. They are also ***incorporeal movables***. See Are Ideas Movable or Immovable?.]

[Archived Mises post with comments]

Update: In a 2002 paper by Hans-Hermann Hoppe and Walter Block, Property and Exploitation:[1]

> The authors contend that what can legitimately be owned in a free society is only rights to physical property, not to the value thereof. You are thus free to undermine the value of our property by underselling us, by inventing a new substitute for our property, etc. But you cannot legitimately physically aggress against our property, even if its value remains constant despite your efforts.

They argue that:

> (1) Discrimination, (2) defamation and libel suits, (3) comparable worth, parity, and affirmative action policies, and (4) the notorious 'ex-lover seeks compensation for no longer being loved' suits would then have to be regarded as scandalous if at times amusing perversions of law and justice. Likewise, institutions such as (5) licensing laws, (6) zoning regulations, (7) anti-trust laws, (8) insider trading laws, etc., represent legal outgrowths of the property-in-value theory. Ultimately, they all involve restricting A's control over specified resources by correspondingly expanding B's control over them.

In other words, these legal practices are all exploitative since they give B control over resources owned by A;[2] that is, they are forms of negative servitudes, if not outright transfers of property rights. Interestingly, the authors do not mention intellectual property such as patent and copyright, though this is one of the most conspicuous examples that could illustrate their point;[3] however, they do mention defamation and libel, which is really a type of IP.[4] In other words, as I've been thinking for some time now, many unjust laws can be classified as negative servitudes, including at least some of those Hoppe and Block analyze in this article.

Update: From :

> IPRs, Professor Cornish reminds us, 'are essentially negative: they are rights to stop others from doing certain things'." Bob Baxt and Henry Ergas, "Australia" country chapter, in R Ian McEwin, *Intellectual Property, Competition Law and Economics in Asia*, p. 97 (2011), quoting WR Cornish, *Intellectual Property*, 3rd edn (London, Sweet and Maxwell, 1996) 6.

Update: I need to generalize this someday, and integrate it with Rothbard's taxonomy of state intervention as either autistic, binary, or triangular, which is discussed in *Power and Market*, in the chapter "Fundamentals of Intervention."

Writes Rothbard:

> What types of intervention can the invader commit? Broadly, we may distinguish three categories. In the first place, the intervener may command an individual subject to do or not to do certain things when these actions directly involve the individual's person or property *alone*. In short, he restricts the subject's use of his property when exchange is not involved. This may be called an *autistic intervention*, for any specific command directly involves only the subject himself. Secondly, the intervener may enforce a coerced *exchange* between the individual subject and himself, or a coerced "gift" to himself from the subject. Thirdly, the invader may either compel or prohibit an exchange between a *pair* of subjects. The former may be called a *binary intervention*, since a hegemonic relation is established between two people (the intervener and the subject); the latter may be called a *triangular intervention*, since a hegemonic relation is created between the invader and a *pair* of exchangers or would-be exchangers. The market, complex though it may be, consists of a series of exchanges between pairs of individuals. However extensive the interventions, then, they may be resolved into unit impacts on either individual subjects or pairs of individual subjects.
>
> All these types of intervention, of course, are subdivisions of the *hegemonic* relation—the relation of command and obedience—as contrasted with the contractual relation of voluntary mutual benefit.
>
> Autistic intervention occurs when the invader coerces a subject without receiving any good or service in return. Widely disparate types of autistic intervention are: homicide, assault, and compulsory enforcement or prohibition of any salute, speech, or religious observance. Even if the intervener is the State, which issues the edict to all individuals in the society, the edict is still *in itself* an autistic intervention, since the lines of force, so to speak, radiate from the State to each individual alone. Binary intervention occurs when the invader forces the subject to make an exchange or a unilateral "gift" of some good or service to the invader. Highway robbery and taxes are examples of binary intervention, as are conscription and compulsory jury service. Whether the binary hegemonic relation is a coerced "gift" or a coerced exchange does not really matter a great deal. The only difference is in the type of coercion involved. Slavery, of course, is usually a coerced *exchange*, since the slaveowner must supply his slaves with subsistence.
>
> Curiously enough, writers on political economy have recognized only the third category as intervention.3 It is understandable that preoccupation with catallactic problems has led economists to overlook the broader praxeological category of actions that lie outside the monetary exchange nexus. Nevertheless, they are part of the subject matter of praxeology—and should be subjected to analysis. There is far less excuse for economists to neglect the *binary* category of intervention. Yet many economists who profess to be champions of the "free market" and opponents of interference with it have a peculiarly narrow view of freedom and intervention. Acts of binary intervention, such as conscription and the imposition of income taxes, are not considered intervention at all nor as interferences with the free market. Only instances of triangular intervention, such as price control, are conceded to be intervention. Curious schemata are developed in which the market is considered absolutely "free" and unhampered despite a regular system of imposed taxation. Yet taxes (and conscripts) are paid in money and thus enter the catallactic, as well as the wider praxeological, nexus.4

I am not quite sure at present how to fit the idea of imposed negative servitudes into this Rothbardian framework. A negative servitude is like autistic intervention in that it commands someone not to do certain things with his own property; yet this right is transferred to another citizen, instead of being wielded directly by the state. It has aspects of redistribution of property rights, where the state takes from A and gives to B (minus a handling charge), as in the case with taxation and welfarism. Must think more on this.

Update: The fact that IP law gives the wielder a negative servitude over the property, and even bodies, of others, shows that IP can also resemble slavery. I pointed this out in *Against Intellectual Property* (see text at n 94); as does Tom Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," p. 281; and Palmer, "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects," pp. 828-29, 831, 862, 864–65; and Roderick Long (Owning Ideas Means Owning People; The Libertarian Case Against Intellectual Property Rights). Palmer notes that William Leggett also "argued that such rights were in reality statutory monopolies that infringed upon the rights of others to the ownership of their own bodies". Palmer, Are Patents and Copyrights Morally Justified?," p. 828–29; see also my post William Leggett on Intellectual Property.

Update: See Arnold Kling & Nick Schulz, *Invisible Wealth* 2011: p. 274: arguing that IP law is akin to slavery or ownership of others' property, and that IP laws create scarcity where none existed: "However, one can also make a compelling case that laws to protect intellectual property are not natural, and that they promote disorder rather than order. They can create conflict where none existed previously. With tangible property, potential conflict exists whenever two people want to use the same thing at the same time. For example, two people cannot farm the same land at the same time. In economic jargon, we say that land is rivalrous, meaning that you and I are potential rivals over land. Similarly, we are potential rivals over a particular hamburger, a particular car, or a particular doctor's time. Tangible goods and services are rivalrous.

Ideas are not rivalrous. I can use a formula, listen to a song, or follow a recipe without interfering with your ability to do so at the same time. I do not have to engage in physical trespass or violence in order to use one of your ideas. If someone takes the book you are holding away from you, they are depriving you of something. But that is not the case if someone unobtrusively stands over your shoulder and reads the book.

Indeed, it can be argued that while tangible property rights serve to *limit* disputes in situations where they might otherwise occur, intangible property rights *create* disputes unnecessarily. It is the person who presses a claim to intellectual property who must engage in physical trespass. I have to stop *your* printing press from printing a book. I have to stop *your* computer from downloading a song. Thus, intellectual property rights seem to confer a sort of reverse property right that diminishes the tangible property rights of others."

Update: see also Wojciech Gamrot, "~~The type individuation problem~~," *Studia Philosophica Wratislaviensia* vol. XVI, fasc. 4 (2021) ("IP rights are about the control of matter," citing Justin Hughes, "The Philosophy of Intellectual Property," 77 *Geo. L.J.* 287 (1988), pp. 330–350; also citing Hugh Breakey, "Natural intellectual property rights and the public domain," *The Modern Law Review* 73 (2010), pp. 208–239 and Radu Uszkai, "Are Copyrights Compatible with Human Rights?," *The Romanian Journal of Analytic Philosophy* 8 (2014), pp. 5–20.)

Intellectual Property and the Structure of Human Action

by STEPHAN KINSELLA*on* JANUARY 6, 2010

From Mises blog and Against Monopoly. Archived comments below.

There are various ways to explain what is wrong with IP. You can explain that IP requires a state, and legislation, which are both necessarily illegitimate. You can point out that there is no proof that IP increases innovation, much less adds "net value" to society. You can note that IP grants rights in non-scarce things, which rights are necessarily enforced by physical force, against physical, scarce things, thus supplanting already-existing rights in scarce resources. (See, e.g., my *Against Intellectual Property*, "The Case Against IP: A Concise Guide," *Mises Daily* (Sept. 4, 2009) (comments on Mises blog archived here) and other material here.)

Another way, I think, to see the error in treating information, ideas, patterns as ownable property is to consider IP in the context of the structure of human action. Mises explains in his wonderful book *Ultimate Foundations of Economic Science* that "To act means: to strive after ends, that is, to choose a goal and to resort to **means** in order to attain the goal sought." Or, as Pat Tinsley and I noted in "Causation and Aggression," "Action is an individual's *intentional* intervention in the physical world, via certain selected *means*, with the *purpose* of attaining a state of affairs that is preferable to the conditions that would prevail in the absence of the action."

Obviously, the means selected must therefore be *causally efficacious* if the desired end is to be attained. Thus, as ~~Mises observes~~, if there were no causality, men "could not contrive any means for the attainment of any ends". Knowledge and information play a key role in action as well: it guides action. The actor is guided by his knowledge, information, and values when he selects his ends and his means. Bad information–say, reliance on a flawed physics hypothesis–leads to the selection of unsuitable means that do not attain the end sought; it leads to unsuccessful action, to loss. Or, as Mises puts it,

> Action is purposive conduct. It is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and **guided by ideas concerning the suitability or unsuitability of definite means**.

So. All action employs means; and all action is guided by knowledge and information. (See also Guido Hülsmann's "Knowledge, Judgment, and the Use of Property," p. 44. [Update: See also Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and "Rearranging", discussing Mises's views that production is "directed by reason"; "**Production** is **alteration of the given** according to the **designs of reason**. These designs—the **recipes, the formulas**, the ideologies—are the **primary thing**; they transform the original **factors**—both human and nonhuman—into **means**. Man produces by dint of his reason; he **chooses ends** and **employs means** for their attainment."])

Causally efficacious means are real things in the world that help to change what would have been, to achieve the ends sought. Means are *scarce resources*. As Mises writes in *Human Action*, "Means are necessarily always limited, i.e., scarce with regard to the services for which man wants to use them."

To have successful action, then, one must have knowledge about causal laws to know which means to employ, and one must have the ability to employ the means suitable for the goal sought. The scarce resources employed as means need to be *owned* by the actor, because by their nature as scarce resources only one person may use them. Notice, however, that this is *not* true of the ideas, knowledge and information that guides the choice of means. The actor need not "own" such information, since he can use this information even if thousands of other people also use this information to guide their own actions. As Professor Hoppe has observed, " in order to have a thought you must have property rights over your body. That doesn't imply that you own your thoughts. The thoughts can be used by anybody who is capable of understanding them."

In other words, if some other person is using a given means, I am unable to use that means to accomplish my desired goal. But if some other person is also informed by the same ideas that I have, I am not hindered in acting. This is the reason why it makes no sense for there to be property rights in information.

Material progress is made over time in human society because information is not scarce and can be infinitely multiplied, learned, taught, and built on. The more patterns, recipes, causal laws that are known add to the stock of knowledge available to actors, and acts as a greater and greater wealth multiplier by allowing actors to engage in ever more efficient and productive action. (It is a *good thing* that ideas are infinitely reproducible, not a bad thing; there is no need to impose artificial scarcity on these things to make them more like scarce resources; see IP and Artificial Scarcity.) As I wrote in "Intellectual Property and Libertarianism":

> This is not to deny the importance of knowledge, or creation and innovation. Action, in addition to employing scarce owned means, may also be informed by technical knowledge of causal laws or other practical information. To be sure, creation is an important means of increasing *wealth*. As Hoppe has observed, "One can acquire and increase wealth either through homesteading, *production* and contractual exchange, or by expropriating and exploiting homesteaders, producers, or contractual exchangers. There are no other ways." While production or creation may be a means of gaining "wealth," it is not an independent source of ownership or rights. Production is not the creation of new matter; it is the transformation of things from one form to another — the transformation of things someone already owns, either the producer or someone else.

Granting property rights in scarce resources, but not in ideas, is precisely what is needed to permit successful action as well as societal progress and prosperity.

This analysis is a good example of the necessity of Austrian economics–in particular, praxeology–in legal and libertarian theorizing (as Tinsley and I also attempt to do in "Causation and Aggression"). To move forward, libertarian and legal theory must rest on a sound economic footing. We must supplant the confused "Law and Economics" movement with Law and *Austrian* Economics.

[Mises cross-post; archived comments; AM]

Update:

Touched on this topic many times:

- See Intellectual Property and Economic Development.

- Hayek: see Hayek's Views on Intellectual Property:
- "the rise of our standard of life is due at least as much to an **increase in knowledge** which enables us not merely to consume more of the same things but to use different things, and often things we did not even know before. And though **the growth of income depends in part on the accumulation of capital**, **more probably depends on our learning to use our resources more effectively and for new purposes**.
  The growth of knowledge is of such special importance because, while the **material resources will always remain scarce** and will have to be reserved for limited purposes, **the users of new knowledge** (where we do not make them **artificially scarce by patents of monopoly**) are unrestricted. **Knowledge, once achieved, becomes gratuitously available for the benefit of all**. It is through this **free gift of the knowledge** acquired by the experiments of some members of society that general progress is made possible, that the achievements of those who have gone before facilitate the advance of those who follow."

- "... The range of what will be tried and later developed, the fund of experience that will become available to all, is greatly extended by the unequal distribution of present benefits; and the rate of advance will be greatly increased if the first steps are taken long before the majority can profit from them. Many of the improvements would indeed never become a possibility for all if they had not long before been available to some. If all had to wait for better things until they could be provided for all, that day would in many instances never come. Even the poorest today owe their relative material well-being to the results of past inequality." **Update**: Re the "fund of experience" notion: see also *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948), discussing scientific discoveries which add to the "storehouse of knowledge of all men"; also discussed in Elizabeth I. Winston, "The Technological Edge." See also "*Against Intellectual Property* After Twenty Years: Looking Back and Looking Forward": "For elaboration, see Kinsella, "Hayek's Views on Intellectual Property," *C4SIF Blog* (Aug. 2, 2013) and "Intellectual Property and the Structure of Human Action," discussing Hayek's comments about how the accumulation of a "fund of experience" helps aid human progress and the creation of wealth. See also Kinsella, "Tucker, 'Knowledge Is as Valuable as Physical Capital,'" *C4SIF Blog* (March 27, 2017)."[1]

- also Tucker, Hayek: Spread of Non-Scarce Knowledge is the Key to Progress; Tucker, "Misesian vs. Marxian vs. IP Views of Innovation"; Tucker, "Hayek on Patents and Copyrights"
- Tucker, "Knowledge Is as Valuable as Physical Capital"
- Hayek's Views on Intellectual Property: Hayek, fund of experience
- "The growth of knowledge is of such special importance because, while the material resources will always remain scarce and will have to be reserved for limited purposes, the uses of new knowledge (where we do not make them artificially scarce by patents of monopoly) are unrestricted.Knowledge, once achieved, becomes gratuitously available for the benefit of all. It is through this free gift of the knowledge acquired by the experiments of some members of society that general progress is made possible, that the achievements of those who have gone before facilitate the advance of those who follow...All the conveniences of a comfortable home, of our means of transportation and communication, of entertainment and enjoyment, we could produce at first only in limited quantities; but it was in doing this that we gradually learned to make them or similar things at a much smaller outlay of resources and thus became able to supply them to the great majority.A large part of the expenditure of the rich, though not intended for that end, thus serves to defray the cost of the experimentation with the new things that, as a result, can later be made available to the poor. The important point is not merely that we gradually learn to make cheaply on a large scale what we already know how to make expensively in small quantities but that only from an advanced position does the next range of desires and possibilities become visible, so

that the selection of new goals and the effort toward their achievement will begin long before the majority can strive for them.””

- ***
- “Although the fact that the people of the West are today so far ahead of the others in wealth is in part the consequence of a greater accumulation of capital, it is **mainly the result of their more effective utilization of knowledge**. There can be little doubt that the prospect of the poorer, “undeveloped” countries reaching the present level of the West is very much better than it would have been, **had the West not pulled so far ahead**. Furthermore, it is better than it would have been, had some world authority, in the course of the rise of modern civilization, seen to it that no part pulled too far ahead of the rest and made sure at each step that the material benefits were distributed evenly throughout the world. If today some nations can in a few decades acquire a level of material comfort that took the West hundreds or thousands of years to achieve, is it not evident that their path has been made easier by the fact that the West was not forced to share its material achievements with the rest—that it was not held back but was able to move far in advance of the others?**Not only are the countries of the West richer because they have more advanced technological knowledge but they have more advanced technological knowledge because they are richer. And the free gift of the knowledge that has cost those in the lead much to achieve enables those who follow to reach the same level at a much smaller cost. Indeed, so long as some countries lead, all the others can follow, although the conditions for spontaneous progress may be absent in them.** That even countries or groups which do not possess freedom can profit from many of its fruits is one of the reasons why the importance of freedom is not better understood.Civilization Can Be Copied [n.b.: this header was not present in the original chapter; it was inserted in the *Freeman* reprint. — SK]**For many parts of the world the advance of civilization has long been a derived affair, and, with modern communications, such countries need not lag very far behind, though most of the innovations may originate elsewhere.”**
- Mises: Mises 1978b (Salerno) https://mises.org/library/ludwig-von-mises-social-rationalist/html/c/587: .”[K]nowledge is a tool of action. Its function is to advise man how to proceed in his endeavors to remove uneasiness”” – Also, from HA: “”Action is purposive conduct. It is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and guided by ideas concerning the suitability or unsuitability of definite means.””
- Rothbard: ““There is another unique type of factor of production that is indispensable in every stage of every production process. This is the “technological idea” of how to proceed from one stage to another and finally to arrive at the desired consumers’ good. This is but an application of the analysis above, namely, that for any action, there must be some plan or idea of the actor about how to use things as means, as definite pathways, to desired ends. Without such plans or ideas, there would be no action. These plans may be called recipes; they are ideas of recipes that the actor uses to arrive at his goal. A recipe must be present at each stage of each production process from which the actor proceeds to a later stage. The actor must have a recipe for transforming iron into steel, wheat into flour, bread and ham into sandwiches, etc. The distinguishing feature of a recipe is that, once learned, it generally does not have to be learned again. It can be noted and remembered. Remembered, it no longer has to be produced; it remains with the actor as an unlimited factor of production that never wears out or needs to be economized by human action. It becomes a general condition of human welfare in the same way as air.”
- Huelmann’s article on “Knowledge, Judgment and the Use of Property.” https://mises.org/system/tdf/rae10_1_2.pdf?file=1&type=document
- See also Guido Hülsmann’s “Knowledge, Judgment, and the Use of Property,” p. 44.)

Against Monopoly comments:

Comments

Can't the argument disproving the legitimacy of intellectual property be simplified to recognizing that two or more people can independently develop the same idea. If two or more people can independently develop an "idea" then how can one person assert "ownership"????Intellectual property, as a concept, presents a logical conundrum, how can one person have property right to an idea that is denied to the others who also legitimately developed the same idea.

[Comment at 01/06/2010 06:20 AM by **Steve R.**]

Two people can never independently develop the same idea. They are two ideas that happen to be similar (indistinguishably).Two dissimilar objects do not magically collapse into a single object just because they become so highly similar that people cannot distinguish between them. Clearly, such magic does not happen in this universe. They remain two distinct objects.

It may be that our language blinds us to this reality, e.g. the use of 'same' to mean both 'indistinguishably similar' ("I have the same phone as you") and 'identical' ("Is that the same phone you had yesterday").

THEREFORE, GIVEN THAT SIMILARITY DOES NOT CONFER IDENTITY, people do own the ideas they think up and when they fix them in a medium or realise them in a mechanism then they become their intellectual property. Only patent attempts to legislate the idea that similarity connotes identity and thus that there can only be one owner of a distinct idea or fixation thereof.

However, let's also not forget that copying is as perfectly natural as intellectual property, so if you lend or give someone your IP, then they are naturally at liberty to copy it. It is only copyright that attempts to legislate the idea that you can give someone an intellectual work and prohibit them from copying it.

Patent and copyright are unnatural.

Intellectual property is as natural as material property.

In other words, there's nothing invalid or unnatural about IP once you eliminate the 18th century privileges that unnaturally augment it (or attempt to).

[Comment at 01/06/2010 07:15 AM by ~~**Crosbie Fitch**~~]

Of course, this assumes that you believe in "natural" anything. The only "natural" I believe in is existence and the law of tooth and claw. All else are constructs of man and inherently flawed.The only "natural" rights anyone has, exclusive of those given to living being by nature, are those invented by someone. If something was truly universal and as obvious as either Kinsella or Fitch say, then there would be universal agreement. Even Libertarians do not uniformly define natural rights or what those rights are. Until they do so, the term is meaningless, as meaningless as Kinsella claims "ownership of intellectual property" is, and perhaps more so since "natural" rights require even more in the way of artificial constructs than intellectual property, including patents and copyrights seems to (I can at least see a single set of rules for patents and copyrights, looking for "natural" rights leads to all sorts of arguments amongst Libertarians at to what they mean).

Patents and copyrights might well by “unnatural,” as Fitch claims. I similarly claim that “natural” rights are just as unnatural (except for the laws of nature, exemplified by “eat or be eaten” and “might makes right,” both with actual nature behind it), especially when “natural” rights exist only under the guise of the Libertarian religion, and especially when various sects of the Libertarian religion have different beliefs regarding same.
[Comment at 01/06/2010 07:57 AM by **Anonymous**]

Ok.
[Comment at 01/06/2010 07:58 AM by **Steve R.**]

Archived Mises comments (alternate saved version):

Rothbard on the Main Fallacy of our Time: Marx's Labor Theory of Value

by STEPHAN KINSELLA*on* DECEMBER 26, 2016

Rothbard, in *The Ethics of Liberty*, writes of the disastrous consequences of the fallacious Marxian labor theory of value:

> "I am convinced, however, that **the real motor for social and political change in our time has been a moral indignation arising from the fallacious theory of surplus value: that the capitalists have stolen the rightful property of the workers, and therefore that existing titles to accumulated capital are unjust**. Given this hypothesis, the remainder of the impetus for both Marxism and anarchosyndicalism follow quite logically. From an apprehension of what appears to be monstrous injustice flows the call for "expropriation of the expropriators," and, in both cases, for some form of "reversion" of the ownership and the control of the property to the workers.[23] Their arguments cannot be successfully countered by the maxims of utilitarian economics or philosophy, but only by dealing forthrightly with the moral problem, with the problem of the justice or injustice of various claims to property."[1]

Rothbard also quite rightly rejected the idea that property titles are to be overturned if we cannot trace title back to Adam, that is, if there is any taint in the "chain of title"—what Jeff Tucker has referred to as "scrupulosity".[2] As Rothbard wrote in an important addendum to a seminal 1974 paper:

> "It might be charged that our theory of justice in property titles is deficient because in the real world most landed (and even other) property has a past history so tangled that it becomes *impossible* to identify who or what has committed coercion and therefore who the current just owner may be. But the point of the "homestead principle" is that if we don't know what crimes have been committed in acquiring the property in the past, or if we don't know the victims or their heirs, then the current owner becomes the legitimate and just owner on homestead grounds. In short, if Jones owns a piece of land at the present time, and we don't know what crimes were committed to arrive at the current title, then Jones, as the current owner, becomes as fully legitimate a property owner of this land as he does over his own person. Overthrow of existing property title only becomes legitimate if the victims or their heirs can present an authenticated, demonstrable, and specific claim to the property. Failing such conditions, existing landowners possess a fully moral right to their property."[3]

But Rothbard could have gone further and condemned not only the Marxian *labor theory of value* but the entire Lockean *labor theory of property*, which is equally fallacious and insidious, and possibly a progenitor of Marx's odious ideas, and at least a close cousin.[4] The entire concept of labor is fuzzy and confused, in both economics and political theory. This is why I argue Locke's Big Mistake: How the Labor Theory of Property Ruined Political Theory.

In Misesian praxeological terms, labor is merely a *type of action*, as distinguished, say, from leisure; these types of action are distinguished by the subjective goals and experiences of the actors (labor is something we prefer not to do if possible for its own sake; leisure is something we do for its own sake).[5] But the praxeological structure of action applies to all actions, no matter how some catallactic economists or psychologists wish to classify the goals or mental states of the actors. All action employs

scarce means, to achieve ends; all action is guided by knowledge, or information, sometimes called "recipes".[6] Human actors employ their knowledge of what ends are possible to them in the world and what they perceive will bring them more or less subjective satisfaction in the future and use their knowledge of causal laws to select means within their control to attempt to interfere with the predicted course of events to achieve some other, more desired, future end-state. Thus all action employs scarce means, which are controllable and manipulable by one's body, to attempt to achieve some end-state in the future; and the action is always necessarily guided by knowledge of causal means available and possible ends in the future that will result from the actor's manipulations of these causal means. The scarce means are subjects of property rights, but knowledge is not—it cannot be. This is why property rights in scarce resources are natural, make sense, and are justified, and why intellectual property rights, such as patent and copyright, are not and cannot be.

The world's leading Rothbardian and Misesian, Hans-Hermann Hoppe, so steeped was he in praxeological reasoning (indeed, he was on the verge of independently formulating his own version of similar laws of action when he came across Mises and Rothbard)[7] that he was able *instantly* to identify the problem with intellectual property rights as far back as 1988, when asked on the spot about this issue by a questioner:

> AUDIENCE QUESTION: I have a question for Professor Hoppe. Does the idea of personal sovereignty extend to knowledge? Am I sovereign over my thoughts, ideas, and theories? ...
>
> HOPPE: ... in order to have a thought you must have property rights over your body. That doesn't imply that you own your thoughts. The *thoughts can be used by anybody who is capable of understanding them*.[8]

This was, by the way, far before IP was to start getting the scrutiny by libertarians that it was to start receiving later, in the Internet age.

Rothbard sensed much of the problem with IP in his condemnation of patent, and, especially, in his condemnation of reputation rights in *Ethics*, ch. 16, "Knowledge, True and False". In this chapter Rothbard attacks defamation law (which includes libel, the written form of defamation, and slander, the oral form), i.e. reputation rights (he also rightly attacks blackmail law), on the grounds that reputation is just the subjective opinions of you that others have in their own heads, their own minds, and since they own their own bodies, you cannot have a property right in what they think; thus, you cannot have a right to a reputation, and defamation law is thus unjust.

And of course a similar argument applies to patent and copyright. As Roderick Long has put it, Owning Ideas Means Owning People.[9] The fact that similar flaws affect both IP and defamation law should not be surprising since, as I have argued, defamation law/reputation rights should also be considered a type of IP, although this is not usually how defamation law is classified.[10] However, anyone familiar with the standard arguments for trademark law (a type of IP) and defamation law should recognize the similarity. Defamation law is based on the idea that you own your reputation since it has economic value, and thus certain statements of others that reduce the value of your reputation are some kind of violation of property rights, and thus may be prohibited. Similar reasoning is made in favor of trademark, law, though here the arguments are muddled. Some say businesses have a property right in the value of their trademark (similar to one's reputation) and that certain representations by competitors may be prohibited—sometimes the defense of trademark is based on fraud (but there are already law against fraud; why do we need another?), sometimes on contract (but we already have contract law; and in the case of contract breach it would be the customer, not the trademark user, who

has a cause of action against some deceptive knockoff company), but often based on the idea that a trademark is like a reputation that "has economic value". Of course, here, again, Hoppe's solid rooting in Misesian praxeology has helped explode the fallacy in all these notions: as he has observed, there are no property rights in value, but only in the physical integrity of scarce resources that one owns.[11]

Rothbard therefore should have seen that not only is defamation law unlibertarian—along with blackmail law and even patent law—but that all IP, including trademark, patent, and copyright, are illegitimate. Instead, he makes a muddled case against modern patent and copyright law but argues instead for something he calls "contractual" or common law copyright. As I argue at length in *Against Intellectual Property*, this argument is completely confused. Some libertarian copyright defenders claim Rothbard is in favor of copyright. He is not. The "common law copyright" he is in favor of seems to be a contractual amalgamation of patent and copyright law (the example he gives is of a mousetrap, an invention, something covered by today's patent law, not copyright law), and bears no resemblance to the older doctrine of common law copyright (which had to do with unpublished manuscripts and was more akin to a combination of contract and trade secret law). And Rothbard is simply wrong that his contractual approach would result in anything like what he imagines it will. This is because he loses sight of the fact that *ownership is always ownership of a physical, scarce resource*, and *not* of information or knowledge—if he had emphasized the role of *scarcity* to property rights, as Hoppe does,[12] and kept in mind the praxeological distinction between scarce means, and knowledge, as Hoppe does, he would not have made this mistake. It's perhaps why he was silent and did not object, when sitting next to Hoppe on the 1988 panel when Hoppe made a similar observation.[13]

In sum—this is why we must object not only to the Marxian *labor theory of value*, but also to the horrendously confused, overly metaphorical Lockean *labor theory of property*. Actions are things we *do*; we do not own action.[14]

Likewise, we do not own our *labor*. Nor does one own "the fruits of his labor." We do not own metaphors. We do not own knowledge. We do not own the "consequences" of our actions. We own scarce means of action; knowledge *guides* our actions, but is distinct from the scarce means that are *employed*. Both knowledge and means play important and essential—and complementary—roles in successful action. Action is not possible without both means and knowledge. Someone having knowledge but no access to any scarce means cannot act; only the employment of scarce means can have a causal effect on what would otherwise transpire. But someone having access to means but no knowledge cannot act, either, for one would not know what ends to pursue or what means to employ to achieve a given end.

Thus knowledge, like scarce means, are essential for action. But this does not mean we *own* knowledge. Scarce means by their nature can be the subject of violent conflict among competing actors; property rights are allocated so that these scarce means can be used peacefully, cooperatively, productively, without violent conflict and clashing. But *knowledge* and information is not a rivalrous, scarce resource and may be employed by any number of actors at the same time, and the accumulation of knowledge over time is essential to human progress. As Hayek observed, the societal accumulation of knowledge is a "fund of experience," which allows humans of every generation to benefit from innovations and discoveries of the past, to more and more successfully and efficiently create, produce, and act.[15]

Rothbard was right to observe that all rights—all human rights—are property rights. In his brief explorations of the arcane topic of IP rights, he lost sight of the fact that all property rights are rights to control scarce resources; he lost sight of this because unlike his student Hoppe, he did not always focus

on the importance of scarcity to property rights, and did not keep in mind the sharply different roles of scarce resources, and knowledge, in human action. We do not own labor, just as we do not own our actions, and just as we do now own reputation, or others' minds or opinions, just as we do not own the *value* of our property but *only its physical integrity*; we do not own knowledge, since all rights are enforceable by law and force and are always directed at some material, scarce thing in the world. We do not own things we create, nor metaphors, nor the fruit of our labor. Libertarian creationism is wrong: creation is not an independent source of property rights. It is a source of wealth, but not of property rights. Production means transforming already existing things, making them more valuable, making the owner more wealthy, but does not give rise to additional property rights.[16] Only original appropriation and contractual transfer or exchange give rise to property rights—and these property rights are always property rights in and to the exclusive right to control scarce resources, not knowledge. This does not mean creation, the intellect, and labor or not important—just as they are not ownable; as with the case that truth and justice are important even though they, like lots of other referents of concepts and words, are not ownable.

If one recognizes that Locke was wrong, one will not make all these mistakes. If you realize the distinct roles played by knowledge, on the one hand, and scarce resources, on the other, in human action, you will understand why property rights always apply only to scarce resources and never to knowledge. And then it becomes easy to understand why action (and thus labor) is not an ownable resource but just the use a person makes of his body and other means, guided by his knowledge. Labor is action, and it employs scarce means, which may be owned; and it employs knowledge, which cannot and need not be.

Update: Facebook comments.

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1. PDF and epub; quote from ch. 9, Property and Criminality, text included in chs. 6-9 excerpt here. [↩]
2. See Tucker, Scrupulosity and the Condemnation of Every Existing Business, archived comments here; discussed in my post Vulgarism, Left-libertarianism, Taco Bell, and "Power"; see also my posts Is Macy's Part of the State? A Critique of Left Deviationists and The Walmart Question, or, the Unsupported Assertions of Left-Libertarianism (Apr. 26, 2009) (archived comments). [↩]
3. Justice and Property Rights: Rothbard on Scarcity, Property, Contracts..., *Libertarian Standard* (Nov. 19, 2010); see also Mises, Rothbard, and Hoppe on the "Original Sin" in the Distribution of Property Rights. [↩]
4. See my Locke, Smith, Marx and the Labor Theory of Value; also Locke's Big Mistake: How the Labor Theory of Property Ruined Political Theory and Hume on Intellectual Property and the Problematic "Labor" Metaphor. [↩]
5. Similarly, as Hoppe writes of the distinction between private and public goods:

> "A clear-cut dichotomy between private and public goods does not exist. . . . All goods are more or less private or public and can—and constantly do—change with respect to their degree of privateness/publicness as people's values and evaluations change, and as changes occur in the composition of the population. In order to recognize that they never fall, once and for all, into either one or the other category, one must only recall what makes something a good. For something to be a good it must be recognized and treated as scarce by someone. Something is not a good as such, that is to say; goods are goods only in the eyes of the beholder. Nothing is a good unless at least one person subjectively evaluates it as such. But then, when goods are never goods-as-such—when no physico-chemical analysis can identify something as an economic good—there is clearly no fixed, objective criterion for classifying goods as either private or public. They can never be private or public goods as such. Their private or public character depends on how few or how

> many people consider them to be goods, with the degree to which they are private or public changing as these evaluations change and ranging from one to infinity."

Hoppe, ch. 10 of *TSC*, and *EEPP*, ch. 1. [↩]

6. As Rothbard wrote in *MES*:

> "There is another unique type of factor of production that is indispensable in every stage of every production process. This is the "technological idea" of how to proceed from one stage to another and finally to arrive at the desired consumers' good. This is but an application of the analysis above, namely, that for any action, there must be some *plan* or idea of the actor about how to use things as means, as definite pathways, to desired ends. Without such plans or ideas, there would be no action. These plans may be called *recipes*; they are ideas of recipes that the actor uses to arrive at his goal. A *recipe* must be present at each stage of each production process from which the actor proceeds to a later stage. The actor must have a recipe for transforming iron into steel, wheat into flour, bread and ham into sandwiches, etc.
>
> The distinguishing feature of a recipe is that, *once learned*, it generally does not have to be learned again. It can be noted and remembered. Remembered, it no longer has to be produced; it remains with the actor as an *unlimited* factor of production that never wears out or needs to be economized by human action. It becomes a general condition of human welfare in the same way as air.

See also Knowledge vs. Calculation, Mises Blog (July 11, 2006) [Mises blog version; archived version with comments]. [↩]

7. As he has explained of his early intellectual development:

> Independently, I had concluded that economic laws were *a priori* and discoverable through deduction. Then I stumbled on Mises's *Human Action*. That was the first time I found someone who had the same view; not only that, he had already worked out the entire system. From that point on, I was a Misesian.

Quoted in my Afterword to Hoppe's *The Great Fiction*. See also Hoppe: First significant thinker to get libertarianism totally right. [↩]

8. See Hoppe on Intellectual Property. [↩]
9. See also his The Libertarian Case Against Intellectual Property Rights; I also make the point that IP is a form of slavery since it gives others a partial right of ownership over others' bodies, e.g. in *Against Intellectual Property* and other writings; as did Tom Palmer in his late 1980s work on IP, as I noted in AIP. [↩]
10. See my "Types of Intellectual Property." [↩]
11. Hoppe on Property Rights in Physical Integrity vs Value. [↩]
12. See "Foreword," in Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (~~Laissez Faire Books ebook edition~~, 2013); "Afterword," in Hans-Hermann Hoppe, *The Great Fiction: Property, Economy, Society, and the Politics of Decline* (Laissez Faire Books, 2012); also "Introduction," with Jörg Guido Hülsmann, in Hülsmann & Kinsella, eds., *Property, Freedom, and Society: Essays in Honor of Hans-Hermann Hoppe* (Mises Institute, 2009) (published as "Essays in Honor of Hans-Hermann Hoppe," *Mises Daily*, Aug. 7, 2009). [↩]
13. See Hoppe on Intellectual Property . [↩]
14. See Cordato and Kirzner on Intellectual Property, where Kirzner cites J.P. Day as follows:

> Day is sharply critical of Locke, denying that one can talk significantly of owning labor (in the sense of "working"). Laboring, Day contends, is an activity, "and **although activities can be engaged in, performed or done, they cannot be owned**." [↩]

15. See Tucker, "Knowledge Is as Valuable as Physical Capital" . [↩]
16. See Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and 'Rearranging'; also my "Intellectual Freedom and Learning Versus Patent and Copyright," *Economic Notes* No. 113 (Libertarian Alliance, Jan. 18, 2011) (also published as "Intellectual Freedom and Learning Versus Patent and Copyright," *The Libertarian Standard*, Jan. 19, 2011). [↩]

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On the Logic of Libertarianism and Why Intellectual Property Doesn't Exist

✢

This was an interview by Anthony Wile at *The Daily Bell*: "Stephan Kinsella on the Logic of Libertarianism and Why Intellectual Property Doesn't Exist," *The Daily Bell* (March 18, 2012). I would not word the title this way—the problem with intellectual property (IP) is not that it doesn't "exist" but rather that IP law is unjust. But I didn't choose the title, and have not changed it here.

✢

Daily Bell: Give us some background on yourself. Where did you go to school? How did you become a lawyer?

Stephan Kinsella: I was from a young age interested in science, philosophy, justice, fairness and "the big questions." In high school a librarian recommended I read Ayn Rand's *The Fountainhead*, which started me down that rabbit-hole. I ended up majoring in electrical engineering at Louisiana State University, from 1983–87. I liked engineering but over time became more and more interested in political philosophy, economics, philosophy, and so on.

In the late '80s I started publishing columns in the LSU student newspaper, *The Daily Reveille*, from an explicitly libertarian perspective. As my interests became more sharply political and philosophical, my girlfriend (later wife) and friends urged me to consider law school. After all, I liked to argue. I might as well get paid for it! I was by this time in engineering grad school, pursuing an MSEE degree. Unlike many attorneys I now know, I had not always "wanted to be a lawyer." In fact, it had never occurred to me until my girlfriend suggested it over a family dinner, when I was wondering what degree I could pursue next—partly in order to avoid having to enter the workforce just yet. And also to make more money.

At the time I naively thought one had to have a pre-law degree and many prerequisite courses that engineers would lack; and I feared law school would be very difficult. I remember my girlfriend's chemical engineer father laughing out loud at my concern that law school might be more difficult than engineering.

So I walked across the LSU campus one day and talked to the vice chancellor about all this. He tried to dissuade me, saying that engineering undergrads tended to find law school difficult. But he conceded that a pre-law degree is not needed; all one needs is a bachelor's degree in *something*, in anything, really. I took the LSAT and did well enough to get accepted at LSU Law Center. (In the US, law is a graduate degree, the *Juris Doctor*, which requires an initial B.A. or B.S. degree. Because of ABA protectionism. But I digress.)[1]

[1] I discuss some of this in "How I Became A Libertarian" (ch. 1); additional biographical material is at www.stephankinsella.com/publications/#biographical.

I actually greatly enjoyed law school. Unlike many of my fellow law students, apparently, who seemed in agony. I was free to talk about laws, rules, human action and interaction. I wasn't stuck with mathematical equations. Norms and opinions were relevant. Human interactions interested me. I enjoyed the Socratic discussion method.

In one sense, it was unlike electrical engineering, which studies the impersonal behavior of subatomic particles. In law, the subject matter is acting humans and the legal norms that pertain to human action. On the other hand, I found it similar to engineering in that it was analytical and focused on solving problems. It is less mechanistic and deterministic than is engineering but it is still analytical. So if you are the type of engineer who can shift modes of thought and who is able to write and speak coherently (not all engineers are), then law school is fairly easy. By contrast, many liberal arts majors are not used to thinking analytically. The first year of law school is meant to teach you to "think like a lawyer"—essentially, to break their spirit and remold them into the analytical, lawyer-thinking, problem-solving mold.

In any case, I became a lawyer and do not regret it. It can be lucrative and mentally stimulating. In my own case, my legal career has complemented my libertarian and scholarly interests. As Gary North has pointed out, for most people there is a difference between career and calling.[2] Your career or occupation is what puts food on the table. Your *calling* is what you are passionate about—"the most important thing you can do with your life in which you are most difficult to replace." Occasionally they are the same, but often not; but there is no reason not to arrange your life so as to have both. If you can manage it. In my case, my various scholarly publications and networks helped my legal career if only by adding publications to my CV. And my legal knowledge and expertise, I believe, has helped to inform my libertarian theorizing.

Daily Bell: You founded your own firm. Tell us how that came about.

Stephan Kinsella: After law school my first job was in oil and gas law at a large Houston based law firm, Jackson Walker. I found the work fascinating; it was all about contract and property rights. Then I moved into patent law because it was more in demand at this time (mid '90s) and unlike state-based oil & gas law, it is a national legal field so allows more geographic mobility. My wife's employer at the time was pushing her to take a job in the head office outside Philadelphia. So I switched to patent law in part to accommodate this and in part to capitalize on the then-burgeoning field of IP law.

I recall discussing my career choices at this time with my friend, LSU law professor Saúl Litvinoff, an old-world gentleman, who confessed that he was "nonplussed" that I, a man, a husband, would take into account my wife's career plans in my own career decisions. Oh, well. Different times.

I ended up taking a job with a Philadelphia law firm, Schnader Harrison, doing patents and related IP work. I and others there ended up moving later to Duane Morris, and when I moved back to Houston in 1997 I opened their Houston office and was eventually made partner. In 2000 I decided to join one of my clients, an optoelectronics company (think: lasers), as general counsel. At the time I had been at big law firms for about ten years and had learned a lot and enjoyed it but was ready for a change. And after about ten years as general counsel, I was ready for another shift

[2] Kinsella, "Career Advice by North," *StephanKinsella.com* (Aug. 12, 2009).

so I have recently formed my own legal practice, specializing in intellectual property, technology and commercial law.

Daily Bell: Why were you attracted to Austrian economics and why did libertarianism attract you?

Stephan Kinsella: I was always interested in science, truth, goodness and fairness. I have always been strongly individualistic and merit-oriented. This is probably because I was adopted and thus have always tended to cavalierly dismiss the importance of "blood ties" and any inherited or "unearned" group characteristics. This made me an ideal candidate to be enthralled by Ayn Rand's master-of-universe "I don't need anything from you or owe you anything" themes.

Another factor is my strong sense of outrage at injustice, which probably developed as a result of my hatred of bullies and bullying. I was frequently attacked by them as a kid because I was small for my age, bookish and a smartass. Not a good combination.

A librarian at my high school (Catholic High School in Baton Rouge, Louisiana), Mrs. Reinhardt, one day recommended Ayn Rand's *The Fountainhead* to me. (I believe this was in 1982, when I was a junior in high school—the same year Rand died.) "Read this. You'll like it," she told me. I devoured it. Rand's ruthless logic of justice appealed to me. I was thrilled to see a more-or-less rigorous application of reason to fields outside the natural sciences. I think this helped me to avoid succumbing, in college, to the simplistic and naïve empiricism-scientism that most of my fellow engineering classmates naturally absorbed. Mises's dualistic epistemology and criticism of monism-positivism-empiricism, which I studied much later, also helped shield me from scientism.

By my first year of college (1983), where I studied electrical engineering, I was a fairly avid "Objectivist" style libertarian. I had read Henry Hazlitt's *Economics in One Lesson* and some of Milton Friedman's works,[3] but I initially steered clear of self-styled "libertarian" writing. Since Rand was so right on so many things, I at first assumed she must be right in denouncing libertarianism as the enemy of liberty. I eventually learned better, of course (for example, when I a saw Libertarian Party pamphlets on campus before the 1988 Presidential election, and when I attended a Ron Paul appearance on campus as part of his campaign).

Daily Bell: How did you meet Lew Rockwell and become affiliated with Mises?

Stephan Kinsella: I eventually started reading more radical libertarians like Rothbard and Austrians like Mises and Hayek and soon became an Austrian and anarchist. The Austrian approach to knowledge made so much sense to me. It was rigorous without being mathematical and it was "Kantian" without succumbing to idealism: Like Rand's epistemology, the Misesian approach is also realistic.[4]

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[3] See Kinsella, "The Greatest Libertarian Books," *StephanKinsella.com* (Aug. 7, 2006).

[4] Some of my favorite works in this regard are Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; https://mises.org/library/ultimate-foundation-economic-science); Murray N. Rothbard, "The Mantle of Science" in in *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/economic-controversies); and Hans-Hermann Hoppe, *Economic Science and the Austrian Method* (Auburn, Ala.: Mises Institute, 1995; www.hanshoppe.com/esam). See also David Kelley's lecture series, "The Foundations of Knowledge" (YouTube playlist at https://www.youtube.com/playlist?list=PLnHOyZsmJrozETJ9zzryDhW0kliZkbIsu).

In 1988, when I was in law school, I read Hans-Hermann Hoppe's controversial and provocative article in *Liberty*, "The Ultimate Justification of the Private Property Ethic."[5] In this article Hoppe sets forth his "argumentation ethics" defense of libertarianism. This idea had a profound influence on me. I wrote several papers defending libertarian ethics, based on this theory and I wrote an in-depth review essay of Hoppe's *The Economics and Ethics of Private Property* (see chapter 22). I promptly sent it to Hoppe, who sent back a warm thank you note. This was around 1994.

Later that year, in October 1994, I attended the John Randolph Club meeting which was held near Washington, D.C., primarily to meet Hoppe, Rothbard and Rockwell. While there I was able to get Rothbard to autograph my copy of *Man, Economy, and State*, which he inscribed "*To Stephan: For Man & Economy, and against the state—Best regards, Murray Rothbard*" (he died the following January). I started attending and speaking at various Mises Institute conferences such as their annual Austrian Scholars Conference.[6] I am now involved with Hoppe's Property and Freedom Society, which has annual meetings in Bodrum, Turkey, since its founding in 2006.[7]

Daily Bell: Tell us about your legal theory of property and how you came to believe that intellectual property doesn't exist.

Stephan Kinsella: My main interest has always been and remains the basics of libertarian ethics: What are individual rights and property, how is this justified and so on. As I discuss in some previous writing, from the beginning of my exposure to libertarian ideas, the IP issue nagged at me.[8] I was never satisfied with Ayn Rand's justification for it, for example. Her argument is a bizarre mixture of utilitarianism with overwrought deification of "the creator"—not *the* Creator up there, but Man, The Creator, initial caps, who has a property right in what He Creates. Her proof that patents and copyrights are property rights is lacking.[9]

So I kept trying to find a better justification for IP and this search continued after I started practicing patent law, in 1993 or so.

Many libertarians abandon minarchy in favor of anarchy when they realize that even a minarchist government is unlibertarian. That was my experience.[10] And it was like this for me also with IP. I came to see that the reason I had been unable to find a way to justify IP was because it is, in fact, unlibertarian. As the anti-IP Benjamin Tucker said of his pro-IP opponent Victor Yarros, in the IP debate in the pages of *Liberty* in the late 1800s, "if he [Yarros] has failed [in his attempts to justify IP] and, so far as I know it, such is the nearly unanimous verdict of the readers of *Liberty*,—

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[5] See "Dialogical Arguments for Libertarian Rights" (ch. 6); "Defending Argumentation Ethics" (ch. 7); "The Undeniable Morality of Capitalism" (ch. 22).

[6] It was eventually disbanded years later. In recent years, the Mises Institute has revived the Libertarian Scholars Conference and also hosts the Austrian Economics Research Conference.

[7] More at www.propertyandfreedom.org.

[8] See, e.g., Kinsella, "Intellectual Property and Libertarianism," *Mises Daily* (Nov. 17, 2009).

[9] See, e.g., my speeches "KOL012 | 'The Intellectual Property Quagmire, or, The Perils of Libertarian Creationism,' Austrian Scholars Conference 2008," *Kinsella on Liberty Podcast* (Feb. 6, 2013) and "KOL253 | Berkeley Law Federalist Society: A Libertarian's Case Against Intellectual Property," *Kinsella on Liberty Podcast* (Oct. 12, 2018); and my blog posts "Objectivist Law Prof Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors," *Mises Economics Blog* (Jan. 3, 2008); "Regret: The Glory of State Law," *Mises Economics Blog* (July 31, 2008); and "Inventors are Like Unto …. GODS…..," *Mises Economics Blog* (Aug. 7, 2008).

[10] The old joke is: What's the difference between a minarchist and an anarchist? A: About six months.

the fault is not with the champion, but with his hopeless cause."[11] So, too, was my attempt to justify IP a hopeless cause.

In coming to understand IP could not be justified, I was heavily influenced by previous thinkers, such as Tom Palmer and Wendy McElroy.[12] Perhaps the unlibertarian character of patent and copyright would have been obvious if Congress had not enacted patent and copyright statutes long ago, making them part and parcel of America's "free-market" legal system—and if early libertarians like Rand had not so vigorously championed such rights.

But libertarianism's initial presumption should have been that IP is invalid, not the other way around. After all, we libertarians already realize that "intellectual" rights, such as the right to a reputation protected by defamation law, are illegitimate.[13]

Why, then, would we presume that other laws, protecting intangible, intellectual rights, are valid—especially artificial rights that are solely the product of legislation, i.e., decrees of the fake-law-generating wing of a criminal state?[14]

But IP is widely seen as basically legitimate. There have always been criticisms of existing IP laws and policies and many calls for "reform." But I became opposed not just to "ridiculous" patents and "outrageous" IP lawsuits, but to patent and copyright *per se*. Patent and copyright law should be *abolished*, not reformed. The problem is not "abuse" of the system, but, as Burke said, the "thing itself."[15] The basic reason is that patent and copyright are explicitly anti-competitive grants by the state of monopoly privilege, rooted in mercantilism, protectionism and thought control.[16] To grant someone a patent or copyright is to grant them a right to control others' property—a "negative servitude" granted by state fiat instead of contractually negotiated.[17] This is a form of theft, trespass, or wealth redistribution.

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[11] Wendy McElroy, "Intellectual Property," in *The Debates of Liberty: An Overview of Individualist Anarchism, 1881-1908* (Lexington Books, 2002; https://perma.cc/ZQM2-82B9), p. 97, reprinted without endnotes as "Copyright and Patent in Benjamin Tucker's Periodical," *Mises Daily* (July 28, 2010; https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical). See also Kinsella, "Benjamin Tucker and the Great Nineteenth Century IP Debates in *Liberty* Magazine," *StephanKinsella.com* (July 11, 2022).

[12] See Kinsella, "The Four Historical Phases of IP Abolitionism," *Mises Economics Blog* (April 13, 2011); *idem*, "The Origins of Libertarian IP Abolitionism," *Mises Economics Blog* (April 1, 2011).

[13] See Murray N. Rothbard, "Knowledge, True and False," in *The Ethics of Liberty* (New York: New York University Press, 1998; https://mises.org/library/knowledge-true-and-false); Walter E. Block, "The Slanderer and Libeler," in *Defending the Undefendable* (2018; https://mises.org/library/defending-undefendable); "Law and Intellectual Property in a Stateless Society" (ch. 14), n.3; Kinsella, "Defamation as a Type of Intellectual Property," in Elvira Nica & Gheorghe H. Popescu, eds., *A Passion for Justice: Essays in Honor of Walter Block* (New York: Addleton Academic Publishers, forthcoming).

[14] See "Legislation and the Discovery of Law in a Free Society" (ch. 13), and the James Carter quote at n.154.

[15] "*The Thing! the Thing itself is the Abuse*!" Edmund Burke, "A Letter To Lord****," in *A Vindication of Natural Society* (Liberty Fund, 1756; https://oll.libertyfund.org/title/burke-a-vindication-of-natural-society) (emphasis added).

[16] See, e.g., Kinsella, "Intellectual Property Advocates Hate Competition," *Mises Economics Blog* (July 19, 2011); Karl Fogel, "The Surprising History of Copyright and The Promise of a Post-Copyright World," *Question Copyright* (2006; https://perma.cc/DV92-TEH3); Kinsella, "Rothbard on Mercantilism and State "Patents of Monopoly," *C4SIF Blog* (Aug. 29, 2011).

[17] See "*Against Intellectual Property* After Twenty Years" (ch. 15), Part IV.B.

So to answer your question: IP rights—patent and copyright—"exist," but are not legitimate any more than welfare rights are. There are many types of IP;[18] all are illegitimate, in my view. Not only because most of them are based on and require legislation (I view all legislation as unlibertarian; see chapter 13) but because they try to set up rights in non-scarce things, which in effect grants negative servitudes to some people at the expense of the property rights of others.

Daily Bell: According to Wikipedia and other sources, "In contract theory, you extend Murray Rothbard's and Williamson Evers's title transfer theory of contract linking with inalienability theory." What does that mean?

Stephan Kinsella: I discuss these issues in various articles (see chapters 9 and 10). The basic idea is to root the entire idea of contract in a libertarian theory of property. The latter is based on the realization that the entire purpose of property rights is to solve the problem of incompatible uses of scarce resources. The fact that some things in the world are scarce (or conflictable) resources means that these resources can be used as means of action only if ownership is assigned and socially recognized. For things that are not scarce there is no social problem to be solved. Hans-Hermann Hoppe addresses these issues in the opening chapters of his foundational treatise *A Theory of Socialism and Capitalism*.

Rothbard recognized that all individual rights are property rights and, therefore, that a theory of contract is not about enforceable or binding "promises" but simply about how owners of resources can contractually transfer title to others. As Rothbard recognized, this has implications for alienability or so-called "voluntary slavery" contracts. Many libertarians, assuming contracts are just binding promises, see no reason one could not bind oneself to be a slave. (See chapters 9–11.) But if you view contracts as simply transfers of title to owned objects, then the question arises: Is one's body alienable, or not? You cannot just assume that it is. Rothbard argued that it was not.

Daily Bell: You also attempted to clarify the theory. How so?

Stephan Kinsella: Rothbard sketched the theory in 1974; Evers elaborated on it in 1977, based on Rothbard's insights. Rothbard then built on Evers's pioneering article in his 1982 *Ethics of Liberty*.[19] But neither were lawyers and only took this analysis so far. I tried to incorporate their insights and integrate them with other Rothbardian, Misesian and Hoppean insights about property rights and liberty and with established legal concepts, such as those developed under the Roman-influenced continental or civil-law systems, which I regard as more libertarian, in some respects, than the more feudalistic common-law concepts.[20]

My basic approach is to recognize that mainstream legal theories of contract have been muddied by unlibertarian and positivistic conceptions of law and rights. Questions about what rights are "alienable" or not, loose talk about how promises should be "binding," etc., highlight the need for clarity in this area. In my view, to sort these issues out one needs a very clear and consistent

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[18] See Kinsella, "Types of Intellectual Property," *C4SIF Blog* (March 4, 2011).

[19] See "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability" (ch. 9); Murray N. Rothbard, "Property Rights and the Theory of Contracts," in *The Ethics of Liberty*; Williamson M. Evers, "Toward a Reformulation of the Law of Contracts," *J. Libertarian Stud.* 1, no. 1 (Winter 1977; https://mises.org/library/toward-reformulation-law-contracts): 3–13. Kinsella, "Justice and Property Rights: Rothbard on Scarcity, Property, Contracts…," *The Libertarian Standard* (Nov. 19, 2010), discusses the origins of the Rothbard-Evers contract theory.

[20] See "Legislation and the Discovery of Law in a Free Society" (ch. 13) at n.153.

understanding of the nature of property rights and ownership. First, we must recognize that only scarce resources are ownable; second, that the body is a type of scarce resource; third, that the mode of acquiring title to external objects is different from the basis of ownership of one's own body. The libertarian view is that human actors are self-owners and these self-owners are capable of appropriating unowned scarce resources by Lockean homesteading—some type of first use or embordering activity. Obviously, an actor must already own his body if he is to be a homesteader; self-ownership is not acquired by homesteading but rather is presupposed in any act or defense of homesteading. The basis of self-ownership is the fact that each person has direct control over the scarce resource of his body and therefore has a better claim to it than any third party (and any third party seeking to dispute my self-ownership must presuppose the principle of self-ownership in the first place since he is acting as a self-owner).[21]

So there is a difference between body-ownership and ownership of external scarce goods. An actor is a self-owner; self-owners are able to acquire property rights in external, unowned objects by homesteading them—or by contractual acquisition from a previous owner. Many libertarians simply assume that if you own something, you can sell it. Thus, they conclude that if we are self-owners, we can sell our bodies. (Walter Block makes this argument.) My view is that we start with the nature of ownership: Ownership means the right to exclude others. It does not automatically imply the "right to sell" since this is actually moving from a situation where you have the right to exclude to one where you *do not*. But in the case of formerly unowned resources, because of the way ownership is acquired, it can be undone, in effect. Homesteading an object requires more than just possession—it requires the intent to own. So if the intent to own is abandoned, then the thing is no longer owned, but merely possessed (if that). Thus, an owner of an object can transfer ownership to another by allowing the other to possess the object and then manifesting his intent to abandon ownership, "in favor" of the new possessor. The new possessor then in effect re-homesteads the item, becoming its new owner. In other words, the nature of ownership in external objects means that it is possible to abandon ownership to them or use this abandonment method to transfer title to someone else. So ownership does not directly include the "right to sell," but it so happens to imply this power, for acquired property. However, the same is simply not true of one's body. There is no way to "undo" the homesteading of your body since you did not homestead it in the first place. There is no way to abandon your ownership of your body since it is rooted in your better claim to it based on your direct control over it. Merely stating "I promise to be your slave" doesn't change your status as having a better claim to your body than third parties. (For more on this, see chapter 11.)

So in exploring the Rothbard-Evers title transfer theory of contract and in building on insights by Hoppe about the crucial importance of scarcity to property rights and his insights as to the nature of self-ownership and homesteading, I tried to identify the difference between body and external resource ownership, the basis and nature of acquisition of rights in each and the nature of what contracts are (transfers of title to alienable owned objects) and what implications this has for body-alienability (namely, that voluntary slavery contracts are unenforceable and invalid).

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[21] See "How We Come to Own Ourselves" (ch. 4), text at n.15; see also "What Libertarianism Is" (ch. 2) and Kinsella, "The Relation between the Non-aggression Principle and Property Rights: a response to Division by Zer0," *Mises Economics Blog* (Oct. 4, 2011).

Daily Bell: You advance a theory of causation that attempts to explain why remote actors can be liable under libertarian theory. Can you clarify this point, please?

Stephan Kinsella: I had long been dissatisfied with the approach various libertarians take to the issue of responsibility for aggression caused by leaders or groups. Too often libertarians made what seemed to me to be too simplistic or unjustified assumptions, which they relied on in their analysis. For example some seemed to assume that there is a fixed amount of responsibility, so that if you say the mafia boss is responsible for ordering a hit, then the lackey who committed the killing is innocent. Or some would argue that a mafia boss or general or president is not responsible for the aggression committed by his underlings, unless he had coerced them or had a "contract" with them.

These all seemed confused to me. As for the latter: a contract is just a title transfer, so it is unclear why *A* hiring *B* to kill *C* means *A* is liable but *A* persuading *B* through sexual favors to kill *C* is not. Focusing on *ad hoc* exceptions to the rule that *A* is not responsible for *B*'s actions seemed confused to me. The Austrian theory of subjective value teaches us that there are many ways to incentivize or motivate or induce someone to commit an action for you: you can promise sexual favors, promise to pay money, hire someone, and so on. Also, there is no reason to think that both the boss and his underling cannot both be 100% responsible: in the law this is called joint and several liability.

So in developing a paper called "Reinach and the Property Libertarians on Causality in the Law" for a Mises Institute symposium in 2001 on Adolf Reinach and Murray Rothbard (see chapter 8), I relied on Mises's praxeological understanding of the structure of human action and cooperative action in general. Mises points out that in a market economy with the division and specialization of labor, people use others as *means* to achieve their ends. This is the essence of market cooperation.

When the aim is peaceful production of wealth, this is good. But people can cooperate to engage in collective aggression too. In this case the members of the group conspire to achieve an illicit end, such as theft or murder. Just as a man can use a gun (a means) to commit aggression, so people can employ others as means to commit crimes. Sometimes these other people are innocent (e.g., hiring a boy to deliver a bomb concealed in a package) and other times they are complicit (the mafia boss's underling). In the latter case, both actors are aggressors, as they play a causal role in action that uses efficacious means to achieve the end of invading the borders of the property of innocent victims. The argument is general and praxeological and focuses on the intent of the actor (which relates to the praxeological *end* or goal of the action) and the *means* employed, whether that means be an inanimate good or another human. Thus, there is no need to resort to *ad hoc* exceptions such as "the boss is liable because he was coercing the underling" or "the boss is liable because of a contract with" the underling. (For more on this, see chapter 8; also chapters 9–11.)

Daily Bell: You provide non-utilitarian arguments for intellectual property being incompatible with libertarian property rights principles. Can you explain this?

Stephan Kinsella: I alluded to this above in my discussion about negative servitudes. An IP right gives the holder the right to stop others from using their property as they wish. For example, George Lucas, courtesy copyright law, can use the force of state courts to stop me from writing and publishing "The Continuing Adventures of Han Solo." J.D. Salinger's estate was able to block

the publication of a sequel to *Catcher in the Rye*, for example. This is censorship.[22] And Apple can get a court order blocking Samsung from selling a tablet if it resembles an iPad too closely. This is just protection from competition.[23]

Daily Bell: You offer a discourse ethics argument for the justification of individual rights, using an extension of the concept of "estoppel." Can you expand please?

Stephan Kinsella: This approach is laid out in chapters 5 and 6. The libertarian approach is a very symmetrical one: the non-aggression principle does not rule out force, but only the *initiation* of force. In other words, you are permitted to use force only *in response to* some else's use of force. If they do not use force you may not use force yourself. There is a symmetry here: force for force, but no force if no force was used.

Now in law school I learned about the concept of estoppel, which is a legal doctrine that estops or prevents you from asserting a position in a legal proceeding that is inconsistent with something you had done previously (see chapters 1 and 9). You have to be consistent. I was at this time fascinated with Hoppe's argumentation ethics, which is probably why it struck me that the basic reasoning of legal estoppel could be used to explain or justify the libertarian approach to symmetry in force: The reason you are permitted to use force against someone who himself initiated force is that he has already in a sense admitted that he thinks force is permissible, by his act of aggression. Therefore if he were to complain if the victim or the victim's agents were to try to use defensive or even retaliatory force against him, he would be holding inconsistent positions: His pro-force view that is implicit and inherent in his act of aggression and his anti-force view implicit in his objection to being punished. Using language borrowed from the law, we might say he should be "estopped" (prevented) from complaining if a victim were to use force to defend himself from the aggressor or even to punish or retaliate against the aggressor. I tried to work this into a theory of libertarian rights, relying heavily on insights from Hoppe's argumentation ethics and from his social theory in general.

Daily Bell: Please comment on and summarize the following books you wrote, with special emphasis on your IP theory:

- *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* (with Paul E. Comeaux). Oceana Publications, 1997
- *Online Contract Formation* (with Andrew Simpson). Oxford University Press, 2004
- *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (with Noah Rubins). Oxford University Press, 2005
- *Against Intellectual Property*. Ludwig von Mises Institute, 2008

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[22] See "Law and Intellectual Property in a Stateless Society" (ch. 14), n.57 *et pass*.

[23] See Kinsella, "Apple Secures Win Against Motorola Over 'Slide-to-Unlock' Patent," *C4SIF Blog* (Feb. 17, 2012); *idem*, "Intellectual Property Advocates Hate Competition." For a more recent example, see Blake Brittain, "US trade commission sides with iRobot, bans SharkNinja robot vacuum imports," *Reuters* (March 21, 2023; https://perma.cc/2MH9-2ZGG).

Stephan Kinsella: The first three books are legal treatises that have little do with libertarianism or IP, although the first and third do examine practical ways for international investors to use international law to protect their property from takings from the host state.[24]

The latter monograph was first published as an article in the *Journal of Libertarian Studies* in 2001, with the title suggested by Professor Hans-Hermann Hoppe, then the journal's editor. My initial title had been "The Legitimacy of Intellectual Property," the name of the earlier paper I had delivered at the Austrian Scholars Conference the preceding year. (I discuss this in chapter 14.)

It was only 11 years ago [from 2012], but at the time there was not yet much interest among libertarians in intellectual property (IP). It was thought of as an arcane and insignificant issue, not as one of our most pressing problems. Libertarian attention was focused on taxes, war, the state, the drug war, asset forfeiture, business regulations, civil liberties and so on, not on patent and copyright.

I felt the same way. I looked into this issue primarily because I had been, since 1993, a practicing patent attorney and had always been dissatisfied with Ayn Rand's arguments in favor of IP.[25] Her weird admixture of utilitarian and propertarian arguments raised red flags for me. It included tortuous arguments as to why a 17-year patent term and a 70-year copyright term were just about right and why it was fair for the first guy to the patent office to get a monopoly that could be used against an independent inventor just one day behind him.

I sensed Rand's approach was wrong but I assumed there must be a better way to justify IP rights. So I read and thought and tried to figure this out. In the end, I concluded that patent and copyright are completely statist and unjustified derogations from property rights and the free market. So I wrote the article to get it out of my system and then moved on to other fields that interest me more, like rights theory, libertarian legal theory and the intersection of Austrian economics and law.

In the meantime, with the flowering of the Internet and digital information and with increasing abuses of rights in the name of IP, more and more libertarians have become interested in the IP issue and have realized that it is antithetical to libertarian property rights and freedom.[26] It is in fact becoming a huge threat to freedom and increasingly used by the state against the Internet, which is one of the most important weapons we have against state oppression.[27]

Daily Bell: What is the reaction to your theory of IP? Hostility?

Stephan Kinsella: At first there was apathy. The few people who thought about it mostly thought my views were too extreme—maybe we need to fix copyright and patent but surely the basic idea

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[24] These books and other strictly legal publications (not libertarian-related) are linked at www.kinsellalaw.com/publications. Since the original article upon which this chapter is based was published in 2012, a second edition of the third book listed above has been published: Noah D. Rubins, Thomas N. Papanastasiou & N. Stephan Kinsella, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide*, 2nd ed. (Oxford University Press, 2020).

[25] See "*Against Intellectual Property* After Twenty Years" (ch. 15), Part I.

[26] See ibid., Part II; and "Introduction to *Origitent*" (ch. 16), the section "Historical and Modern Arguments About IP."

[27] See references in "*Against Intellectual Property* After Twenty Years" (ch. 15), at n.20 and "Law and Intellectual Property in a Stateless Society" (ch. 14), n.56.

is sound. But my impression is that nowadays most libertarians are strongly opposed to IP.[28] And, in fact, scholars associated with the Mises Institute sensed the importance of this issue earlier than most—for example, the Mises Institute awarded my "Against Intellectual Property" paper the O.P. Alford III Prize for 2002.[29]

Laissez Faire Books is coming out with a new edition of my *Against Intellectual Property* later this year.[30] I also plan to someday write a new book on IP, tentatively entitled *Copy This Book*, taking into account more recent arguments, evidence and examples. In the meantime, those interested in this topic may find useful the additional material suggested in "Law and Intellectual Property in a Stateless Society" (ch. 14), n.‡.

Daily Bell: How do you think artists and writers feel about it? What do they do to make a living if they do not receive royalties?

Stephan Kinsella: Well, sharing is not piracy, and copying is not theft. (And competition is not theft, either.)[31] But people are used to thinking in these terms, due to state- and special interest-inspired propaganda to the contrary.[32] Most artists and writers do not make much money from copyright; if they are successful at all they typically go through a publisher who makes most of the profits and owns the copyrights anyway. Luckily, technology is allowing writers and musicians to bypass the publishing and music industry gatekeepers.

There are any number of models artists can use to profit from their talent and artistry. It is not up to the state to protect them from competition. Musicians can obviously get paid for performing and having their music copied and "pirated" helps them in this respect by making them more well known, more popular. As Cory Doctorow has noted, "for pretty much every writer—the big problem isn't piracy, it's obscurity."[33] Artists are just entrepreneurs. It's up to them to figure out how or if they can make a monetary profit from their passion—from their calling, as I discussed above. Sometimes they can. Musicians can sell music, even in the face of piracy. Or they can sell their services—concerts, etc. Painters and other artists can profit in similar ways. A novelist could use kickstarter for a sequel or get paid to consult on a movie version (see Conversation with an author about copyright and publishing in a free society). Authors of non-fiction such as academic articles do not even get paid today—but it enhances their reputations and helps them land jobs in academia, for example. Inventors have an incentive to invent to make better products that outcompete the competition—for a while. Or they are hired in the R&D department of a

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[28] See references in "Law and Intellectual Property in a Stateless Society" (ch. 14), n.5.

[29] https://perma.cc/E33D-JST6.

[30] See the 2012 Laissez Faire Books edition linked at www.c4sif.org/aip.

[31] See Kinsella, "Stop calling patent and copyright 'property'; stop calling copying 'theft' and 'piracy,'" *C4SIF Blog* (Jan 9, 2012); Christina Mulligan & Brian Patrick Quinn, "Who are You Calling a Pirate?: Shaping Public Discourse in the Intellectual Property Debates," Brandeis University Department of English Eighth Annual Graduate Conference (2010; https://perma.cc/7SCS-8P3J); Nina Paley, "*Copying Is Not Theft*," YouTube (https://youtu.be/IeTybKL1pM4); Kinsella, "Intellectual Property Advocates Hate Competition."

[32] See Kinsella, "Intellectual Properganda," *Mises Economic Blog* (Dec. 6, 2010); and comments by Machlup and Penrose in "*Against Intellectual Property* After Twenty Years" (ch. 15), n.78.

[33] Kinsella, "Cory Doctorow on Giving Away Free E-Books and the Morality of 'Copying,'" *Mises Economics Blog* (Sept. 16, 2008).

corporation that is always trying to innovate. And so on.[34] And if you cannot make your calling your career, then find a way. As director Francis Ford Coppola has observed:

> You have to remember that it's only a few hundred years, if that much, that artists are working with money. Artists never got money. Artists had a patron, either the leader of the state or the duke of Weimar or somewhere, or the church, the pope. Or they had another job. I have another job. I make films. No one tells me what to do. But I make the money in the wine industry. You work another job and get up at five in the morning and write your script.[35]

Daily Bell: We find your theories reasonable but are you making headway? Are people generally hostile?

Stephan Kinsella: As I mentioned earlier, libertarians have, in my impression, generally become more opposed to IP, and generally on principled grounds. Most "mainstream" people are reluctant to take a principled or "extreme" position, instead recognizing that IP is "broken" and needs to be "reformed." They think IP abolitionism is too extreme, but really cannot articulate why. So they advocate "reform."[36] Those who stubbornly insist on defending IP have to keep coming up with increasingly absurd arguments to justify it.[37]

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[34] See Kinsella, "Examples of Ways Content Creators Can Profit Without Intellectual Property," *StephanKinsella.com* (July 28, 2010); and references and discussion in "Law and Intellectual Property in a Stateless Society" (ch. 14), at n.98.

[35] See Kinsella, "Francis Ford Coppola, copyfighter," *C4SIF Blog* (Jan. 29, 2011).

[36] Most libertarian or free-market oriented IP critics, or others who pose as critics of IP, are not actually IP abolitionists; they simply want to reform or tame the "excesses" of the system, e.g., Tom Bell, Jerry Brito, Alexander Tabarrok, Michael Masnick, Cory Doctorw, Larry Lessig, Mark Cuban (who has sponsored a chair at the EFF to fight "stupid patents"; see https://perma.cc/3K8N-8RMG), even leftists like Eben Moglen and Richard Stallman etc. who pose as opponents of corporate IP. But none of them want to abolish patent and copyright. They just want to reform it, and/or replace it with some other statist system, like taxpayer funded innovation awards or prizes. E.g., Tom Bell wants to return to the "Founder's Copyright." I mean, better than nothing, but thin gruel. As for the others, see Kinsella, "Tom Bell on copyright reform; the Hayekian knowledge problem and copyright terms," *C4SIF Blog* (Jan. 6, 2013). Tabarrok supports reducing the patent term, but not to zero, and also supports a tax funded innovation prize. Kinsella, "Tabarrok's *Launching the Innovation Renaissance*: Statism, not renaissance," *StephanKinsella.com* (Dec. 2, 2011). Lessig things "some punishment" of Aaron Swartz—the brilliant young co-creator of RSS, who committed suicide when facing decades in federal prison on copyright charges for uploading academic articles to the Internet—was justified. See Kinsella, "Tim Lee and Lawrence Lessig: 'some punishment' of Swartz was 'appropriate,'" *StephanKinsella.com* (Jan. 13, 2013), *idem*, "The tepid mainstream 'defenses' of Aaron Swartz," *C4SIF Blog* (Jan. 29, 2013), and *idem*, "Lessig on the Anniversary of Aaron's Swartz Death," *C4SIF Blog* (Jan. 10, 2014). See also *idem*, "Tabarrok: Patent Policy on the Back of a Napkin," *C4SIF Blog* (Sept. 20, 2012); *idem*, "'Intellectual Property' as an umbrella term and as propaganda: a reply to Richard Stallman," *C4SIF Blog* (Feb. 10, 2012); *idem*, "Stallman: An Internet-Connectivity Tax to Compensate Artists and Authors," *C4SIF Blog* (June 19, 2011); *idem*, "Eben Moglen and Leftist Opposition to Intellectual Property," *C4SIF Blog* (Dec. 4, 2011); *idem*, "Cory Doctorow, Victim of Fox Copyright Legal Bullying, Should Take A Stand Against Copyright," *C4SIF Blog* (April 27, 2013).

[37] For example:

- "Thank goodness the Swiss did have a Patent Office. That is where Albert Einstein worked and during his time as a patent examiner came up with his theory of relativity."
- "It is true that other means exist for creative people to profit from their effort. In the case of copyright, authors can charge fees for reading their works to paying audiences. Charles Dickens did this, but his heavy schedule of public performances in the United States, where his works were not protected by copyright, arguably contributed to his untimely death."

Daily Bell: We've come to the conclusion that copyright law and patent law are deterrents to progress and technology. Your view?

Stephan Kinsella: The empirical studies all point this direction.[38] And this should not be surprising. Everything the state does, without exception, destroys (okay, it's good at propaganda as well—making people think it's necessary). Patent and copyright are pure creatures of state legislation. The origins of copyright lie in censorship and thought control; the origins of patents lie in mercantilism and protectionism. As Tom Palmer writes, "[m]onopoly privilege and censorship lie at the historical root of patent and copyright."[39] It should be no surprise that state interventions in the market lead to destruction of wealth, which of course will have an adverse effect on innovation.

Daily Bell: What would the world look like without patent and copyright law?

Stephan Kinsella: As far as copyright, I think it would look somewhat like what our current world is heading to since there is rampant "piracy" despite copyright law. Except there would be fewer outrageous, draconian results like jail terms and prison.[40] And there would be more freedom to engage in remixing and other forms of creativity and a richer public domain to draw on. We would still have a huge amount of artistic works being created, of course.

Without patents, companies would be free to compete without fear of lawsuits—and without being able to rely on a state-granted monopoly privilege to protect them from competition. I believe that an IP-free world would have far more innovation and diverse creativity than today's world. And there would be fewer barriers to entry so smaller companies could compete with the oligopolies that patent law has helped to create.[41]

Daily Bell: Can you explain how patent and copyright law evolved and why it was likely a reaction to the Gutenberg Press and a means of controlling information rather than protecting the public?

- If you are not for IP, you must be in favor of pedophilia.
- If you oppose IP, you are advocating slavery.
- "Patents are the heart and core of property rights."
- Song piracy and file-sharing are the cause of stage collapses at concerts.
- "To make a distinction between things which are ownable or not ownable with the difference being whether they're constructed out of molecules or pixels is to create a new kind of apartheid, in which some kinds of property are just [n-words]."
- If IP isn't legitimate, then it's okay to steal other people's babies.
- Without IP you can't have money

See Kinsella, "Absurd Arguments for IP," *Mises Economics Blog* (Dec. 10, 2010); see also *idem*, "There are No Good Arguments for Intellectual Property," *Mises Economics Blog* (Feb. 24, 2009); *idem*, "There are No Good Arguments for Intellectual Property: Redux," *StephanKinsella.com* (Sep. 27, 2010).

[38] See references in "*Against Intellectual Property* After Twenty Years" (ch. 15), n.23.

[39] Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," *Hamline L. Rev.* 12, no. 2 (Spring 1989; https://perma.cc/DH7K-ZCRV): 261–304, p. 264 (footnote omitted).

[40] See, e.g., references re Aaron Swarts in note 36, above; Kinsella, "Six Year Federal Prison Sentence for Copyright Infringement," *C4SIF Blog* (March 3, 2012); *idem*, "Man sentenced to federal prison for uploading "Wolverine" movie," *C4SIF Blog* (Dec. 21, 2011); *idem*, "British student Richard O'Dwyer can be extradited to US for having website with links to pirated movies," *C4SIF Blog* (Jan. 13, 2012).

[41] Kinsella, "Google's Schmidt on the Patent-Caused Smartphone Oligopoly," *C4SIF Blog* (Dec. 5, 2012).

Stephan Kinsella: The roots of copyright lie in censorship. It was easy for state and church to control thought by controlling the scribes, but then the printing press came along and the authorities worried that they couldn't control official thought as easily. So Queen Mary created the Stationer's Company in 1557, with the exclusive franchise over book publishing, to control the press and what information the people could access. When the charter of the Stationer's Company expired, the publishers lobbied for an extension, but in the Statute of Anne (1710) Parliament gave copyright to authors instead. Authors liked this because it freed their works from state control. Nowadays they use copyright much as the state originally did: to censor and ban books—or their publishers do, who have gained a quasi-oligopolistic gatekeeper function, courtesy copyright law.[42] And now we see copyright being used, along with regulation of gambling, child pornography and terrorism, as an excuse for the state to radically infringe Internet freedom and civil liberties.[43]

Patents originated in mercantilism and protectionism; the crown would grant monopolies to favored court cronies, such as monopolies on playing cards, leather, iron, soap, coal, books and wine. The Statute of Monopolies (1623) eliminated much of this but retained the idea of a monopoly grant to an inventor of some useful machine or process.[44]

Daily Bell: Didn't Germany do better *without* strict copyright than Britain did *with* it? Isn't this the reason that Germany progressed so much in literature, philosophy, mathematics, etc. during the 17th and 18th centuries?

Stephan Kinsella: It probably had something to do with it. One study, by economic historian Eckhard Höffner, indicates that Germany's lack of copyright in the 19th century led to an unprecedented explosion of publishing, knowledge, etc., unlike in neighboring countries England and France where copyright law enriched publishers but stultified the spread of knowledge and limited publishing to a mass audience.[45] Höffner's study claims that this is the main reason that Germany's production and industry had caught up with everyone else by 1900. This seems believable to me.

Daily Bell: Shouldn't the enforcement of copyright law be strictly civil? When did it become a criminal offence?

Stephan Kinsella: I am not sure exactly when the criminal penalties were added but as I noted above, there are potentially severe civil and criminal penalties for copyright infringement, including prison, extradition, being banned from the Internet and so on.[46] Patent law can also be enforced

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[42] See references in note 16, above; also Kinsella, "History of Copyright, part 1: Black Death," *C4SIF Blog* (Feb. 2, 2012); *idem*, "How Intellectual Property Hampers the Free Market," *The Freeman* (May 25, 2011).

[43] See references in "*Against Intellectual Property* After Twenty Years" (ch. 15), n.20.

[44] See "KOL108 | "Why 'Intellectual Property' is not Genuine Property," Adam Smith Forum, Moscow (2011)," *Kinsella on Liberty Podcast* (Dec. 11, 2013); also Kinsella, "How Intellectual Property Hampers the Free Market."

[45] See Frank Thadeusz, "No Copyright Law: The Real Reason for Germany's Industrial Expansion?," *Spiegel International* (Aug. 18, 2010; https://perma.cc/R3H7-6KG8). As indicated by Thadeusz, a new study by economic historian Eckhard Hoffner argues that the main reason that Germany's production and industry had caught up with everyone else by 1900 is the absence of copyright law. This seems plausible to me. See also Jeffrey A. Tucker, "Germany and Its Industrial Rise: Due to No Copyright," *Mises Economics Blog* (Aug. 18, 2010).

[46] As noted in note 36, above, there are serious criminal consequences for copyright violation, which led to Aaron Swartz's suicide, for example.

not only by a damages award but also by a court injunction ordering a competitor to stop making a given product, on pain of contempt of court. And patent law literally kills people.[47]

Daily Bell: Why is Kim Dotcom in prison in New Zealand?

Stephan Kinsella: I've discussed this case in a number of posts on C4SIF.[48] Basically, he offered a service that permitted people to share files (information) with each other. This crackdown threatens any number of "legitimate" sites and services such as YouTube, Yousendit, Dropbox and so on.[49]

Daily Bell: We've postulated a simpler solution than what you present. We've pressed the argument for private justice—clan and tribal justice as practiced for thousands of years. In this formulation no "authority" is present but those agreed upon by the two parties to the quarrel/crime. Thus, copyright issues would become incumbent on the *copyright holder* to enforce. In other words, the copyright holder not the state would have the expense of enforcement. What's your take on this?

Stephan Kinsella: I suppose this could be an improvement but I think it's still misguided. Any attempt to use force against people using information would be aggression. The only exception would be if someone has contractually agreed to pay a fine if they use information in an unapproved way. But who would sign such a ridiculous contract?

In the end, I believe there is nothing wrong with using information. If you reveal information to the public by telling people or selling some product that embodies or otherwise makes evident some idea, you have to expect people to learn from this, compete with you, maybe emulate or copy it or even build on and improve on it. As Wendy McElroy has explained, quoting Benjamin Tucker:

> [I]f a man publicized an idea without the protection of a contract, then he was presumed to be abandoning his exclusive claim to that idea.
>
> "If a man scatters money in the street, he does not thereby formally relinquish title to it … but those who pick it up are thereafter considered the rightful owners …. Similarly a man who reproduces his writings by thousands and spreads them everywhere voluntarily abandons his right of privacy and those who read them … no more put themselves by the act under any obligation in regard to the author than those who pick up scattered money put themselves under obligations to the scatterer."

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[47] Kinsella, "Patents Kill Update: Volunteers 3D-Print Unobtainable $11,000 Valve For $1 To Keep Covid-19 Patients Alive; Original Manufacturer Threatens To Sue," *C4SIF Blog* (March 18, 2020); *idem*, "Patents Kill: Millions Die in Africa After Big Pharma Blocks Imports of Generic AIDS Drugs," *C4SIF Blog* (Jan. 31, 2013); *idem*, "Patents Kill: Compulsory Licenses and Genzyme's Life Saving Drug," *C4SIF Blog* (Dec. 8, 2010); *idem*, "Killing people with patents," *C4SIF Blog* (June 1, 2015). Not to mention that IP is *death*. See the final lines of Kinsella, "The Death Throes of Pro-IP Libertarianism," *Mises Daily* (July 28, 2010), quoted in "*Against Intellectual Property* After Twenty Years" (ch. 15), text at n.60.

[48] See, e.g., Kinsella, "Two lessons from the Megaupload seizure," *C4SIF Blog* (Jan. 24, 2012).

[49] A recent copyright threat is to the Internet Archive. See Mike Glyer, "Judge Decides Against Internet Archive," *File 770* (March 24, 2023; https://perma.cc/K5UH-VCWT); Mike Masnick, "Publishers Get One Step Closer To Killing Libraries," *TechDirt* (March 27, 2023; https://perma.cc/BYG5-6MXL).

> Perhaps the essence of Tucker's approach to intellectual property was best expressed when he exclaimed, "You want your invention to yourself? Then keep it to yourself."[50]

Daily Bell: Why should the state enforce copyright on behalf of the individual?

Stephan Kinsella: It shouldn't. In fact, the only thing the state should do is commit suicide. Staticide. Whatever the word would be.

Daily Bell: Why should disinterested third parties pay for copyright enforcement?

Stephan Kinsella: They shouldn't and wouldn't. The whole idea is preposterous and flies in the face of human action. The market provides abundance in the face of physical scarcity. It's a good thing when we are more productive. Likewise more information and knowledge is good. To try to restrict the spread and use of knowledge is insane.

Daily Bell: If people want to claim copyright and third party contracts, shouldn't it be up to them to enforce those contracts?

Stephan Kinsella: Sure. But you can't get IP from contracts. IP is an *in rem* or *erga omnes* right—something good against the world. Contractual rights are good only as between the parties—*in personam*—and can never result in *in rem* IP rights. I've explained this over and over.[51]

Daily Bell: Is the US legal system—which is a state-run, "public" judicial system—competent and fair in your estimation?

Stephan Kinsella: No. It is thoroughly unjust and illegitimate. It is just the facade of a criminal organization with a pretense to legitimacy.

Daily Bell: Why does the US have so many millions of prisoners, half the world's population?

Stephan Kinsella: Someone has to be first. But seriously—it's partly due to our insane war on drugs and also due to the devastation various state (mostly federal) policies have imposed on the black population: minimum wage, welfare, inflation, unemployment, war, Jim Crow and other vestiges of slavery.

And the US regularly uses IP as an excuse to engage in imperialistic bullying of other nations, to benefit US industries such as Hollywood, the music and software industries, big Pharma and the like.[52]

Daily Bell: Is there a power elite intent on moving toward one-world government and are they behind copyright and patent laws?

Stephan Kinsella: I used to be fearful of a one-world state but my current view is that the big powers, primarily the US, are the biggest threat. But yes, the western powers are using copyright and patent to crack down on dissent and to influence other countries' policies at the behest of the MPAA, RIAA and so on.

Daily Bell: What would be the best approach to socio-politics in your view?

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[50] McElroy, "Intellectual Property," in *The Debates of Liberty: An Overview of Individualist Anarchism, 1881-1908* (Lexington Books, 2002), pp. 97–98.

[51] See "Law and Intellectual Property in a Stateless Society" (ch. 14), Part III.C.

[52] See references in "*Against Intellectual Property* After Twenty Years" (ch. 15), n.19.

Stephan Kinsella: As I explain in chapters 2 and 3, I am definitely an anarchist—have been since 1988 or so. I prefer the term "anarcho-libertarian" nowadays, in part because of confusion spread by some left-libertarians about the connotations of "capitalism." But I am in favor of a free market and capitalism rightly understood. I am basically a Rothbardian-Hoppean in terms of politics.

Daily Bell: Do you think the Internet itself, via what we call the Internet Reformation, is having a big impact on the powers-that-be and their ability to control society and information?

Stephan Kinsella: As some earlier answers have indicated—yes. The Internet is one of the most significant developments in our lifetime, perhaps in the history of humanity.[53] The state is trying to control the Internet but I believe and hope that by the time the state is fully roused to the danger the Internet poses to it, it will be too late for it to stop it. As a *Salon* writer said about former congressman/now copyright lobbyist Chris Dodd after the Internet uprising that helped defeat the Stop Online Piracy Act (SOPA): "No wonder Chris Dodd is so angry. The Internet is treating him like damage, and routing around it."[54] My hope is that the Internet will find ways to treat the state like the cancerous damage that it is, and route around it and leave it in the dust.

Daily Bell: Where does the IP movement go now? What are the next moves? Are you content with theorizing about it? Is it having a real-world impact? What would that be?

Stephan Kinsella: Ultimately we have to try to highlight the illogic and injustices of the system so that people realize IP is illegitimate. This is an uphill battle, of course. Most people are unprincipled and utilitarian, influenced by state propaganda and economically illiterate. I have pondered trying to set up some kind of patent defense league but have not yet figured out how viable this is.[55] I would also like to urge some group like EFF or Creative Commons to come up with a simple, reliable, inexpensive way for people to abandon their copyrights. At present there is no easy way to do this.[56] And though it is not prudent to advocate that people flout the law, the widespread disregard for copyright and resort to piracy, torrents and encryption will put some limits on how effective copyright enforcement can be.

Daily Bell: Any other points you want to make?

Stephan Kinsella: Let me close with a quote from Lew Rockwell:

> Let me state this as plainly as possible. The enemy is the state. There are other enemies too, but none so fearsome, destructive, dangerous, or culturally and economically debilitating. No matter what other proximate enemy you can name—big business, unions, victim lobbies, foreign lobbies, medical cartels, religious groups, classes, city dwellers, farmers, left-wing professors, right-wing blue-collar workers, or even bankers and arms merchants—none are as horrible as the hydra known as the leviathan state.

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[53] Though as of late (2023), the *Omni Magazine* types and space cadets seem to be overly obsessed with AI and ChatGPT. See Kinsella, "Rothbard on Libertarian 'Space Cadets,'" *StephanKinsella.com* (Sep. 23, 2009).

[54] See Kinsella, "Kevin Carson: So What if SOPA Passes?," *StephanKinsella.com* (Jan. 23, 2012). For more on SOPA, see "Law and Intellectual Property in a Stateless Society" (ch. 14), n.56 and "*Against Intellectual Property* After Twenty Years" (ch. 15), at n.20.

[55] See Kinsella, "The Patent Defense League and Defensive Patent Pooling," *C4SIF Blog* (Aug. 18, 2011).

[56] See note 34, above.

> If you understand this point—and only this point—you can understand the core of libertarian strategy.[57]

Daily Bell: Any references, web sites, etc. you want to point to?

Stephan Kinsella: As mentioned, I may someday write *Copy This Book* and I also have another book in the works, *Law in a Libertarian World: Legal Foundations of a Free Society*, an edited selection of my rights and law-related articles. Also, I blog regularly at *The Libertarian Standard* [now defunct] and *C4SIF*. Finally, the slides and audio/video for the four Mises Academy lectures I delivered in 2011: Rethinking Intellectual Property, Libertarian Legal Theory, The Social Theory of Hoppe, and Libertarian Controversies, are also available.[58]

Daily Bell: Thanks for your time.

Stephan Kinsella: You're welcome. Thanks for your interest.

After Thoughts

by Anthony Wile

We thank Stephan Kinsella for this interview and for the work he has done generally on this issue of copyright. Ideas have ramifications far beyond their apparent initial non-acceptance. What seems impractical now may be common sense tomorrow.

Human history seems to go in cycles. Right now we are seemingly at the top of the totalitarian arc. Cold comfort to most, but there has probably never been a time in human history when there was so much hidden totalitarianism and when a cabal of individuals controlling Money Power were likely making final moves to try to control the world

It is very hard to peer through the confusion purposefully laid by the dynastic families that apparently control central banking (and thus money) around the world. Monetary apologists are out in force these days, claiming that various forms of government money are an antidote to the abuse of mercantilism.

Of course, it is via mercantilism, the abuse of government laws and regulations by private parties, that Money Power retains its clout. Only by controlling the "democratic process" does a tiny group of people retain their hold on the levers of government. Behind the scenes these levers are pulled for their benefit. And *they* do the pulling.

It is mercantilism, the use of public law to reinforce private privilege, that bides at the base of Money Power. And those who are behind Money Power, the assorted apologists and enablers, will use *any* tool to buttress their privilege. Lately, in our view, they've been behind the resurgence of

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[57] Kinsella, "Rothbard and Rockwell on Conservatives and the State," *The Libertarian Standard* (Jan. 26, 2012).

[58] See these *Kinsella on Liberty Podcast* episodes: "KOL172 | 'Rethinking Intellectual Property: History, Theory, and Economics: Lecture 1: History and Law' (Mises Academy, 2011)" (Feb. 14, 2015); "KOL018 | 'Libertarian Legal Theory: Property, Conflict, and Society, Lecture 1: Libertarian Basics: Rights and Law' (Mises Academy, 2011)" (Feb. 20, 2013); "KOL153 | 'The Social Theory of Hoppe: Lecture 1: Property Foundations' (Mises Academy, 2011)" (Oct. 16, 2014); and "KOL045 | 'Libertarian Controversies Lecture 1' (Mises Academy, 2011)" (May 2, 2013).

Georgism, Greenbackerism, Social Credit and a number of other "movements" that claim "the people" need to take back government.

Of course, it is improbable, these days anyway, that people can "take back" their government. What is more likely is that the powers-that-be are encouraging these movements because they provide a fertile methodology for the continuance of mercantilism. Mercantilism is impossible to apply in the absence of government.

But so long as public nostrums are being peddled, it is fairly easy for Money Power to gain a foothold once again. This is why we are proponents of laissez faire and libertarianism. The solution to the problem of government is not to have more of it "properly controlled," but to have as *little* of it as possible. The less government there is, the less feasible it is to abuse it.

People like Stephan Kinsella do us a great favor when it comes to establishing this sort of argument. Any perspective that shows us how laws and regulations provide artificial benefits to some at the expense of others is of a larger benefit as well because it delegitimizes force.

Force, in fact, is at the heart of government, any government. A handful of people pass the laws that bind us to the state, and generations to come as well. But Rothbardian libertarianism (and Misesian libertarianism generally) has been all about providing an alternative narrative to the force of the state.

Logically, Rothbard, Mises and other Austrian economists have shown us that force is the common currency of government and that voluntary, free-market societies have existed in the past and are likely the better alternative.

By opening up our minds to an alternative view of copyright, Kinsella continues this process. You don't have to agree with him, of course, and we ourselves have proposed a simpler solution: If people want to enforce copyright (or any other legal nostrum for that matter) let them do so out of their own pocket. That would put an end to the regulatory state in short order.

Beyond that, government doesn't work on a logical level. Every law and regulation, enforced by the threat of incarceration or even death, fixes prices by transferring wealth from those who earn to those who haven't. The more price-fixing you have, the more unfair, disorderly and inefficient society becomes. Eventually, society falls apart entirely.

Of course, in the West, one could argue we're at that stage now. Humans badly need new solutions. People need to understand that they need to think for themselves and exercise their own "human action" in order to help themselves and their families to survive as the world continues its slow-motion spiral into depression and military destruction.

People like Stephan Kinsella are indispensible to this process. Austrian economics, generally, and the larger ambit of free-market thinking it encourages are necessary in providing us with alternatives showing us that the current environment is not the "only alternative."

Whether you agree with Kinsella or not, we're happy he's around and has presented such thought-provoking ideas. It's people like Kinsella with exciting new ways of looking at sociopolitical and economic issues who provide us with a vision for the future. He is, in fact, part of the so-called "great conversation."

You can join it, too. Just study the great thinkers and come up with your own ideas. If the ideas are interesting enough, people will start to discuss them and write about them and respond to them. That's how the Austrian school succeeded and why its ideas are now part of the larger economic dialogue.

We know it's a real discipline because it builds on thousands of years of economic history. Don't let the sophists and the wily ones distract you from the truth. As free-market thinking succeeds, they are coming out in force. But the bottom line, unfortunately, is that government is force, no matter the "law" it is enforcing.

Of course, there is no absolute freedom and human beings are innately tribal. But within this context, we choose to advocate for freedom above all. One travels toward minarchism via rigorous anarchic logic, not by advocating *more* government. We're glad that people like Kinsella give us additional intellectual tools to make persuasive arguments for a less coercive society.

TRANSCRIPT

A Libertarian's Case Against Intellectual Property

Stephan Kinsella
Kinsella Law Practice, *Libertarian Papers*, C4SIF.org
with critical commentary by Professor Talha Syed
UC-Berkeley Law School Federalist Society
Oct. 11, 2018

KOL253 | Berkeley Law Federalist Society: A Libertarian's Case Against Intellectual Property

00:00:03

HELENA: So hello. My name is Helena. I am co-president of the Federalist Society here at Berkeley Law. The Federalist Society has the following mission statement: The State exists to preserve freedom. The separation of government powers is integral to our constitution, and that it is empathetically the province of the judiciary to say what the law is, not what it should be. Here at Berkeley Law, we have students of all different viewpoints that participate in this group to ensure that Berkeley is intellectually diverse.

00:00:29

Today, we are delighted to host Mr. Stephan Kinsella who is a patent attorney and a leading libertarian scholar on intellectual property. Mr. Kinsella is the founder of the Center for Innovative Freedom and executive director of Libertarian Papers. Mr. Kinsella is the leading voice in libertarian scholarship on the topic of intellectual property. Mr. Kinsella got his Bachelor of Science and master's from LSU and his JD from the Paul M. Hebert Law Center.

00:01:00

After Mr. Kinsella's presentation, we will have commentary from professor of law at Berkeley, Professor Talha Syed. Professor Syed teaches on intellectual property and torts. His research focuses on patent and innovation policy for pharmaceuticals. Professor Syed got his JD at Harvard Law School. Lastly, we will open up the floor for Q&A, so if you have questions, hold your hand up high so I can call on you. And without further ado, please join me in welcoming Mr. Stephan Kinsella.

00:01:29

[applause]

00:01:34

STEPHAN KINSELLA: Thanks very much, Helena. Glad to be here. I'm from Louisiana, and I was at LSU in 1988 to '91 for law school. And I didn't even—wasn't even a member of the Federalist Society

back then, but it was very small. So the turnout at Berkeley is much larger than it would have been even at that conservative place then, so that's heartening. I've long been an admirer of the Federalist Society. I don't believe the State is here to protect our rights, however, unfortunately, so a little bit more radical than the average Federalist Society member. I am a patent attorney and intellectual property attorney. I've spoken on this issue many, many, many times over the years, probably hundreds of times, more than I would have wanted to. I gave an intensive course at the Mises Academy about five years ago, and it took about nine hours, and even that didn't cover everything.

00:02:30

So in the 30 minutes I have, I can only scratch the surface and hope to give you a new perspective that you can consider. I won't persuade everyone here. I might not persuade anyone here, but at least you can think, hmm, maybe there's a little bit more to this issue than I thought. So let me get the boring stuff out of the way first. What is intellectual property?

00:02:53

Intellectual property can be viewed as legal rights protected by law having to do with the products or creations of the intellect or the mind, and that's why the word intellect is used there. Classically, this includes four legal rights: patents, copyrights, trademarks, and trade secrets. And there are many others that have been spun off over the years either by common law or by legislation such as semi-conductor mask works, which protect Intel's chips, boat hull designs, database rights in some countries, not the US so much, moral rights in some countries, not the US so much, rights to one's likeness, and even reputation rights, which are not classically considered part of IP, but I believe they should be given the way they operate. This is defamation or libel and slander law.

00:03:47

And then there are certain cultural things happening around the world that you could think of as similar to intellectual property law such as killing people for painting pictures of a certain prophet that they shouldn't be printing, a painting, and even the modern leftist cultural appropriation idea that you are not entitled to say certain things if you're not of the correct race or ethnicity. Those are IP-like, although they're not technically enforced by most governments.

00:04:16

Okay, why should we care about intellectual property? And it's impressive that we have a nice, full room on a beautiful day, wondering about this topic that makes most people's eyes glaze over like my relatives at Thanksgiving. IP—we should be interested because it's a subject of heated debate in political theory. On the one hand, you have people like Ayn Rand, the sort of father of the libertarian movement, and I say father because she clapped her hands in glee when she was referred to as man one time. But she said patents are the heart and core of property rights, and she told her lawyer and friend, Murray Frank, who is an IP lawyer, oh, IP—intellectual property is the most important field of law.

00:05:07

So and then you have things like the US Department of Commerce releasing a study in 2012 purporting to show that intellectual property intensive industries contribute $5 trillion and 40 million jobs to the US economy every year. That's probably actually true, but it's IP-intensive industries. That's like saying that companies that rely on roads contribute 100% of the GDP to the US economy as if it's an argument for roads.

00:05:38

Then on the other hand, you have empirical studies saying that patent trolls, which are just one small slice of the patent problem, cost $29 billion a year to the economy. And then you have the United States through Donald Trump and other administrations trying to foist IP protections on other countries through trade agreements and treaties like the USMCA, the new version of NAFTA, and the Trans-Pacific Partnership, which I and others have called intellectual property imperialism. And then, of course, you have the fact that copyright threatens—distorts culture, severely censors free speech, and threatens the freedom on the internet. So it actually matters that we get this right. This is an important, important topic.

00:06:24

I've been a libertarian since about my high school years, and I was—everything made sense to me that I read. It all made sense to me. Milton Friedman, Ayn Rand, Murray Rothbard, Henry Hazlitt, Frederic Bastiat, these guys. But when I came across Ayn Rand's comments about patent and copyright, it never quite made sense to me. She's in favor of the government granting these monopoly privileges to have a limited right in time to exclude people from competing with you in the field of either ideas for copyright, which last roughly 100+ years, or patents, which last roughly 17 years. And it struck me as odd that you would have a right that would expire, didn't seem like a natural right like the other things that made sense to me in free-market economics and in libertarian theory.

00:07:16

So I always puzzled that. I shelved it to the side because I didn't understand it. It's a very arcane topic. And in college, I kept thinking about it a little bit. In law school, I thought about it some more. And when I took the patent bar and decided to become a patent lawyer, I started thinking about it even more and researched and read a lot. And by the time I passed the patent board in 1994, right around the same time, I became convinced that—I was trying to find justification for patent and copyright law because everything I read made no sense. So finally, I realized, oh, Kinsella, you're failing because this can't be justified. That's the solution to the problem.

00:07:51

And then when you understand this, it helps to unlock the key to a lot of things about political theory, property rights, the legal system. Some of the biggest influences I had were writers that came before the internet. After the internet in '95 and so this issue of piracy and things like this became way more prevalent, and then people started ratcheting up copyright enforcement. And so people started turning their attention to copyright law. It was kind of ignored before. It was the domain of specialists.

00:08:21

But there were a few people who had written before like Tom Palmer, a Cato scholar, and Wendy McElroy, a Canadian libertarian feminist—individualist feminist scholar. And Ludwig von Mises, who didn't write exactly on this topic in a coherent way, but he did lay the foundations for the economic way to look at human action, which I think helps solve this problem. And then Hans-Hermann Hoppe, those are the four writers that influenced me the most to come to my current views.

00:08:48

Okay, so I, of course, have spoken on the law as a patent attorney to further my career, and I've written on this topic. But as a libertarian, my main interest always was rights theory, legal theory, contracts, things like that. I only wanted to write—I saw that everyone was confused about IP, and I had finally figured it out in my mind. So I thought I'm going to write one paper on this and get it over with and then go back to the things I like.

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And so in 2000, I had a big paper published in the Journal of Libertarian Studies, and that keeps being re-treaded, and I have to write further articles and give speeches because this issue is vexing to some people. But I have found that once you look at it the way I'm looking at it, which I will get to, it does help to unlock things like causation and the law, fraud theory, contract theory, property theory, rights theory, and also the very issue of the nature and sources of wealth and human prosperity.

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Okay, so the question we have to answer is not, hey, is IP a good idea? This is a very unprincipled, pragmatic way to look at things. The question is not, is IP a good idea? The question is not, what kind of IP system should we have? The question is what should the legal system be? What are human rights? What are individual rights? What should the law be? So to understand that, we have to go back and understand what law is.

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Law is the legal enforcement of rights, and as Murray Rothbard explained in the *Ethics of Liberty*, all rights are necessarily property rights because rights arise because we do not live in the Garden of Eden. The Garden of Eden is this hypothetical state of nature, which, of course, never existed. But it's the idea that we live in a state of super abundance where our wants are always satisfied. Nothing is ever impossible to achieve. There's no scarcity of anything.

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We don't live in the Garden of Eden. We live in a world of scarcity, and this is where Mises, the famous Austrian economist, and his theory of human action, which he called praxeology, comes into play. Don't be scared by the word. He did coin a word. I think everyone gets to coin one word and only one word, although Mises has two, but he's so genius I'll give him two. Some people come up with too many like Hayek and Voegelin. But praxeology just means the logic of human action. It's very common sensical.

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What we do in our lives, all of us, is we act. When we act, we employ means to try to change something that we anticipate is going to happen in the future. When we do this, we employ our knowledge as well, our knowledge of what we think is happening and our knowledge of what means we can employ to change the course of events. So human action is centered around the idea of employing scarce resources or means of action guided by knowledge. These are the two components of human action.

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If you lived in isolation like Robinson Crusoe on an island, you would still have to use means, make a fishing net to catch fish, your knowledge about how to do this, and you would have to use your knowledge. But you wouldn't have the problem that we have in society, which is the problem of conflict. When you have more than one human actor, there's a possibility of conflict. There's also the possibility of cooperation, which makes us richer through the division of labor and social interaction.

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But there's a possibility of conflict because we live in a world of scarcity. There are scarce resources, and the nature of those resources is that they can be used only by one actor at a time. And if we are to use these things peacefully and cooperatively with each other, we need rules that permit us to use these resources without being violently interfered with by someone else. This is exactly what property rights are. Property rights are simply the allocation of rights to scarce resources.

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Every legal system has property rights: socialist systems, communist systems, theocratic systems, dictatorships, autocracies, democracies, and even free societies have property rights. There is some legal system, which gives an answer to the question, when there's a dispute over this resource between A and B or C, who gets it? That's the answer, and that's what the ultimate purpose of law is. Law is a codified or an existing set of rules that determines the owners of scarce resources when there's a dispute over these resources.

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Now, the natural set of rules that tends to emanate from the common law and from human interaction and human society is very simple. It's basically the Lockean idea, John Locke's idea, and you can summarize it this way: in the case of the human body, which is a scarce resource because they can be owned by either the person himself or by someone else, which is—we call that slavery. The libertarian answer and the common law answer and the traditional answer is—the default is every person owns himself. That's the answer unless something happens like a crime of murder, self-defense, something like that.

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But in general, everyone is the default owner of their body. That's the first property rule. And then for everything else in the world that's a scarce resource, every external resource that there is that was one

time, that was at one point never owned, that is, previous unowned, for these things, the things that we need to employ—land, animals, wood, materials, food—these things we determine the ownership in the case of a dispute by three rules.

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The first one is original appropriation. This is the Lockean idea of homesteading. That is, all things being equal, if two people have a contest over a resource, the first person to use the resource has a better claim than the other unless—rule two—it was transferred by contract. So if I own it because I got it first, and I give it to someone else by contract, now they have a better claim than me and then the rest of the world.

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And a third or subsidiary thing would be transfer of property because of a tort. If someone harms someone else, then they owe them restitution or rectification, and some of their property can be transferred from them to the other person to rectify the harm that was done. But those four rules—self-ownership plus, in the case of external resources, original appropriation, contractual, consensual transfer, and transfer because of rectification, or the—basically all the four rules of all law. All legal systems originate from these things.

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Now, what distinguishes libertarianism from other, even the common law in classical liberalism, is just a more hyper insistence on consistency for these types of rules. So, therefore, we're really, really passionate about self-ownership and about we reject the idea of the hypothetical contract between people unless they actually had an agreement. But the core of the common law and the private law that even you're studying now is rooted in these basic principles.

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Okay, now, before we apply this to IP law, let's just quickly understand where IP law came from, the history. You can go back as far as about 500 B.C. There was, in the Greek city state of Sybaris. There was some culinary competition, and there would be a competition who had the best recipe for a dish. And whoever won would have the monopoly right for one year to be the only one who could cook that dish.

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So you can see the beginnings of this idea of someone having a monopoly on some idea they come up with that other people like or that's useful. Fast forward a little bit. You started having this practice in the, say, 14-, 1500s of monarchs granting what's called a letter patent, which means patent—the word patent means open in Latin. So it was like an open letter, an instruction from the king to the world saying this guy is the only one who has the right to practice this trade in this region, to sell sheepskin in this area. So it was just a monopoly grant. It was anti-competitive, and it was just a favor handed out by the king to someone in exchange for something they had done for the king.

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This problem got out of hand, and in Britain in 1623, the parliament passed the Statute of Monopolies to reign this in, and so they restricted the king's ability to grant these monopolies, these monopoly privileges. But they kept in force the ability of the king to grant monopolies for inventions. So—and then in 1789 when the US was founded and the copyright and patent clause, this right of congress to enact a similar thing, similar to the Statute of Monopolies, was kept alive. Copyrights originated—look, the church and the state controlled thought easily before the invention of the printing press.

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The scribes were all members of the church or government under government control, so the government could control what was being printed. When the printing press came about, it was a threat to the state and to the church because they didn't want the people having mass-produced books without permission, with the government having an approval first. And so the government starts the Stationers Company—we're talking England now—which had about a hundred-year monopoly.

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And finally, when that expired, there was a debate, and so the Statute of Anne was enacted in 1709, which is sort of the genesis of our modern copyright law. So you can see that copyright law that we have now originated in censorship, that is, the control of thought, and patent law originated in the grant of monopolies, which were anti-competitive. And, of course, this is the way they work now, although what happened was, in the 1800s, the free market economists—when they saw the emergence of this modern type of patent and copyright system that the US started and then Western Europe started enacting, the free-market economists started saying, wait a minute. These government-granted privileges are getting out of hand.

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They're contrary to the free market. They're contrary to private property rights. The industries that had grown up around these monopoly grants and had become dependent upon them like the publishing industry and certain companies that made inventions, they fought back. And the way they fought back is they said it's not a government-granted monopoly privilege. It's a property right. And everyone said it's not a property right. Property rights last forever. Property rights are property rights, intangible things.

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And so the defenders of the IP system said, well, it's an intellectual property right. It's a creation of the mind. And when they did this, they turned—they used a combination of two types of arguments: utilitarian arguments, which are pragmatic and sort of consequentialist, empirical, and deontological, or principled, arguments basically rooted in the Lockean conception of our natural rights.

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So let's go quickly through the utilitarian argument. The basic utilitarian argument—you'll hear this today, and this is the predominant argument most people use today because everything is utilitarian is that there is basically market failure. Now, they won't put it this way because they don't want to seem like—they don't want to all seem like they're criticizing the market because most people today would think that intellectual property rights are a type of property right that's part of the capitalist western system. And it went along with American and western prosperity since the 1800s.

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So they think it's a natural part of the market, and it is true that people trade these rights. They sell them all the time. So most people think this is natural, and so the argument is that without patent law and without copyright law, there would be a so-called underproduction of creative goods because there wouldn't be enough incentive to do it. And the reason is because, unlike physical goods or tangible goods or corporeal goods as we say in civil law, it would be too easy for people to compete with you. So the idea is that if I have a car factory like Henry Ford, it's not easy for someone to make a competing car company. It's fine if they compete with you eventually, but that's just part of the free market process.

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But if my product is a book or a map or a painting or a computer program or a new carburetor design or a pharmaceutical, as soon as I start selling this, then the key part of the value is the way it's arranged, and that is a pattern. That's information. And that can be easily duplicated by competitors, and therefore, they're going to compete with me right away, and I won't be able to sell my product at a monopoly price long enough to recoup my research and development cost. That's the basic idea. And therefore, we need the government to come in and fix this market failure and give people monopoly rights for a limited time so they can recoup more of their cost, and there's more incentive to engage in these activities in the first place. This is the basic utilitarian idea.

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There are so many problems with this notion. Number one, it's totally unprincipled. But let's just talk about the burden of proof. When you come up with a system that is a derogation from the common law rights, from our natural rights, from the free market, you would think the burden of proof would be on the proponents of this. Now, the founders didn't have any empirical studies to prove that patent and copyright would benefit the free market or make us wealthier. In fact, they originated in anti-competitive monopoly grants by kings and pro-censorship restrictions on free speech by the church and the crown in copyright.

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So they basically had, at most, a hunch. The constitution doesn't require patent and copyright. It only gives congress the authority to issue patent and copyright laws if they want to, and they did the very next year. By the way, there's also an argument you could make that patent law is clearly constitutional. I don't deny that, although that doesn't make it right, in my opinion. The Constitution recognizes lots of things that are wrong like taxation and slavery.

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But copyright law—you could argue that the copyright clause was enacted in 1789 when the Constitution was ratified. Two years later, in 1791, when the Bill of Rights was ratified, the first amendment restricts the Congress' ability to restrict freedom of speech and freedom of the press. And the Supreme Court has long recognized that copyright law clearly does infringe freedom of speech and freedom of press because it literally prevents people from printing or saying what they want to say. So what the court has done is the court is balanced. They say, well, we have a tension in the law. We have to balance it, sort of like anti-trust law versus patent law.

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Okay, but as you all know, there's a canon of interpretation, of statutes and constitutional provisions that, as the later provision that is enacted can override an earlier one, which is why prohibition of alcohol is now overturned because the later amendment came later. So you could argue that the first amendment, in 1791, came two years later under a different Congress, and to the extent there's a conflict between copyright law and free speech and free press rights, that the free press rights, the first amendment has to prevail. And the court has just dismissed that argument because it would be too disruptive to overturn copyright law based upon the first amendment.

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In any case, we'll go with that. And, by the way, trademark law is not authorized in that clause, which is why the trademark statute, the Lanham Act, is held to be valid under the interstate commerce clause, and which is why states still have their own trademark systems because federal government couldn't quite preempt that.

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Okay, so in any case, the problem is that, as I said, the burden of proof needs to be on the advocate of intellectual property. Have they fulfilled that burden of proof? They didn't at first. Now, there's a famous economist, Fritz Machlup. He's kind of an Austrian-leaning economist. He was hired along with Edith Penrose in the '50s by Congress to do an extensive study on the patent system. And what he concluded in an officially authorized study for Congress, no economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit on society. So what he concluded was that, if we didn't have a patent system right now, there would be no evidence to justify instituting one.

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And in the meantime, there's been French economists, Lévêque and Ménière. By the way, I'm going to post this on my website, so I'll have these notes there if anyone wants to follow up on this. A French economist in 2004 said that an economist analysis of the costs and benefits of IP law is no more within our reach today than it was in Machlup's day. Boston University Law School professors, Bessen and Meurer, who are economists, they concluded in 2008 that on average, patents place a drag on innovation.

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And the economists, Boldrin and Levine, who studied this issue in a groundbreaking work called *Against Intellectual Monopoly*, and they started this research hoping to defend patent law, and they concluded that it's totally indefensible. They argued that the case against patents can be summarized briefly. There is no empirical evidence that they serve to increase innovation and productivity unless you equate it with the number of patents awarded, but that's just circular reasoning.

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Okay, so the utilitarian case fails, but I'll be honest. As a libertarian, I would be against the patent system and the copyright system even if the utilitarian case made sense because it's just wrong. It's just like the argument against the minimum wage or anti-trust law. People have a right to collude. People have a right to offer someone less than minimum wage for a job. That's a fundamental human right. It's a property right. The utilitarian arguments always have to come second.

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Now, when the utilitarian argument fails, people resort to what was the sort of original argument, the natural rights argument, the Lockean argument. And, by the way, Locke did not endorse—Locke did not believe that his natural rights theories implied patent or copyright. He was loosely in favor of copyright as a utilitarian measure, but his theory of property—even he didn't think that. The problem, I believe, is that John Locke made a mistake unintentionally, but the way he formulated his argument, and it has led to unending human misery and even death since. John Locke argued this. He was trying to argue against the monarchical system before and Filmore's argument.

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John Locke said, listen. Governments are here to serve us. How did he argue that? God gave Earth to the humans. Every person owns himself because God gave him control over his body. If you own yourself, you own your labor. If you own your labor, you own what you mix with it if no one else owned it first. So this is the labor-mixing argument of Locke. This is the natural rights argument of Locke.

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Unfortunately, I think his argument was flawed in that he didn't need the labor step. He didn't need to say you own your labor because you don't own your labor. Labor is an action. It's what you do with your body. You do own your body, but you don't own what you do with it. So that mistake led people to think of labor as a substance, as a thing that you can own, which has also led to some people believe to the labor theory of value, which led—through Smith and Ricardo, to Marx and then to communism. And, of course, communism led to lots of destruction and death and human immiseration in the 20th century. I'm going to skip my alternate theory history that Locke's views have led to…

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HELENA: You have about five more minutes.

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STEPHAN KINSELLA: Five more, okay. I'm going to skip my excursion that we have global warming now because of Locke because we don't have thorium energy because we had plutonium energy because the military needed to—I mean, we had uranium because the military needed to make plutonium for nuclear weapons because of the Cold War, which is because of Marx, which is because of the labor theory of value, which is because of the labor theory of property. Well, that was it in a nutshell.

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Okay, there's one other argument some law professors make, unfortunately, to quasi-libertarians, Richard Epstein, who's a libertarian, and Adam Mossoff, who is an objectivist law professor and others. What they argue is that, oh, you libertarians who are anti-IP, you're wrong. You're wrong to say that IP is some artificially government-created right. It's a natural right. Thomas Jefferson thought it was a natural right. John Locke did, which is all totally wrong. Jefferson and Locke did not think it was a natural right, and even if they did, they were just wrong.

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But what they argue is that patent rights and copyrights, they're very much like classical natural law, common law of property rights because you can trade them. You can rent them. You can bargain for them on the market. Yeah, of course. But during slavery, we could buy and sell humans too. There's a whole body of case law during the chattel slavery days during the antebellum south. So what? What the law does and what the law can do doesn't show what the law should be.

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I'll wrap up quickly. What is the future of IP going to be? I would just say this. The birth of the internet is a great thing because the digitalization of information, encryption, torrents, the internet has made copyright enforcement very, very difficult. It has made piracy rampant, and that's a good thing. The more we can undermine copyright law, the better, and my hope is that the more 3D printing becomes a thing, the same thing will happen to patents. So hopefully technology and the free market will undermine these systems.

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I'll conclude with a quote from Thomas Paine: A long habit of not thinking a thing wrong gives it a superficial appearance of being right, and raises it first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason. Thank you.

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[applause]

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TALHA SYED: So this is a bit of a strange assignment for me because Mr. Kinsella has made an argument against intellectual property on libertarian premises. I have not too much to disagree with

about aspects of his conclusion, so I'll say a bit about that at the beginning. But of course—not of course, I entirely don't accept the premises, so it's kind of a bizarre thing. I actually more or less am sympathetic that the case for intellectual property rights is, in fact, much weaker than is commonly thought, both on instrumental grounds and on principled grounds. And I also agree that the issue is very important. I also agree there's massive overreach today. So on all these, we agree a lot, and so it's not really clear what I should say about that.

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But my basis for thinking this is entirely different than his, and I guess where we disagree a lot is on his basis. So I think I should say more about that than about the fact that I also agree that Machlup's conclusion in '58 has not been challenged to this day that the overall case for intellectual property rights on an instrumental or economic basis has always been and remains, even at best, that there's many costs of intellectual property rights from an instrumental economic basis.

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Alongside, there are ostensible extensive benefits, and that at best, patents and copyright may be justified on an instrumental basis in a few specific areas where the costs of production are very high, and the costs of reproduction are very low, ostensibly patents and movies and biotech, but maybe not even there, and we could talk about that. So I kind of agree with all that, so I don't really want to push on that too much.

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The reason I agree though is that, for me, intellectual property rights—you have to begin with the basic idea that they are rights to exclude others from using a resource—information or knowledge or culture—which resource is intangible. And because it's intangible, it's nonrival, and because it's nonrival, many people can use without anyone degrading anyone else's use. So it's really unfortunate, unfair to restrict access on that.

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I'm not sure, but I don't know if I heard in Mr. Kinsella's talk any point what the actual burden or harm of IP rights is. So for me, that's the—I think you might have not—I think your view is that it interferes with the property rights of people, but you didn't sort of cash that out here I think. So you might want to speak to that a bit. For me, the harm is that it restricts access to something which, once created, should be available to all because it does not derogate from anyone's use that others share it. That's the miracle of intangible resources.

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Having said that, there is both fairness and incentive arguments for why the creator might be owned a decent return for the effort that went into creating something that's socially valuable and that, if we don't get that decent return, it might be that others will be discouraged from doing so, and we might get less innovation. That's my basic, very modest framework. Access restrictions on intangible resources are a default bad idea.

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But some way of generating those resources may be required through some legal policy to promote fairness and robust production and robust innovation. What the ultimate principled basis of that is we could explore, and I'm happy to discuss. But it's this mix of sort of basic ideas of wide access and fair returns that motivates my view that intellectual property rights, like some other innovation policy mechanism, should be evaluated in terms of how well they enable wide access and robust production and fair, equitable returns.

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And on that, I'm not committed to intellectual property rights as being the best scheme or how strong they should be. My own view is that current rights are, through the roof, way too strong. There's a massive overreach. There's a very clear, political economy story why that happens. It's completely unfortunate, and it's expanding to this day. And what's happening on the internet with criminal enforcement and so forth makes it all even much worse.

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So on all that, we, I think, are not too far apart, although one could have various sort of modest disagreements. But where we disagree is sort of the foundational basis of our positions. And so on this, I don't have much time, so I'm going to just try to see a few things. So, Mr. Kinsella has what he claims is a sort of a libertarian, principled position based on natural rights arguments.

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Now, to me, there's a few problems with this. First of all, it's always puzzling to me why it's called the libertarian position when it's really the propertarian position. It's not about freedom. It's about property rights. Well, then say that. It's a propertarian position. It's not about an unvarnished, principled commitment to freedom. It's about the guiding motif being something called property rights.

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Now, on the idea of property rights, I just want to say three things and see if I can get it in in this time. First, the idea that all—so, first of all, natural rights. I've never understood what people mean when they say natural rights. To me, rights are claims against others. Mr. Kinsella seems to agree. There are no rights on a desert island by yourself. Rights are claims against others. Rights are social relationships.

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Now, the basis of those rights can be in various different kinds of arguments. Those are arguments. Calling them natural is just cheating. Where do they reside? They're not your eyesight. Eyesight might be natural for some. To call something natural is a dishonest way of trying to get pre-modern warrant for a normative argument as quasi-non-normative. It is, in a word, bullshit.

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There are rights, which we can respect based on reasons. We have to give reasons for those rights. When the reasons are given, they can be more or less persuasive. Calling them natural does nothing to the argument except try to convince you that it's not a normative argument at all. It's like a physical act. Well, there's a chair there, don't you know. Well, okay, good. But that doesn't tell me about whether the chair is nice or not nice, pleasing or not pleasing, should be sat upon or not, whose chair is it, and so forth.

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Those are normative arguments. Historically, until about 17-1800, normative arguments were couched in the language of time in memorial, divinity, revelation, and so forth, or something called natural rights, which was a fusion of them, natural reason, according to Locke in the second treatise. Ultimately, natural reason is just reason, and I'm fine with arguments from reason. But putting this label "natural" on it as if it's not any longer something human, something social, something historical, something normative, is a cheat, pure and simple. It's an attempt to deny the inescapable reality that rights are social relationships, which we have to argue about to determine which interest merit protection over which other interests.

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I have no problem saying the argument should be grounded in something called right reason of the second treatise, but then you have to tell me what the premises and principles of that right reason are. So let me go to that second point. On that second point, the idea that all rights are property rights strikes me as patently bizarre. Either it's going to be tautologically true because we're going to empty the concept of property rights of any content and meaning in which case what's the point of the exercise? Or it's going to be false because I don't understand what it means to say that my interest in being able to express myself is—should be protected as a right against other people's interests in not hearing what I say and being able to violently stop myself from speaking.

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Oh, well, that's really a property interest because you're using your vocal organs, and you own them. I don't know what that means. I don't know how that helps anything. I don't know what that means except to illicitly try to reduce all human interest to the logic of the market. And that's, to me, a very historically specific recent phenomenon, or what I call propertarians, think it, somehow time in memorial, they're just wrong.

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There are no such arguments until very recently on the stage of history because the social form that those arguments track is very recent on the stage of history. Propertarian mindsets are the mental expression of people who live in capitalist societies. That's fine, but that shouldn't be then naturalized into some sort of trans-historical, human phenomenon through the gobbledygook of natural and blah, blah, blah. It just doesn't make sense. It's dishonest. It's patently absurd. The argument should be made on their own terms, not with the implication of unhelpful metaphors, which try to hide the ball.

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Last point. The rights of property that are being claimed as absolute and sacrosanct here are the rights in one's body, self-ownership, and the rights in external resources based on first occupancy fundamentally when there's contract and rectification. But that's a very strange argument, first occupancy. The first person who delimits or does something that no one else has done now has it. Locke never made that argument fully. He thought that that argument by itself was too thin a reed, and he was right because, of course, by itself, that can't be enough, just being there first.

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What if you're there first in a lot of places, and you don't leave enough and as good for others? Well, there's a problem. Locke understood that. The propertarian literature has struggled with this from the beginning. How do you deal with the in-built limit on property rights in external resources based on the enough-and-is-good proviso? There is a whole industry on talking about this. What does it mean to be born into an Earth that's already been occupied and owned by everyone? What is all this about? And fundamentally, I can't really argue against this at this time. I'm happy to argue it against it at length.

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But I just want to leave you with an idea that, fundamentally, this whole mindset is a bizarre idea that humans are born fully form, self-autonomous beings at birth. They are not. They are born vulnerable, fragile, deeply dependent, social beings all the way down. Adults at some point in a market society come to resent this reality and deny it deeply by pretending something else is the case and then invent a series of fictional just-so stories which none of which have any grip for anyone who's not already in the grip of the idea, the infantile desire to escape the reality of society and history and go back to some primordial, fictional story in which there are absolute rights, sacrosanct between self-governing sovereigns who relate to each other as pinball machines and can't define their rights in any plausible way.

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There is no such thing, period, as an absolute right because rights are social relations, and to have an absolute right would mean to have an interest protected against any other interest absolutely. And that is conceptually and institutionally not on the cards. Okay, I'll stop.

00:42:53

[applause]

00:43:00

HELENA: We have about 15 minutes left.

00:43:02

STEPHAN KINSELLA: I'll try to speak for five or six minutes and leave room for Q&A. How about that?

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HELENA: **[indiscernible_00:43:14]**

00:43:10

STEPHAN KINSELLA: I really appreciate the responses. I've done several debates. This is the most intelligent response I've ever gotten, which is probably why—you're probably somewhat anti-IP. If we had two hours each, we could go into this in more detail. Just quickly, the harm of IP in terms of copyright, there are people in jail. Aaron Swartz committed suicide facing penalties. People die, and the culture is distorted. There is censorship, and freedom of the internet is threatened. That is a huge thing. Internet is one of the most important tools we have against state tyranny. And when the government threatens internet freedom in the name of copyright, it's a big problem, so that's the harm of that. The harm of patents, I believe, it has slowed down innovation and human progress depends upon the accumulation of knowledge over time.

00:43:58

TALHA SYED: But you can't have both harms. You need principled harms, so give me the principled harms. You've got to have principled harms. Or you can't have instrumental harms.

00:44:06

STEPHAN KINSELLA: Well, your criticism about natural rights, actually, I agree with a lot of what you said. I tried not to rely upon natural rights arguments. I'm using the word natural as a shorthand, but actually I agree with Hans-Hermann Hoppe's argumentation ethics and the more dialogical arguments for liberty, which sort of agree with the is-ought problem of the standard natural law argument. So I would take a more libertarian take on the Habermassian type of arguments, okay?

00:44:35

TALHA SYED: Habermas?

00:44:34

STEPHAN KINSELLA: Yeah. Of course, that was Hoppe's PhD advisor, Habermas and **[inaudible_00:44:38]**.

00:44:39

TALHA SYED: That's great. Habermas is **[inaudible_00:44:42]**

00:44:43

STEPHAN KINSELLA: So I'm trying not to rely on natural, but I do think that there is a way to use the natural—the description of the natural position without having a loaded argument. Mises did it. Hoppe does it. There is—and Rothbard did it. There is a natural position, and you can describe that natural position, and then you can make reasoning based on that. I think my case, when I have more time to do it, and in my writings, is based on reasons, and I agree with your appeal to right reason. I have used the word propertarian before. The problem with that is that term has been co-opted by some alt-right guys, so I don't like to use it.

00:45:17

And also, as I said, every legal system on Earth believes in some form of property rights. So I think the question comes down to who gets the property right, and that's the libertarian distinction. I do agree with you that rights are justifiable claims and that you have to use reasons to adduce them.

00:45:36

Now, you talk about being dishonest. I do agree that, when you sort the word natural, you can bend the needle. But what's really dishonest is calling government-granted monopoly privileges intellectual property. It's not property. And you are correct to identify the Lockean proviso as a potential snag in our arguments, which is why those radical anarcho-capitalist libertarians of us completely and utterly reject the Lockean proviso.

00:46:02

So I have written in print and so has Hoppe and others that why we disagree with the Lockean proviso. And I do think that original appropriation is good enough because it establishes a link between one person and the resource, which is an objective, intersubjectively ascertainable—there's the Habermas for you—link between a person and a resource, which gives him a better connection to it than anyone else.

00:46:25

Now, as for this hypothetical previous state, as you know in the law, we don't have to trace title back to Adam and Eve or the Garden of Eden or even to the sovereign to settle a dispute. When there's a dispute between two people in the real world, they go before a tribunal and A and B both claim this resource, and all you have to do is trace back to a common ancestor. This is what the law does. The civil law and the common law both do this.

00:46:47

So you basically have to go back to a common ancestor. You can stop there. It doesn't matter how that common ancestor got it because from that point on, you go back four or five generations. You find the grandfather who had it, and then you see what he did with it and who gets the best title from there. So the law is about better title, which is relative. It's not absolute. It doesn't need to be absolute in practice.

00:47:06

I'll stop there. Almost everything you spoke about I've written on in more detail on my website, and I'll be happy to take questions either now or by email later. But just go to C4SIF.org, which is my website. I've got tons of material there, which elaborate on all of this. Thanks.

00:47:24

[applause]

00:47:31

HELENA: We have a few minutes for questions.

00:47:33

00:47:37

W: Mr. Kinsella, I think **[inaudible_00:47:42]**. You mentioned the utilitarian arguments for and against intellectual property, but you didn't actually get very much into the substance about the deontological argument.

00:48:01

STEPHAN KINSELLA: Correct.

00:48:02

W: Of intellectual property.

00:48:03

STEPHAN KINSELLA: Sure. And if you want to speak on that too. The deontological argument is that —is the Lockean argument that we own ourselves, and therefore, we have the—I think there's a confusion. There's a confusion between economic concepts and legal concepts. So economically, we trade. Economically, we profit from our labor. Economically, you can say you sell your labor, which is simply a legal way of describing the motivation for engaging in labor or in action is so you get rewarded for it. Someone gives you something in exchange for it.

00:48:35

That makes us think legally that if I trade an apple for an orange with someone, title is being transferred. I'm selling the apple. Someone is selling their orange. I'm buying the orange for my apple, etc. If I get paid to paint someone's fence, then we think of that as a sale too, and legally we start thinking of the thing that was sold as an object that you must have owned. You must have owned your labor. So the idea is this idea that if you work hard in a free market system where everyone's rights are respected, you are going, by and large, to profit from what you do.

00:49:06

So people start thinking that you have a right to profit from what you do, which is one thing I disagree with in what you said, professor, the idea that you're owed a right of return. I don't think you are ever owed a right of return. You're not ever owed a right to profit. But this is the idea that hard work merits—it's a Protestant idea—if you work hard, you're entitled to some compensation. I don't think that's true at all.

00:49:26

Someone who's an entrepreneur, and we're all entrepreneurs. Every action we take is entrepreneurial in the sense that we're predicting the uncertain future, and we're trying to make up a psychic profit in what we do. We might fail. We might succeed, but no one is obligated to fulfill that for us. If I start a new restaurant, a new hamburger chain thinking that this is going to be a hit, or a new pizza delivery thing and someone is going to compete with me pretty soon.

00:49:50

So I might be able to make a lot of money for a few years, and the competitors are going to come in. They're going to imitate me. I'm not entitled to those customers. When people say he stole my customer, they sometimes take that word "steal" too seriously. Or he stole my girlfriend. I don't own my girlfriend. I don't own my country. Just because we use the word, the possessive "my" doesn't mean there's really a title relationship there. So language is really key here. We have to be careful about metaphors and how language is used ambiguously and unintentionally or intentionally for equivocation.

00:50:21

So the principled argument is that—here's the principled argument. It's the idea that, if you create something, you own it. And the idea is that, well, I created this symphony. I created a novel. I created a new design for a carburetor. I created it. Therefore, I own it. I can control what people do with it, which is why professor called it a resource and excluding a resource. Economically it's not a resource. It's an idea. That's why I used the Mises idea of praxeology to distinguish between the use of scarce means or scarce resources.

00:50:51

There are corporeal, tangible, material things as opposed to information. So the idea is that if you create something, you should own it. And they make the analogy to Locke's idea or the natural right idea, which is sort of sloppily formulated. So people think that creation is one of these sources of ownership, which is why I specified the three I did: original appropriation, contract, and rectification. You notice that creation is not one of those. Creation is actually not a source of ownership.

00:51:19

This is the mistake everyone makes. They believe that if I create a chair, I own it. That's not true. I own the chair because I own the raw materials that went into the chair. I had to own them first to own the

chair. So creation is a source of wealth. That is, I take a resource that I own. I rearrange it into a better form. It's more valuable to me or to others. It makes the wealth of the world higher. But you don't own wealth. You don't own subjective value. You only own the underlying material that's the scarce resource.

00:51:48

Conversely, if I didn't own the raw material that I made the chair from like I'm an employee at a factory and I'm making the chairs for my employer, I don't own the chair that I produce. So creation is neither necessary nor sufficient for ownership, which, by the way, is part of the Marxian mistake. So Marx thinks that employees are exploited because their labor—they're not getting fully compensated for the value they put into the chair because their labor.

00:52:12

So this whole idea of labor ownership, Locke's use of the labor in his argument, is a mistake. And so the fundamental mistake, and I've called this libertarian creationism, the idea that creation is a source of ownership, is a false idea. Once you believe that, you can say, well, if creation is a source of ownership for tangible things, creation is a source of ownership for poems or novels. So I reject creationism as a source of rights utterly and completely.

00:52:37

00:52:43

W: I'd like to know whether Professor Syed has a response to that.

00:52:47

TALHA SYED: To which part exactly? I mean, I'm not sure I even know what part I'm supposed to respond to. Do I think that people deserve, as a matter of fairness, social recognition and returns for meaningful contributions to society? Yeah. Do I think that's a right? Well, I don't think there's any magic to that. To me, R-I-G-H-T has no magic.

00:53:09

It's just a label for a normative argument based on reason. That's it. Now, do I have comment on the Marx thing? Well, not really because that's not what Marx has done. That's what Ricardo might have done but not really. Marxists have thought that, and you're right about that. Marx himself never had any interest in Lockean **[indiscernible_00:53:27]** theory of any sort.

00:53:28

HELENA: One more question.

00:53:32

00:53:44

W: So Professor Syed and Mr. Kinsella, I mean, on the issue of natural rights, I'm wondering is the disagreement here, is it just like a verbal thing? You just don't like the word "natural," like you think it's somehow implying something other than it being like something based in actual reasons?

00:54:07

TALHA SYED: **[indiscernible_00:54:08]** so let me just be clear. I think the word "natural rights" has mental-blocking properties. The minute you say natural right, you've made it seem as if you're making an argument A) of individuals outside of society. All rights are social, period, conceptually and institutionally. That's just a truth. There's nothing you can do about it except cry. But that's what it is. All rights are social.

00:54:30

W: I don't think anyone disagrees with that.

00:54:31

TALHA SYED: No, no, no, but natural rights theorists have, for most of history, argued that natural rights can be justified in unilateral, individualist ways. Any time you get an argument that justifies someone's rights in a unilateral, individualist way, without taking into account competing bilateral claims, it's someone who doesn't understand what a right is conceptually and institutionally. And that misunderstanding is facilitated by the rhetoric of natural, which has had, historically, that role.

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Second, natural also has the rhetorically loaded character of inviting you to believe that this is something you observe as an empirical claim rather than something that you argue for as a normative claim. The minute someone says, yeah, of course, all rights are social and normative and backed in normative reasons, we're fine. Then the word "natural" plays no role. If you say, well, that's what the word means, then my question is, well, why use the word "natural?" What does natural add except to say certain reasons do not depend on their recognition by certain contingent legislature? Well, that I agree. But of course, I absolutely agree that rights are not just the conventional positive legal rights that our legal system may or may not recognize.

00:55:43

Of course, I agree we all have the right and obligation to be critical of the existing rights of a legal regime according to reflection and reason. Of course, that's right. Anyone who doesn't think that besides **[indiscernible_00:55:56]** is crazy. I mean, but that's a different view. The word "natural" doesn't add anything. I claim the word "natural" does more work. But if you accept that rights are reason-based and dialogic-based and Habermassian-based, then we have no methodological disagreement on that question. I just think it's good to drop the word "natural," and you seem not to disagree on that.

00:56:15

STEPHAN KINSELLA: I don't disagree. I agree with most of what you said. If you want to look into this further, look at some of the stuff on my site with Hoppe and argumentation ethics. And Hoppe's criticism of natural-rights reasoning, and a funnier one, by the way, is Robert Anton Wilson had a book called *Natural Law, or Don't Put a Rubber on Your Willy*. So he was sort of mocking the Catholic church's natural law stuff, which is related to natural rights, the idea that you can extend what's been said by the church or what's been done is history as an argument for what normatively should be. So I agree with Hume that you can't go from an is to an ought. So that's one problem with the classical natural rights argument.

[**Note**: The following comments are missing from the Youtube version but are included in this podcast audio]:

00:56:53

And the other is that, as Hoppe points out, human nature is very diffuse and broad. You can't get a lot of specificity from that, which is why he anchors his argument in dialogue, which is an argumentation. It's a particular activity of humans, which has a specific nature, and you can anchor norms in that. But, by the way, my entire case on IP, and I've written on rights, but my case on IP I think doesn't depend upon this in any case. In any case, I'll stop there.

00:57:19

HELENA: Okay. I think that's a good place to stop. Thank you so much for coming. Let's give them both **[indiscernible_00:57:27]**.

Locke's Big Mistake: How the Labor Theory of Property Ruined Political Theory: Transcript

by STEPHAN KINSELLA*on* APRIL 13, 2013

This is a transcription of my speech KOL037 | Locke's Big Mistake: How the Labor Theory of Property Ruined Political Theory. I have cleaned up a few things and added a few links and notes.

Update:

- The Superiority of the Roman Law: Scarcity, Property, Locke and Libertarianism (Mises, Aug. 17, 2010) (archived version with comments)

0:01:12.9**Johnathan Hubbard**:	Our next speaker is a patent attorney from Houston and a very long time defender of liberty. He has written lots and lots of articles and a very fantastic book, a very important book, I think, called *Against Intellectual Property*. You can just Google it and find the book because that is part of the premise of the book is that ideas should be free. And so, I really don't have anything else to say. The guy's credentials are so long it would take forever to explain them to everybody, or whatever, and say….so I hope you guys can, you know, stay awake and enjoy Mr. Stephan Kinsella.
Stephan Kinsella:	Thanks. I'll do my best. I thought that the best thing to keep people awake after a long lunch on a Saturday would be a talk about John Locke, 17th century philosopher! The title is (well, I have slightly changed it*) Locke's Big Mistake – How the Labor Theory of Property Ruined Political Theory*. I'll try to explain why I think this is interesting and very relevant to our fight for liberty.Let me start with a question. Who was the most evil man of all history? Any guesses? There are no wrong answers. (Well, there are *some* wrong answers.)
Audience Member:	Mao!
Kinsella:	Who did Ayn Rand think was the most evil man in all history?
Audience Member:	Kant!
0:02:43.8**Kinsella**:	Yeah. She said "Kant is the most evil man in mankind's history." I mean you might not agree with his idealism [i.e. non-realism], some of his philosophy, but he was a pretty good classical liberal.

0:03:58.4	So I don't know if I can agree with that.Ayn Rand was known for rhetorical excesses. She also said "patents are the heart and core of property rights." Even if you believe in intellectual property, that one is hard to swallow.But I will give her some credit too. She also has a rhetorical line that I love in her Money Speech which was: "Run for your life from any man who tells you that money is evil. That sentence is the leper's bell of the approaching looter".Love that line. I feel that way with people who say they disagree with the idea of self-ownership. I'm like, "Well, I'm going to keep an eye on you".Well, I don't think Kant was the most evil man in all of history. And I don't think Locke was either, but I do want to have a similar thesis to Ayn Rand, and that is identifying one big mistake in political theory and philosophy. I don't think Locke did this on purpose. I think he did a lot of good. And I'm going to try and identify what I think is good in Locke and what mistake he made. I won't even say he is evil, although he was sort of a racist defender of the slave trade [see The Contradictions of Racism: Locke, Slavery, and the Two Treatises. Robert Bernasconi & Anika Maaza Mann; google books]. But that is an *ad hominem* and we never do that here. But parts of his argument have caused a lot of serious problems in political theory in the meantime. Now why is this? Before I get into the details, in my view, I have been thinking about libertarianism for over twenty-five years and I've come to the conclusion that one problem we face is overuse of metaphors and imprecise use of language and clear thinking. We can't abolish it completely, but we have to be wary of the dangers of using metaphors and imprecise language and unclear thinking. One of America's most famous Supreme Court justices, [Cardozo,] before he was a justice, when he was a judge, said, in 1926, "Metaphors in law are to be narrowly watched for starting as devices to liberate thought, they often end up enslaving it".

	He is right. You can ask what is a metaphor? In Louisiana, we might say, "It's for to explain things better". But sometimes there's problems. Austrians like Böhm-Bawerk, Mises, Guido Hülsmann, they have all written on all the dangers of using metaphorical language. [See On the Danger of Metaphors in Scientific Discourse; Creation and Labor as Sources of Property Rights and the Danger of Metaphors.] For example, all these scientistic metaphors are used to explain the economy, like friction or momentum. The economy has "green shoots" right now or maybe it doesn't have "green shoots". We talk about prices communicating knowledge or coordinating behavior. And also mixing of labor which I'm going to talk of a little bit about here.
0:05:29.5	Let me ask a question, just a show of hands of the audience. Who here believes that you own your body? Who knows pretty much what your body is? It's hard to say you own your body if you don't know what it is. Now there is a difference though between whether you do own your body or whether you should own your body. Who thinks here that you own yourself? Now who knows what their self really is? I don't know what my self really is. I mean it is not as concrete of an idea as body ownership, right?
	So when we talk about self-ownership and libertarianism, really I think we are talking about body ownership. So the question is always who owns your body? Me or someone else? Do you believe in your own control of yourself, or your body I should say, or slavery? That is the fundamental choice. If you talk in clear language, these things become clearer.
	We also have to distinguish between factual questions, or legal questions, and normative questions. If I say, "Do you own yourself?", you are really thinking, "Should I own myself"?

So the questions "Should you own yourself?" and "Do you own yourself?" are separate questions. I would say you don't own yourself completely, under today's legal system, because the government maintains the right to draft you, throw you in jail for doing drugs, to take your money if you don't pay taxes or to put you in jail if you don't pay taxes. So I think we are only partly self-owners in today's society. As Stefan Molyneux mentioned earlier, "A slave is someone who is a 100% tax victim". So we have to distinguish between should and facts.

So there are some ideas, words, and terms which I think we ought to try to avoid or at least be very careful of when we use them. Let me go through a few of those.

One is conflating government with society and state. Or conflating society with state or conflating government with state. Or conflating country with state. The problem is if you say you are against the government, people think you are against law and order because they think you are against the governing institutions of society, when really we are against the state. So what libertarians are against is the state.

0:06:43.6

The state currently monopolizes and runs the government, the governing organizations of society: law, justice, order. The state also runs the roads, but we don't say we are against roads, do we? We say we are against government roads or state roads, we should say. Just like we say we are against state education. So we have to be careful when we say we are against government because you'll have minarchists or regular people think that you are for chaos and lawlessness, the idea of the anarchist with the bomb. We have to say we're against the state if you want to be clear and precise.

	Another one is people say, "Well, I'm against coercion. I'm a libertarian".
	Or
	"I'm against violence".
	Well, no, we're not against violence. We're not even against coercion. We're against aggression. Aggression is the initiated use of force or the initiated violence or the initiated coercion. Coercion is just a type of force. It means to use force to compel someone to do something. If someone is breaking into my house, I'm going to coerce the guy and it is rightful. So we're not against coercion. We're not against force. We're not against violence. We're against initiated force, coercion and violence or aggression. [See The Problem with "Coercion"; What Libertarianism Is.]
0:07:53.8	Another one, which I'll deal with in a few minutes, is labor versus action. People always talk about owning the fruits of your labor. People have a right to sell their labor. These kinds of things. They act like labor is some special thing. Now, I don't know about you, but to me labor is just a type of action. Humans own their bodies. We act in certain ways. That is human action. Labor is just a type of action, maybe a subset of action. What kind of action is it? It is action that has disutilities, some people say. It's not leisure. It's not fun. You do it to get some end. But it is just one type of action.
	And then, of course, there is intellectual property which begs the question just by saying it that way. Some of us don't think it should be property. So don't call it property to prove that it should be treated as property. It is better to call it an intellectual privilege or just call it patent and copyright, what the government calls it.

Finally, another one, which Jeff Tucker and I were talking about on the way up here this morning is the idea of limited government. This one always bugs me because, you know, every government that has ever existed is limited. There has never been an unlimited government – I mean, maybe the Nazis, maybe the Russians at a certain point in time. But every government has limits, or every state, I should say, has limits on what it can do. And almost everyone believes in some limits. The welfare liberals believe in a limited government. They just want the limits to be a lot less than we would like.

So what defines an ultra-minimalist conservative or a classical liberal or a libertarian is not that we believe in limited government. It is what limits we believe should be on the state. And the most consistent, most radical libertarians think the limits should be complete, meaning the state should have nothing it can do whatsoever. In other words, the state should die and not exist. But even a minarchist believes that the limits should be completely so tight that the state can only do a few minimal functions: defense, police, and courts. So when you say limited government, that doesn't really distinguish us from others.

So in thinking about how to define the essence of libertarianism over the years, I think the best way to think of it is that we recognize that we are all people who live in society with each other. We all, at least the civilized people among us, we generally want our own lives to be good, but we also favor peace and prosperity. We want our neighbors to be good. And we like living in society with each other.

0:09:13.9

And we all realize the following – this is Mises I'm going to go into here a little bit – Mises was, in my

mind, the greatest Austrian economist . He developed a theory called praxeology. That is the logic or the science of human action.

It sounds funny. It is a weird word. It took me a long time to understand. Like epistemology took seventeen years before I finally started using the word. I'm still not there with ontology, but with epistemology and praxeology I am. Mises says, look, it is common sense. Look at human action. What do human beings do in their lives? Every moment of their lives they're taking an action.

Now an action means you're an intelligent, rational person. You understand something about the world and you know that the future is coming. And you envision something about the future you think is going to happen that you are not satisfied with or that you want to change. This is what human action is. We don't think of it like this, but this is what we do in every moment of our lives.

And we also realize that we have the ability to affect that future. How? By using what Mises called scarce means. These are things in the world that you can use to change the course of the future, including your body and including things that we find, tools basically. And we have some understanding, or some knowledge, in our mind that we have accumulated from human civilization and from society in the past, from others, from learning, from emulation. We have some knowledge about what we think is coming, what we think might satisfy us better than what would come if we don't take an action, and what means are available and how they will causally change things.

0:10:43.6

So that is what human action is. It's understanding, making a choice, grabbing some kind of means and employing that means to change the future. This is

how we have to understand human action. And within that framework we can understand libertarianism is the idea that we understand that these means are scarce. Scarce means rivalarous. It means only one person can use this thing at a time. Otherwise, you have two or more people fighting over this thing, clashing over it, having conflict, violent disagreement.

So an example would be baking a cake. You need a recipe, which is the knowledge of how to make the cake and you need the tools, the capital equipment, the ingredients, the raw materials. Only one person can use this egg at a time to make the cake or this wooden spoon or this bowl or this oven. But any number of people can use their own eggs and their own ingredients, all using the same recipe, or the same knowledge, at the same time.

This is exactly why the intellectual property idea is so fallacious. Intellectual property seeks to grant property rights in the ideas as well as we do in the scarce means. It makes no sense because you don't need to put property rights on the ideas because they are not scarce. The entire purpose of property rights is to permit conflicts to be avoided in the use of the scarce means of action. So we

can all go about our daily business and our plans cooperating with each other, trading with each other, helping each other, selling to each other, using our own scarce resources with the legally recognized exclusive right to control it. That is what property rights are and that is what ownership is. It makes no sense to grant these rights on ideas. I'm not going to go into that in detail here. That is the entire intellectual property argument I have been making for a few years now. But I just want to put it in a framework. This is what the libertarian idea is.

0:12:11.2

Now, what does this have to do with Locke? Okay. The way to reformulate this is to think that the essence of libertarianism is a very simple set of rules. As I mentioned earlier, we can't say we're for limited government because that doesn't distinguish us from other schools of thought. And you can't say we're for property rights because that doesn't distinguish us either. Why not? Because property rights are inherent in every human society and every political system that has ever existed. Communists believe in property rights. Socialists believe in property rights. Fascists believe in property rights. Environmentalists believe in property rights. Welfare Liberals believe in property rights. We believe in property rights. What's the difference?

How they are assigned. That is the difference. So we look at the world and we see scarce resources that need to be controlled by someone, by the legal system, so that they can be used peacefully, productively. And our rule is simple. It's the Lockean Rule. The Lockean Rule basically says whoever can show the better claim to a resource gets it. And the better claim is defined as either the first person who transformed it. Yes, with his labor, in a sense. Or if you acquired it by contract from someone else. It is very simple: contract plus first appropriation.

Now what is the reason for the first appropriation rule? Locke spelled this out in his argument. If no one had the right to be the first one to use a resource, it could never be used. Someone has got to be the first one to use this unknown thing out there. And if he has got the right to use it, then he has a right to keep it because otherwise the second guy can take it from him which is not a property right system. That is a system of violent clashing. So it is almost like the Misesian Monetary Regression Theorem when you trace back the origin or the value of gold type money to its pure commodity, non-monetary use. It's like that. You can see who has got a resource now, trace the title back to the first active appropriation. This is what we say.

0:13:37.1	Now you can add one more rule. You could say if someone commits an act of aggression, some kind of tort, you harm someone else, you violate their rights, because you performed that action, you have incurred an obligation to compensate them. So they might get a claim to your property because of that. So we could modify the rules. The person who owns the resources is either the person who acquired it by contract from an owner or who first appropriated it or who acquired it because of some act of crime by the original owner. Other than that, there are no other ways to own property.
	What did Locke say? What Locke said, he basically said this, but he had some extra stuff in his argument. Locke said God created the universe. God owns the universe. God created Adam and Eve. He owned them, but God in his benevolence (he apparently is a libertarian) granted dominion of all the unowned resources that he created to man. So within the human sphere, whether there is a God or not, whether you care that God is a slave-owner or how you look at that, the point is there is a system set up where the rule is if each man is a self-owner, that is Locke called it, and remember the danger of saying self-owner – it is better to say he is a body owner because that is the resource in dispute. I care if someone stabs my body, not if they stab my "self." So every person is a body-owner.
	Then here is what Locke said and here is the problem, I think, with Locke's argument. Locke said if you own yourself, then you own the labor you perform with your body or your self. First off, thinking right now as a critical libertarian legal theorist who wonders what words mean, the nagging feeling is what does that really mean, to own your labor? But I'll go with that.
	Then Locke says, so you own this labor. Now I'm thinking like a substance emanating from myself. And so if it mixes with something unowned, well, I own the labor, so the only way I can keep ownership

of that labor is to own the thing it's mixed with. Otherwise, you are taking my labor away from me. So this is his argument for why we can appropriate unowned resources.

0:15:11.4

Now, David Hume, writing later, Locke was in the 1600s, Hume was a little bit later, pointed out, and I agree with Hume, Hume pointed out that this argument of Locke is overly figurative or metaphorical. We don't really own our labor. We own our bodies. If you own your body, that means you have the right to perform whatever actions you want with it. You can use those to sell your services to someone.

Think about it. If someone pays me to sing a song, they give me a dollar after I sing a song for them, the song pleased them, but do they own the song now? Are they in possession of a song? No, they are in possession of a memory. Can I say that I gave them a memory? I suppose, but I really didn't own a memory that I transferred to them. This is all completely imprecise, metaphorical stuff. And you don't need it. It is unnecessary. As Hume pointed out, Locke's argument works if you simplify it and you take out the stuff. Locke's argument works for the reasons I mentioned earlier, the libertarian reason. When you have an object that is disputed or contested, a scarce resource, then there really can be no other answer than that the person has a better claim to it that was the first one who appropriated it. Because if you don't give him that right then, as I said, no one could ever appropriate anything in the first place or they would appropriate it with violence and people squabbling over it which, again, defeats the purpose of having a legal system that permits resources to be used in a conflict free way. So this is the problem.

Now, you might say, well, he could have worded it better, but what is the problem with this? The problem is this entire mentality, this entire approach, has led to a deep, vast confusion that has

	contaminated and infected political theory ever since his day. Arguably, it also, at least partially, contributed to the rise of a related doctrine, called the Labor Theory of Value which is more of an economic idea which is what contaminated Ricardo's and Adam Smith's and then Marx's thought. The Labor Theory of Value has this mystical idea that the value of a product is based upon the labor that went into it.
0:16:39.6	Now, there are several mistakes here. Number one, value is subjective. There is no value in things. So right away he is thinking in intrinsic value terms. It makes no senses whatsoever as Menger and the Austrians have shown. And furthermore, you don't own labor. Labor is not a substance. And, of course, the idea that you have two laborers that mix their labor with two objects, one is high quality and one is low quality. If this guy put 100 hours into it and this guy did it in 10, they're not going to have the same value. So then you have to reverse engineer your theory and say, well, now we have to have a multiplier coefficient on this guy's labor. So then you have a contorted theory. Anyway, that is the Labor Theory of Value which resulted in Communism and hundreds of millions of deaths. If Locke is to blame for that, I guess we could say he is a little bit negligent. But I won't blame Locke for that because you can trace these ideas back to Muslim thinkers back in the 1300s, I mean a long time ago. But there is some evidence that this idea of labor as this thing people can own, this metaphorical approach, did lead to the Marxian Labor Theory of Value. But the problem with Locke is the Labor Theory of *Property*. Again, the idea that you own things that you mix your labor with. This, obviously, is not true. For example, if I am an employee of a company, which Marx would abolish I guess, and I'm paid to mix my labor to build a chair out of the employer's wood and nails, well, I mixed my labor with it, why don't I own it? Well, because there is a contract and I never owned it in the first place.

So the problem with the Labor Theory of Property is that it has led to this idea…libertarians will say this all the time, sort of casual thinking, not very precise, they'll say there are three sources of property ownership. Number one, if you find something, original appropriation or homesteading, Locke's idea, a libertarian idea. Number two, by contract, by contractual acquisition. They're right about that. If you want to mention a third, it should be some kind of aggression which I mentioned can trigger a property title transfer, but that is a way of transferring title that exists already, so let's say finding something or by contract from a previous owner.

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And then they'll say the third way you can own something is by creation. See, what they doing is they're going back to this labor idea. They're mixing things together. They're thinking humans are productive. We labor. Our labor, our intellect, our intellectual creativity helps create things of value. And just as I labor in a field and make a valuable firm out it, I must own that because I labored on it which means I own anything that I create with my labor. You see how they go from one argument to the next? They never stop and ask the question, well, what is an ownable thing in the first place?

And then sometimes they'll argue by possessives, the most maddening thing. Like if I don't own my labor, who does? Like the word "my" means I have to own it. I have a wife, my wife, my girlfriend, my job, my customers. Do I own those because there is a possessive? No. Sloppy thinking.

So another dangerous word that I wanted to get to is the word "property". We have this tendency to refer to things that we own as property. This iPad is my property. Now, I think it would be better to say this scarce resource, I have a property right in this scarce resource or I own this scarce resource. Because

	when you start staying, "That's my property" – think about why the word property was used in the first place. Locke said you have a propriety in your things. What he is talking about is that when a human being acts in the world, we don't just use our bodies, we have standing room, we have other scarce resources that we employ to affect change, as I mentioned. All these things are sort of in the orbit of your control. They are a property of yourself in the sense that they are a feature of yourself. They're a characteristic of yourself. They are a way of describing part of your nature or your identity. So what they're talking about is what is proper to man? What is proper for a man to be able to rightfully control?
0:19:36.4	So that is why the words property and property rights is used – now it is like a type of metonymy, if you know what that is, to refer to the thing itself. But if we think clearly, we never arrive at the question most intellectual property advocates do, for example, which is, well, the question is what is property? No, that is not the question. The question is who owns this resource always because nothing else can be fought over because resources are necessarily things that can be fought over or contested. So the question in all of political philosophy is always, always if you can point to a given resource, something that more than one person desires to use and there is potentially conflict over, who should rightfully be able to control it or own it or have a property right in? But don't call it property unless you are really careful about it. If you call it property, then you are going to end up with intellectual property and things like this.
	The problem with the argument, that there are three sources of ownership for property, is that it conflates the source of wealth with the source of property rights. It is completely true that if I own some raw materials, let's say some paper or let's say some wood and some metal, and I fashion these things into a chair, I have made an object that is more valuable. More valuable to who? To me or maybe to a potential customer. Remember, there is no value in the chair. Value is not intrinsic. It is not

	objective. Value is the subjective relationship between valuing, acting human beings.
	So, anyway, I transform resources into a more valuable shape or we can say, in economic terms, I have created wealth. Why have I created wealth? Because I have made something more valuable to me or someone else. In fact, if two people just trade their objects, two people trade an apple for an orange, they have created wealth by that transaction. It is not, as classical economists say, a horizontal trade where the values are equal. In fact, the guy who buys the apple with his orange values the apple more than the orange and vice versa. That is why they engaged in the trade. Each one is better off after the trade. So wealth is created just by pure trade.
0:21:01.3	Wealth is also created by humans laboring on their property. Wealth can also be destroyed. If you make a mistake and you ruin your property in an attempt to make a machine or something, then you can lose wealth. But the property rights don't change. In fact, for me to make a chair presupposes that I own the raw materials. I already own these raw materials. How did I get them? One of the first two ways. I either bought them from contract from a previous owner or I homesteaded them from the state of nature. That's it. So this ownership starts already, before the act of creation or the act of production. The act of production is an act of laboring, using your labor, sure, on materials that you already own or it can be on someone else's materials, if you are an employee working on someone else's materials and then you don't own it. So they key is always who own the raw materials that go into productive labor.
	So creation, labor, is a source of wealth, but it is not a source of property rights. [See: Hoppe on Property Rights in Physical Integrity vs Value; Objectivist Law Prof Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors; Locke on IP; Mises,

	Rothbard, and Rand on Creation, Production, and 'Rearranging'; Creation and Labor as Sources of Property Rights and the Danger of Metaphors.] And if you realize that, you will never fall into the trap of wondering, well, who owns that labor? Who owns that poem? Well, naturally, a poem doesn't spring out of nowhere. If you believe a poem is an ownable thing, or a movie or a song or a pattern of information or a discovery or a fact or a database, well, I agree with Tibor Machan. The best candidate for owning that is the guy who created it. [See New Working Paper: Machan on IP; also see the criticism and discussion in the comments (e.g., those of Carl Johan Petrus Ridenfeldt at November 30, 2006 4:59 PM); see also Owning Thoughts and Labor [Rothbard and Hoppe on 1988 Panel], *Mises Blog* (Dec. 11, 2006) and related comment thread; and the comments in The Copyright/Baseball Analogy.]
0:22:28.5	But this presupposes that these things are ownable. Not everything is ownable. My memories are not ownable. My love is not ownable. My past is not ownnable. The earth's rotation is not ownable. These are characteristics, ways of describing the universe. You could say, as a practical matter, that I own my actions or I own my memory because I can control them. But if you say it like that, you make the mistake of double counting because you are saying, well, I own my body and I own my actions. Well, no. You have the ability to control what actions you perform *because* you own your body. It is a consequence. It is derivative. It is not a separate independent thing. If we clear up these confusions then a lot of confusions in thinking arise. So, as I said, property, limited government, state.
	Let me talk a little bit about one thing I touched on which is an objection I hear a lot. This is about contracts. Now, I hear this all the time, about this labor argument. They say, well, if you don't own your labor how can you sell it? I hear this all the time. This is because people don't usually have a sophisticated or deep understanding of contract law in general, much less what I think is the libertarian view which is the Rothbard/Evers view which he

calls the Title Transfer Theory of Contract. I don't want to get too much into legal theory, but let me just tell you what I think is a simple way to look at, the right way, to look at contract.

First of all, in today's legal system, the way contracts are viewed as binding obligations….and that is how most libertarians look at it. If I make a promise to you with a certain formality, in a certain way, then the law, even in private law in an anarchist society should enforce that promise. Your promises should be binding.

However, even in today's legal system, which characterizes the contractual realm that way, it doesn't operate that way. So, for example, if I promise to sing a song for you at your son's birthday party and I decide not to show up, then you can't go get the cops to drag me there and make me sing, for several reasons. Number one, it wouldn't be a very good song. I'm being compelled. And that is a practical consideration the courts use. Courts generally don't enforce what is called specific performance which means they don't actually treat contracts as binding promises. What they do is they make me pay $1,000 damages to the guy, in a contract law suit, which means really what the contract is is just a transfer of title to property. It's as if I had said, "I'm predicting that I will sing at your son's birthday party tomorrow. I'm just making a prediction because I know myself pretty well and I don't think I'll change very much between now and then. I can't bind myself because I might change my mind. But I tell you what, to give my future self an inducement to sing, I will hereby transfer to you $1,000 in damage payments, conditioned upon my not singing".

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That's fine. So that is what the contract is. It is really a transfer of property. And that is what Rothbard said. Rothbard said contracts should not be viewed as obligations or promises. They should only be viewed as transfers of title to owned

resources. I just said property. See, I made the mistake, too.

And if you think about it, this is perfectly consistent with and an outcome of the two sources of property rights, the Lockean idea that I mentioned earlier which is the idea that you own things because of first appropriation or by contract. So contract here means the owner of a resource has the ability to give up his ownership of it in favor of someone else, to transfer it to them. That is what contracts are. That's how they need to be viewed.

So how do we reconcile this with the idea that you can sell your labor like in an employment contract or a service contract? The problem here is the person making the objection to my argument, the person arguing for IP in effect, the person trying to argue that labor is an ownable thing because you can have a contract regarding it, what they are doing is they're thinking in terms of a standard simple contract like the apple versus the orange. A typical contract would be two people exchanging titles, apple for orange. It is an exchange. It is a contract.

But remember the definition of contract I mentioned doesn't talk about exchange. It just talks about transfer. So if I give my niece $1,000 gift to go to college, that's a contract. It is a transfer of title. It is not an exchange, not really. I mean you could say I get pleasure out of it, but it is definitely not a bilateral exchange. It is a one way exchange. This is how we have to think of employment contracts or service contracts. The sale of labor is another dangerous, confusing metaphor. The sale of labor is not really a metaphor. It is really not what happens. It is not literally true.

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What is happening here is people are analogizing this labor contract to a regular exchange and they're

thinking, well, if there is something being sold there must be an exchange of title of what is being sold, title to the labor. No. It is like the example I gave earlier about the singing. What is being done is the buyer of my services, you could say, knows that I own my body. He knows I have the power to decide not to sing or to sing or to paint his fence or not paint his fence. He knows he's got to motivate me to do what he wants me to do. Just because this guy wants something and is willing to pay for it, doesn't mean that thing is an ownable good. He might want it to rain tomorrow. He might want there to be peace in the world tomorrow. These are the ends of action, but they are not ownable things.

Scarce means are what we use to accomplish ends. They are ownable things. The ends of actions are often intangible. I mean, I might pursue a girl and buy her roses because I want her to go out with me. I want her to marry me and be my wife. But that end is getting a wife. It has got nothing to do with an ownable thing. We have to give up the idea that just because you pursue something and you pay money for it, means that the thing you paid for is an ownable thing.

It is the same thing with a service contract. I want this guy to sing a song. So I know he is going to refuse to sing unless I compensate him. So I make a deal with him. I say, if you sing, I will transfer $1,000 to you. In other words, I hereby transfer $1,000 to you, conditioned upon you singing this song. If he sings it, he triggers a condition. The money transfers.

Did he buy the song? No.

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Did he buy the singing? I guess, in a metaphorical sense. As long as you keep in mind that no title was transferred back. It was an outcome that I wanted.

So the argument goes, well, you have to own something to sell it. I think I just showed why that is incorrect. So the fact that there are labor contracts doesn't show that labor is ownable. Now the opposite would be what Walter Block has argued with me before. He says, well, if you own something, you have to be able to sell it, which goes towards voluntary slavery. He says, "Stephan, if you own your body, then surely you can sell it in a slavery contract and it should be enforceable".

His argument is that, if you own something, you have to sell it. What is the assumption here? The assumption is that ownership implies the right to sell, but it doesn't. Ownership means the exclusive right to control something. You have to have something else to make something sellable. In my view, this is a little bit of a tangent, but my view is there are ways of acquiring two types of property. One is your body. We own our bodies, not because we homestead the bodies. We don't acquire our bodies. We can't exist without our bodies. That is part of our identity, our essence, our existence.

There is another reason we own our bodies. That is because close connection to our bodies. We have a unique direct control over those resources. So it is not homesteading. Locke alludes to this a little bit with the idea that God gives everyone the propriety of himself. He doesn't talk about homesteading there really.

For things that were previously unowned, out in the world, we own those because we have first appropriation or some contract after that. So for all these things the first idea is that ownership means

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you have the exclusive right to control it. Nothing in that implies the right to sell, not immediately, not directly. But then we recognize, well, this thing was unowned before. I'm the one who acquired it. I have the right to abandon this thing. I can "unown" it, so to speak. I can return it to the state of nature. And because of that power, which is an implication of the nature of these scarce resources and an implication of how we come to own these things, that gives you the practical ability to abandon it in favor of someone else. You know, I could take this apple and instead of throwing it into the woods, I can hand it to you and instead of loaning to you I could say I now release my claims. Now I have given up my ownership. Now you are holding this unowned thing. You would instantly be homesteading.

This is why things that have been homesteaded can be sold. It's not because you own them. It's because of the way they were acquired. Things that can be acquired can be de-acquired. But we don't acquire our bodies and our bodies were never unowned. From the moment you were a legal person or a philosophical person, you were identified and tightly bound up with a body. [See How We Come To Own Ourselves.] I'm not going to get into the metaphysical or religious idea of whether you have a soul and whether you are just your body or whether there is....I don't care. It makes no difference. If you're just a body, then your body owns your body. Fine. Don't give me nonsense about, well, that makes no sense because what I hear is you don't think I'm a self-owner. That means you think you're my owner or someone else is. So I'm going to keep my eye on you. [See What Libertarianism Is.]

Let me mention one thing for two more minutes. There are some libertarians, like Adam Mossoff, others, they're trying to rehabilitate Locke. They're trying to show that Locke did believe that intellectual property was a natural right, which he didn't. It's wrong. Locke did believe in intellectual property, but just for prudential reasons, the same reasons the Founders did. Locke, in fact, did not believe that his homesteading theory implied that intellectual

property is a type of right which means, I think, he realized that he was using an overly metaphorical description. So I think he would have taken my side on this.

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And number two, so what? I don't care what Locke believed. If Locke believed in intellectual property, he was dead wrong, just like he was wrong about slavery. So I'll stop here.

Thank you very much.

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Gooch:	Okay. We are going to start with questions. I'm going to start off with a question because I have a question. Let's imagine a world without intellectual property rights as recognized by law. Is this a world where drug companies and companies invest millions and millions of dollars in research and development for lifesaving drugs?
Kinsella:0:38:53.5	Okay. If we live in a communist dictatorship with no private property rights, there is no intellectual property law, then, no, I don't think drug companies would exist at all.So the question has to be imagine some kind of world where intellectual property rights somehow disappear and we have some kind of free market still. And I am imaging that the reason we don't have IP laws is people realize what private property rights are and so we have a more stateless society in the first place, a freer market. We're going to have much more wealth and riches. And so, yes, I think of course.If you imagine taking the tax burden and the regulatory burden and the FDA process and the tariffs and all the government regulations on drug companies, it would remove immense burdens

0:40:17.1	from them. They would have tons more customers, tons more money to invest. And, as an empirical matter….I mean my argument is more principled and moral, just like Ayn Rand said about anti-trust law. We think it is unlikely businessmen would be able to collude or cartelize successfully on the free market. But even if they did, they have the right to do it. There is freedom of contract.I would say the same thing about IP. Even if we have less overall innovation, I'm for property rights in principle. I don't think anyone else should have a property right in my resources to tell me what I can't do with them unless I'm committing some type of tort or I have agreed by contract with them.But, as an empirical matter, if you look at Chapter 9 of Boldrin & Levine's book, *Against Intellectual Monopoly*, which is a more utilitarian, empirical look at the IP thing, they show there is a whole host of myths about the pharmaceutical industry.There is just a myth that the patent system is really a big contributor to their profit margins. And, in fact, if you took away the FDA process, the "need" for patents would reduce. The drug approval process takes so long because of the FDA and they have to disclose it to the public. And so, in a free market, you could keep things secret for a while. You would have a first mover advantage. But in today's society, these drug companies have to pull down their knickers and show the world everything they've got. So by the time 15 years later this drug is approved, now everyone is ready to compete with them if they wanted. So they say, "Oh, I need a patent to stop them from competing". So the government screws me and I want the government to screw my competitors now to level the playing field. I prefer to free up on both sides and I think we would have a lot more creative artistic achievement. People could make documentaries without being worried about being sued for having a statue of some building in the background. You wouldn't have large companies bullying small companies and individuals with trademark suits, defamation suits, commercial liable patent suits. I mean there are people dying right now. Tens of millions of people have died in Africa because they can't get AIDS drugs because the drug companies here insist on

	keeping the patent caused monopoly prices up. There are people in New England with Fabry's Disease who cannot get this drug, which is patented, because there is a limited supply and no one can compete with them and make additional supplies. And what they have is being sold to Europeans for some arcane reason. There are people dying right now because of patents.
0:41:46.6	Patents cause censorship. Not just copyright, trademark and patents cause censorship as well. Copyright is causing people to go to federal prison. I've seen one study that the average internet user is potentially guilty of $4.5 billion worth of copyright infringement liability every year, just for emailing people things and copying a few things for a report. It's insane. And, as you mentioned at lunch, we all probably commit four or five felonies a day. We can't help it. [We are all copyright criminals: John Tehranian's "Infringement Nation".]
	I think an IP free world would be more innovative, freer, richer, more competitive. Look, the advocates of IP, even free market ones, say we have to have patent and copyright to slow down the diffusion of ideas. We don't want unbridled competition. They say this. [Intellectual Property Advocates Hate Competition.]
	Well, I want unbridled competition because I don't want anyone bridling it. So that is my opinion.

Audience Member:0:43:25.3	I was wondering if our idea of property itself maybe needs to be clarified. Because there are two parts of it. There is an empirical component of property as in who is actually exercising and who is in control of it. And then there is a normative component of who should exercise control. I wonder if those two have to be combined into one concept of property or can you split them?
Kinsella:	Well, the institution of property is inherently normative. What you are talking about more legally should be classified as possession. Even that has a normative component. There's legal possession in the law. And, of course, they blend together. They affect each other.So, for example, you have heard the expression, "Possession is nine-tenths of the law". There is a reason for that. Because you have to have a presumption about who owns something. But the question is always who has the legal right to control something? And when two or more claimants come into some kind of court, even a private court and they are reasonable people, they both want this thing, but they want to settle the dispute in a reasonable way, then the question has to be who has the right to control it or who should get it? The guy that is currently in possession of it may be presumed to be the owner unless the other guy can show that he shouldn't be. So the burden of proof might be on the claimant. Possession might be what is used to determine who the claimant is, but I do think we should distinguish them.But if you do what I said earlier and you keep property as a right idea, and we talk about ownership or property rights and scarce

0:44:37.6	resources, then the question is always who ought to have the right to control that scarce resource?For pure human action, as I mentioned, human action means using your ideas to decide and choose what scarce means to actually employ. That is a pure possessive or non-normative concept. But for the humans that are civilized and that want to live in a civilized society, where we are not fighting with each other with violence, then we seek for normative rules. We seek to say, well, who should have that thing, not just who is using it.
Audience Member:	If Locke was wrong on labor, how do we originally appropriate resources? Or how do I know what I need to do appropriate resources?
Kinsella 0:46:09.8	Right. So…I didn't mention this, but another fallacious sort of concept that leads to confusion is the very idea of private property. In a way, *property is public*.It is not "private" because the very function of property rights is that we recognize there is scarce resources and we want these resources to be used by someone productively. And because we are moral normative people we are trying to come up with an agreement with each other as to the fair way of doing it. There is an ethical concept there. So we're searching for some kind of property assignment rule. Who is the best one to get….we think someone should have it. Otherwise, we are going to have fighting over it and they're not going to be used productively.So the very idea of property rights is to set up boundaries or borders that are publically visible. If you don't have some kind of public border, publically visible…Kantians would say intersubjectively ascertainable. It just means an objective border, something everyone can see. Tall fences make good neighbors. The Robert Frost thing. I think it's Robert Frost.Property, inherently, has to have some visible manifestation, not only of its borders, but of a tie between the resource and the owner. Other people can know where the borders are so they can avoid infringing it or trespassing if they want to be cooperative and they know who owns it so they know who to get permission from. So for something to be a property right, the act of appropriation has to somehow set up these borders.So that is why mixing labor comes into it. Basically, you have to transform it or do something with it. You might put a fence around a field. You might take a limb from a tree and carve it into a staff or a club. When you do these things people can recognize them as artifacts. Some human has done something and they have done it in a way to set up a

	border that signifies their claiming of proprietary interest in it.Now, that is part of language, right? In other words, we can't have society without language. Language means we have the ability to communicate with each other somehow. And communication requires default or presumed rules. So it is not always expressed or explicit.
	So if a custom arises in a given area that having a house in a neighborhood with normal neighbors means that the homeowner is kind of okay with little neighborhood children going on their lawn to retrieve a lost baseball, which means you don't put landmines on your lawn to kill those kids. It would be murder if you did that, not because you don't have the right to keep people from trespassing, but because by the language of the community, you have basically communicated to everyone, I'm like the regular guy. People can walk up to my door and knock on it for a cup of sugar.
0:47:28.4	If I want to change the default presumption, I have to put a post it sign up and say "Trespassers will be shot" or something. So you change the default presumption. If you lived in a neighborhood where the presumption was the opposite, then you might have to put up a sign saying, "You're welcome to come knock on my door for Trick and Treat. I won't shoot you". And then you are inviting someone.
	But the question is always…so labor and labor is one way that you can transform and therefore connect yourself to the property and send up a sign to the community using communicative norms. You're telling people this is mine. It is no longer unowned. I have transformed it with my labor. The reason you have a better claim to it is not because you own your labor. It is because you connect yourself to it. You're the first one to own it, to use it. And, again, if the first person to use property doesn't have the right to do it, then we don't have a property right system at all. We're back to the war of all against all and violence.

0:48:43.0**Hubbard**:	We have one last question. If you didn't get your question in, we are going to have a panel discussion….
Audience Member:	….To better understand I would like to put up a scenario. Let's say that during the discussion right now, I recorded it and then I burned it on some DVDs and I put it on the market and I sold them and I made a million dollars. Who owns that?
Kinsella:	No one. It is not an ownable thing. Who owns the money? You own the money. People gave it to you. People that own the money gave it to you voluntarily in exchange for you doing something that they liked.
Audience Member:	But do you have any claim on that money?
Kinsella: 0:50:12.4	No, absolutely not. Unless, unless, you agreed to a contract by entering this private arena which has certain rules of the road, so to speak, or you and I….I said I'm not going to speak unless I get everyone that wants to come hear me sign an agreement saying if

	they profit in any way, if they learn from what I said, if they have the audacity to walk out of here knowing anything more than they knew before, if it affects their actions at all, then they have to pay me a million dollars. Okay, I think I would have an empty stadium.So unless there is a contract or an implicit contract because of the rules of the private venue, then, no absolutely not. You have the right to do whatever you want. Because you didn't trespass against my body and I didn't have a contract with you. Basically, Libertarianism says you can do whatever you want. We don't need to seek permission for our actions. This is not supposed to be Soviet Russia. This is what the IP mentality does. It makes people wonder what permission do I have to do that? No. The question is you can do anything you want in your life as long as you don't invade my property borders. That's it. And you didn't do that, did you? You gave people information. And if I don't want people to see my face I should stay in my house all day.
Hubbard:	Thank you Stephan.

Intellectual Nonsense: Fallacious Arguments for IP: Transcript

by STEPHAN KINSELLA*on* APRIL 25, 2021

As noted in this podcast episode, KOL236 | Intellectual Nonsense: Fallacious Arguments for IP (Libertopia 2012), at Libertopia 2012, I delivered a 45-minute talk , "Intellectual Nonsense: Fallacious Arguments for IP," the slides for which are below. I spoke for 45 minutes—well, 40, then the last 5 were taken up by a question from J. Neil Schulman—but only covered the first 25 slides. I covered most of the remaining 41 in a separate recording, Part 2: KOL237.

A lightly-edited transcript of Part 1 is below; see also the transcript for Part 2.

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Libertopia 2012: Intellectual Nonsense

by Stephan Kinsella

Edited transcript of a talk delivered at ~~Libertopia~~ 2012 (San Diego, Oct. 12, 2012) [transcript for Part 2]

STEPHAN KINSELLA: Okay, let's get started. Good morning everybody. My name is Stephan Kinsella. I'm a patent attorney in Houston, and I'm a long-time libertarian, writer, thinker, etc. And I am a strong opponent of intellectual property, which some of you may know, even though it's what I do for a living. So I give a lot of talks on this topic, and I've approached it different ways. Today is going to be a little bit different. What I wanted to do is just lay out the basic argument against IP, just take a couple of minutes because the case is pretty simple actually. And then what I want to do is just go through one at a time all the arguments I've heard over the last, say, 17 years, and I think I've heard them all. And I think explaining what I believe is wrong with these arguments will help you understand the case against IP in a deeper way.

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So today's talk is entitled "Intellectual Nonsense: Fallacious Arguments for IP." I do have a PowerPoint I provided. I'm not going to show it. I will put it on my website later. You can go to c4sif.org for more information on what I talk about here, more articles on intellectual property. If you want to go deeper, talk to me later, email me. I'd be happy to respond; c4sif.org stands for Center for the Study of Innovative Freedom, and it's basically a website which I call a think tank. So – and I want to point out one thing that Roger had mentioned to me, which is ironic, is that this speech is being given in the Lysander Spooner room, and when Spooner who is fantastic on almost every issue except intellectual property. So it's a little bit ironic that it's in this room, but so be it.

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W: Excuse me.

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STEPHAN KINSELLA: Yes.

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W: Could – do you have a mic on?

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STEPHAN KINSELLA: I do. Test, test.

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M: The mic is for the recording…

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STEPHAN KINSELLA: Oh okay. I'll speak up then, all right.

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W: Can't hear you very well.

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STEPHAN KINSELLA: Okay. Did everyone hear what I said so far? I'm going to lay out the case against IP very quickly. Then I'm going to respond to common arguments I've heard for intellectual property over the last 17 years that I've been an IP abolitionist basically.

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So I would say that the basic argument against intellectual property, aside from the fact that it's a state-legislated law, which couldn't exist in a free society with no government, is that it basically is totally incompatible with private property rights and individual rights. The basic libertarian position as I understand it and believe is basically a set of principles: self-ownership, which means each person owns his own body; and second of all, the basically Lockian idea of homesteading, which is that for any scarce resource in the world, that is, any tangible item, anything that exists over which there could be conflict, over which there could be dispute, the libertarian solution is property rights are assigned in that scarce resource in accordance with whoever first used it or whoever acquired it by contract from a previous owner.

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So basically the libertarian argument is that every scarce resource in the world can be identified as having an owner, and that's either the person in the case of a body or the person homesteaded it. And the problem with intellectual property rights is this. It takes awhile to understand this because there's several types of intellectual property. There are patents, copyrights, trademarks, trade secrets, boat-hole designs, database rights, moral rights, semiconductor mask work protection, defamation law if you count that, which I do, as a type of IP, and it's a highly specialized and arcane field of law, which only certain specialized lawyers really understand. So it's hard to get an understanding of what is really in common between these types of rights. Why are they called intellectual property for example?

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And I think the best way to think of it is what I've come to, and let's focus on the two biggest and most egregious types of IP: patent and copyright. Briefly, patents give an inventor a monopoly right in an invention. Copyrights give an author, let's say, of a book a monopoly right in that pattern of information. Both of these rights I believe should be classified as what we call in the civil law a negative servitude, or in the common law, in a pertinent easement. So basically they give an owner or the holder of the IP right a veto right over how other people use their own scarce resources.

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Okay, so if I have a patent on sliding to unlock an iPhone, I can sue Samsung, use the government force to say you are not able to use your own property in a certain way, so it's a veto right. Now, there's nothing wrong with having these veto rights. This is commonly done in, say, restrictive covenants or in neighborhood association. You can think of it this way. You own your home. Your neighbor has a co-ownership right in your home with you to the extent that he can veto your painting your house purple, let's say, if you have an agreement. So there's nothing wrong with these types of divided ownership if they're done consensually and voluntarily. That is, if you sign an agreement.

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But in the case of patent and copyright, the owner of property, who now is subject to a veto right from another person, never did sign a contract for the government just grants this negative servitude, which is a property right, to someone, which gives them a property right in other people's property, and that's basically the problem with intellectual property. It's completely contrary to free markets, competition, private property rights, and the libertarian understanding of homesteading.

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Now, I find Mises' praxeology, his way of looking at human action, to be sort of the most helpful way to understand the role of property rights. The basic idea is that humans act, which means we employ scarce means in the world to try to change the course of events. To do this, we need knowledge as well. You have to understand the laws of cause and effect. You have to understand what means will achieve the end you desire.

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So successful action requires the exclusive control of scarce resources, and it requires knowledge or information. Knowledge or information is not a scarce resource. So if you just take a simple example, someone wants to bake a cake. They need a recipe. That's knowledge. And they also need ingredients and capital equipment—a bowl, an oven, a place to stand. Only one person can use that bowl and those ingredients at the same time. That's why we have property rights in those scarce means so that it can be used peacefully and productively.

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But the knowledge can be shared and used by a million people at once. You could have a million people in their own homes using the same recipe at the same moment. This is fundamentally why it makes no sense whatsoever for there to be property rights in information, and as I just mentioned, the only way to assign property rights in information is really to give someone a partial ownership right in other people's already owned scarce resources. So that's the short argument against intellectual property.

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Now, over the years, I have heard so many arguments. I will go through a few of the really outrageous, stupid, absurd ones first that are kind of amusing. And by the way, let me mention, in my understanding, in my impression, it seems to me that in the last, say, ten years, the tide has really turned among libertarians on the IP issue. Most libertarians that I'm familiar with are strongly anti-IP now, and they also understand what an important issue it is because of the threat to internet freedom with SOPA/PIPA, things like this, extraditing foreign students to face federal prison for linking to the wrong websites, etc. And I think this is especially true in my experience among Austrians and anarchists and left libertarians to their credit. The holdouts would be sort of utilitarians and Randians.

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So here are some of the – just to get going before I get to some more serious arguments. This is what a patent attorney – his name is Gene Quinn. He's just a notorious patent shill, and what he wrote was, "Thank goodness the Swiss did have a patent office. That's where Albert Einstein worked, and during this time as a patent examiner, he came up with the theory of relativity." So we need patents to have patent offices to employ potential geniuses so they have spare time to work on physics theories.

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Here's one. This is from William Shughart who's an economist with the Independent Institute, a libertarian outfit. He says, "It's true that other means do exist for creative people to profit from their effort other than copyright. In the case of copyright, authors can charge fees for reading their works to paying audiences. Charles Dickens did this, but his heavy schedule of public performances in the US, where his works were not protected by copyright, arguably contributed to his untimely death." So if we don't have copyright, authors may speak themselves to death to get fees.

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This is a troll on the Mises list. "If you are not for IP, you have to also be in favor of pedophilia." Another troll on the Mises list: "If you oppose IP, you're basically advocating slavery." And other one: "Song piracy and file sharing are the cause of these recent stage collapses at rock concerts." Insurance companies are blaming copyright piracy for collapses of concerts. And other guy said, "The copyleft" – this is a commentator with Techdirt, which is a great site for IP – "Copyleft advocates are like homophobic, anti-gay-marriage bigots." And finally, "If IP is not legitimate, then it would be okay to steal other people's babies." Not really the most persuasive.

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All right, onto some more serious arguments for IP, although honestly I have yet to hear a good argument for IP. Most of the arguments are either rights-based or deontological or principled we might say, but most are utilitarian or empirical or welfare maximizationist. My view—they're both flawed, and I'll go through some of those today.

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So the first one I'd like to approach is I think is the fundamental reason why people have been – found it difficult to understand this issue and to get it straight in their own heads and why the libertarian movement even was confused for decades on this topic. It's what I call creationism or libertarian/propertarian creationism. And the argument is basically, well, don't you own what you create? Isn't that part of Lockian homesteading? Isn't that part of libertarianism? And if you create a valuable idea or pattern, I mean who else should own it other than the creator?

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So the one problem with this argument is that it assumes that ideas or patterns are ownable. So if you assume that, you say, well, ideas are ownable, well then the answer – well, of course, the creator should be the one who owns it. But the problem is this is a confusion about the proper role of homesteading in acquisition of property rights. In other words, it confuses the role of wealth creation with property acquisition. So people will say there are three ways of acquiring property. You can create it, you can find it, or you can buy it from a previous owner by contract. But this is actually incorrect. There are only two ways. One is to acquire an unowned resource, which is by appropriate or homesteading, and the other is to acquire it by contract from someone else. That's it. Those are the only ways to acquire property rights.

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Now, it is true that creation or intellectual effort or labor is a way of increasing wealth, but wealth is just making something that you already own more valuable. So if you labor on some physical resource like you shape metal into a sword, now you don't own the sword because you shaped it into a sword. You owned it because you already had to own the raw materials that go into it, the factors of production. If you didn't own it, you wouldn't have had a right to manipulate it to turn it into a sword in the first place. So no ownership comes out of the act of creation in that sense, but you do increase the sum total of wealth in the world and for yourself because you make the object that you own more valuable to you, which is the same thing as saying you increase wealth.

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Okay. And I think one reason this mistake was made was some sort of metaphorical – overly metaphorical sloppiness on Locke's part where he talks about when you mix your labor – well, he says we own ourselves, so therefore we own our labor, which right off there's his first mistake. We do not own our labor any more than we own our actions, or to say that is double counting because if I own my body then of course I can use it to act, but to say I own my action would be like saying I own my jogging. It just makes no sense. But his argument goes, we own ourselves. Therefore, we own our labor, like it's some kind of mystical substance that you pour onto the world, and when you mix it with something unowned, you're binding part of your ownership or your patrimony with some scarce resource, and therefore, you acquire that scarce resource.

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But I think that part of Locke's argument is totally unnecessary. You don't need to say you own labor to justify the ownership of an object that you've mixed your labor with. By mixing your labor with it, you have become the first one to visibly emborder it or appropriate it, thereby establishing a better claim to it than anyone else just because you were first. So that part of Locke is confusing.

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Also, Rand – Ayn Rand also has a sloppy, overly metaphorical way of talking about values. She talks about man's – man has to create values. Well, value is a subjective thing. If you own an object, you might value it, or you might demonstrate that you value it. So you do create wealth, but all that means is you're transforming something to making it more valuable to you. We don't literally create entities called values that float around that you can homestead or own.

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So that is – in fact, Ayn Rand should have recognized this just like Mises and Rothbard who did recognize this. Ayn Rand had a statement where she recognized that – I'll quote it here. "The power to rearrange the combinations of natural elements is the only creative power that man possesses. It's enormous and glorious power, and it is the only meaning of the concept creative. Creation does not and metaphysically cannot mean the power to bring something into existence out of nothing. Creation means the power to bring into existence an arrangement or combination or integration of natural elements that had not existed before."

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So you see here Rand is actually recognizing the essence of production, of creating wealth is to own some existing factors, transform them through intellect, creativity, and your labor into something that is a new shape, a new arrangement. If Rand is stuck with this line of reasoning, she would have realized that it was totally incompatible with her arguments for patent and copyright, which are sort of a strange mixture of utilitarian and allegedly principled arguments because she's favoring 17-year patent terms and, I guess at the time, seven-year, so your copyright terms and trying to justify this arbitrary, finite length of time. No natural rights expire in 17 years.

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And this focus that Rand has on creating values and then you own the values that you create leads them to sort of minimize or dismiss the importance of scarcity. I had a debate with David Kelley I think in 1995 in his newsletter about this, and he basically wrote back to my criticism of Murray Frank's pro-IP views. He basically admitted scarcity is important, but it's not the only source of rights. So what he says is that there are two conditions required – this is what Kelley says. "Two conditions required in order to appropriate things in nature and make them your property: (1) you must put them to some productive use, and (2) that productive use must require exclusive control." So far I agree. "Condition (2) holds only when the resource is scarce. But for things that one has created, such as a new product, one's act of creation is the source of the right regardless of scarcity."

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So he's saying when you say regardless of scarcity, that lets you talk a little bit sloppily and loosely about these values that you create. I created a value. It's out there somewhere. Who cares if it's scarce or not? It has value. It is of value, whatever that means, so of course the creator is the one who gets to own it. So they've lost the connection to scarcity, which is the only reason we need property rights in the first place. If we lived in the Garden of Eden, there would be no need for property. In fact, the idea would make no sense whatsoever.

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Oh, here's one I hear all the time, and this is probably our fault for using the word scarcity, which has multiple meanings. People will say – I'll say, well, you can't own ideas because they're not scarce resources, and they'll say, well, I don't know. Good ideas seem pretty scarce to me. So this is their argument. It's just – a quip is their argument. So I'll say, well, as we carefully define in our argument, scarcity for us means basically rivalrous, a conflict – a good that can have conflict over it. So if you change the argument to say ideas are not rivalrous, then they can't come back and say, I don't know; good ideas are pretty rivalrous. It makes no sense.

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Here's another one. This is more of a legal – sort of a legal positivist-type argument, which I've heard made by Adam Mossoff who's a pro-IP objectivist, law professor, and Richard Epstein, who is a somewhat pro-IP kind of utilitarian libertarian law professor. And their argument is that how do you classify property? Sorry. How do you classify intellectual property or patent and copyright? And they have these arguments that, as a lawyer or as a legal scholar, we classify different types of writings. They have a long argument about why you can classify patent and copyright as property rights.

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Yes, you can. So what? People can be property too. It's called chattel slavery. So the fact that you can – a legal system can classify something as property is completely irrelevant to the case about whether it should be property or whether it's just. And furthermore, I think their argument is wrong. They

should not be classified as property, as I think Professor Bell has argued, but as privileges. And, in fact, as Professor Bell who is here pointed out in a really clever blog post, there is – the danger of treating patent and copyright as property rights is that some of the doctrines that rule this arcane body of law, which are purely statutory, and so, for example, there's fair use doctrine in copyright law.

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The reason we need the fair use doctrine is because copyright is so hideously unjust that we have to blunt its sharp edges so that people don't rebel against it. So you have all the exceptions to keep it from being too terribly harsh in some of its effects. So the danger is that you take these artificial exceptions or doctrines that apply to patent and copyright, and they would contaminate real property law. In fact, there is a scholar who analogizes property land, let's say, to copyright and argues that just like copyright has a fair use exception, there should be a fair trespass exception so that you're entitled to using other people's property as long as it's fair use like in copyright.

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And there's a current case pending right now before the US Supreme Court, which some of you may be aware of, in which the doctrines of copyright law are actually starting to contaminate property in physical things. And this is the case – it's about a foreign student who imported, I think, John Wiley textbooks from Thailand or some Asian country where their books are sold legally by the publisher but for a much cheaper price and on thinner paper. And he got his family members to send him the books to the US, and he just – it's arbitrage. He just sold them for a discount here. He made a couple million dollars, and then he got sued for copyright infringement. Now why? In copyright, there's something called the first sale doctrine. That is the idea that the person who holds the copyright, the publisher, only gets one bite of the apple.

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They make their money, their artificial monopoly price, when they sell the book the first time, and after that someone who owns the book – now, they don't have the copyright in the book, so they can't make a copy of the book, but they can sell that book. Otherwise, the publisher could say I didn't give you permission to sell that book. You're giving my copyrighted work to a third party, and you can't do that. Well, the defense has always been first sale doctrine. Well, in this case, in the lower courts, the court said that in this case the problem is that the books were sold overseas or made overseas.

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And the first sale doctrine, if you read the copyright statute closely, the first sale doctrine arguably is only triggered when the first sale is in the US. Now, what that means is that these books don't have the first sale doctrine, and what it means is that they can't be resold here. Now, if the Supreme Court upholds this ruling, this affects not only books but – that would be bad enough. Millions of books that are resold on Amazon, leant out by libraries, you're going to have to have two types of books now. You're going to have to have the ones that have the mystical, invisible tendril back to Europe, and then you can't resell those or even lend them out maybe.

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And it could affect property like a watch or a piece of furniture or a painting bought overseas so – or how about an iPhone? Apple has this made in China, so ships to me in the US. If they make the sale happen in China, which there's ways they do that contractually, then the first sale doctrine doesn't apply. I can't resell this iPhone. It would be violating Apple's copyright if I resell it. So you're basically – you see how this veto right I mentioned earlier kicks in.

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Basically what's happening now is, because of copyright, there's a very real strong potential – a strong likelihood that the original copyright holder, who already got their profit from you when you made the sale, when they made their first sale, they can veto your right to resell property that you own, physical, tangible property. So we see another danger of treating IP as property. We need to quarantine it to the legal privileges of monopoly ghetto if not eliminate it altogether.

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Now, here's an argument I've heard many times, and I think it's very insidious, and it's important to figure this one out. So the argument is that the IP proponent – they will agree with you that yes, in effect, the patent or copyright gives the holder a sort of property right in other people's property. Yes, it's a limit on what you can do with your property. But then they'll say, well, so what? Property rights are never absolute anyway. All property rights are limited. They'll say, for example, your right to your nose – your right to swing your fist ends where my nose begins, which we all agree with.

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So here's the argument basically. It's okay to limit property rights because property rights are always limited. Well, that doesn't – first of all, that doesn't make any sense, even if it's true that normal property rights could be viewed as a limit on property rights, which right away you can see that makes no sense. The fact that there are property rights means property rights are not limited. It's kind of a weird argument.

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But even if that were true, it doesn't mean any limit is okay. I mean by this argument you could be the hell out of someone, and then when they start complaining you say what are you complaining about? All property rights aren't absolute. All property rights are limited, so how can you complain that I'm beating the hell out of you? Let's just look at your body as being limited. I mean there's no argument there whatsoever. And there's – one of my favorite quotes is from *Atlas Shrugged* by Ayn Rand's Francisco, and I'm reminded of this quote whenever I hear people say property rights aren't absolute.

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When I hear this, I'm thinking hold onto your goddamn wallet because they're coming after it, and this is – it's the line, "Run from your life from any man who tells you that money is evil. That sentence is the leper's bell of an approaching looter." And I agree with that. So when people start telling you, oh, property rights aren't absolute, they're coming after yours. They're trying to reduce it.

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And here's the other problem with this argument. I think it's actually not true that property rights are limited. I don't know what it means for property rights to be absolute. I don't know what – they're not absolute, and they're not non-absolute. They're just the right to use property exclusively. But property rights are actually not limited by the obligation not to violate other people's rights. It's actions. Now, you can think of it this way. Let's say I have a knife. Now, you have a right to not be aggressed against from me. You have a right for me not to stab you without your permission at least.

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Now, is that a limitation on my property rights in the knife? No. It's a limitation on what actions I can perform. I cannot perform the action of aggression, and it's easy to see this. Imagine if I don't own the knife. I borrowed it from my brother. Now is it okay? I mean no. So it's – in other words, ownership of the scarce means that you employ to commit aggression is completely irrelevant. It doesn't matter whether you own something. Another way to see this is if you steal my knife and you use that knife to kill someone, does that mean I'm the murderer? After all, it's my property that was used. So really there's no connection between the ownership of means and the prohibition on aggression.

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The prohibition on aggression simply means you cannot perform this action. All actions have to employ scarce means as Mises said. So it has nothing to do with whether the means are owned, so there's another mistake in that whole argument. So property rights are actually not limited by property rights. Property rights – actions are limited because of property rights.

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This is a little bit of a tangent, but I was reminded of this leper's bell thing in the property-rights-aren't-absolute argument with kind of an amusing set of responses to – this was back in the late '80s, early '90s. Hans-Hermann Hoppe has an anarchist treatise called *A Theory of Socialism and Capitalism*, which got a lot of attention in libertarian circles in the late '80s. And Loren Lomasky, who is a Canadian libertarian philosopher, who I had thought was an anarchist, but apparently he's not, had a very critical book review of Hoppe's book.

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And Hoppe's response, and I'm going to read Rothbard's response too. Hoppe is quoting Lomasky. "It is," Lomasky laments, "No less than a manifesto for untrammeled anarchism." And Hoppe says, "So be it. But so what?" And then Hoppe explains anarchism is just a system respecting property rights, etc. absolute self-ownership, the right homestead, the right to contract. And then Hoppe concludes, "Only someone advocating the trammeling of private property rights would take offense, as does Lomasky with my attempt to justify a pure private-property economy." This is not really on the IP topic, but it's the same idea that if someone is opposing untrammeled property rights, they must want to do some trammeling.

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And here's what Rothbard wrote, and this is in *Liberty Magazine* 1990, about a year after Hoppe's book came out. Lomasky "is shocked and stunned that Hoppe is not simply a defender of existing capitalism. His book is 'no less than a manifesto for untrammeled anarchism.' Well, heavens to Betsy! Anarchism. One wonders where Lomasky has been for the last 20 years! Perhaps the knowledge has not yet penetrated to the fastnesses of Minnesota, but anarchism has been a vibrant part of the libertarian dialogue for a long time, as most readers of liberty well know."

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Okay, let's talk about another argument for IP. How much time do I have? 15 minutes? 15? Okay. By the way, I've 66 slides, and I'm on 17, so I'm not going to finish. There's a lot of bad arguments. However, I will put this PowerPoint on my website later, and I'm going to add some more links, so there will be tons of links if anyone wants to look this over.

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So there's an argument that – so most advocates of copyright, let's say – let's stick with copyright for now. They recognize that copyright can have a chilling effect, to put it mildly, on freedom of speech, freedom of press. And, in fact – so they admit this. Their arguments would need to have a balance, so this is the typical utilitarian, squishy, unprincipled balancing bullshit. Now, the roots of copyright lie in censorship, the Stationer's Company in 1557 was given the monopoly over what books could be printed, and it was to suppress the wrong kinds of books being published that the church or the state didn't want published.

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That evolved into the Statute of Anne in 1710, which is sort of the genesis of the modern copyright system. So the origins of copyright or in censorship and at least censorship today literally – it has literally in our lifetimes led to people being put in jail for publishing their own books, books being seized and burned, movies being seized and burned by the state literally. Now, I had quoted William Shughart awhile ago from the Independent Institute. Here's another quote of his. He's pro-IP, and he says, "To paraphrase the late economist, Joan Robinson, patents and copyrights slow down the diffusion of new ideas for a reason: to ensure there will be more new ideas to diffuse." Well, thanks for being honest.

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So their idea is that we need to have a balance, and this is what the courts do. So we need innovation and creativity, which we have to have copyright and patent to induce, but it's got a chilling effect on free speech. Now, actually I've got an argument that I believe that there's a good argument that copyright law is unconstitutional because, even though it's – even though the constitution, when ratified in 1789, has a copyright and patent clause – well, first of all, the clause arguably has a limit, which says that, to promote the progress of science and the arts, Congress can pass these limited

monopolies. And there's been – as I'll get to in a few minutes, there had been no statistical proof whatsoever in the last 230 years that art and creation is promoted.

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So arguably, the law is unconstitutional by its own clause, but even if we forget that, if you remember, in 1789 the constitution was ratified. It's got the copyright clause in there, so arguably Congress has the authority to pass copyright law, which they did a year later; 1791 the Bill of Rights is added to the constitution. The Bill of Rights has the first amendment, which prohibits the federal government from infringing on freedom of speech, freedom of press. Now, the courts acknowledge – proponents of IP acknowledge that copyright law infringes freedom of speech. So the reason they try to balance it is they treat the first amendment and the copyright clause as on par with each other. They're kind of conflicting provisions in the constitution, but we have to balance them because they're both in there.

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However, one was passed two years later, and the way it works is the later statute or the later amendment takes precedence, which is why we can have a drink right now. Prohibition was ended because the constitutional amendment that undid prohibition came after the one that caused prohibition. The most recent one counts. So two years later the copyright – the first amendment was enacted, and in my opinion they're completely incompatible. There is no way to have a copyright statute that doesn't significantly infringe on freedom of speech. So I think it's clearly unconstitutional.

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And I also believe that the statutory damages and the insane penalties people have to pay, which has no bearing whatsoever to the actual so-called damage of piracy, let's say, is probably a violation of the eighth amendment's ban on excessive fines. I mean it's basically completely outrageous, and it's a penalty. And I think the eighth amendment also is a reason why copyright should fall.

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Okay. As for this balance, there s a good quote by Cory Doctorow, who's kind of anti-IP. He's for openness anyway. And he's talking about how there's these fights right now between the movie industry and Google and YouTube and things like this, and they basically want YouTube severely limited, shut down. They want to ratchet up this DMCA takedown system we have. And what Cory says is – he's saying the big studios are saying you must shut down the system [the internet and YouTube] that delivers billions of hours of enjoyment to hundreds of millions of people so that we can go on delivering about 20 hours' worth of big budget films every summer. "To me, this is a no-brainer. I mean I love sitting in an air-conditioned cave watching Bruce Willis beat up a fighter jet with his bare hands as much as the next guy, but if I have to choose between that and all of YouTube, well, sorry, Bruce." (see https://c4sif.org/2010/11/doctorow-what-do-we-want-copyright-to-do/).

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And speaking of balance, there's another balance that the courts engage in with respect to patent and copyright and that is anti-trust law, which is another unconstitutional law in my opinion. However, so

we have the federal government passing laws against monopolies, which aren't real monopolies, but they're private so-called monopolies and granting monopolies. So guess what the courts say? Well, there's a tension between. So they have to adopt – they have to come up with this doctrine of IP abuse. So yeah, we're giving you a monopoly, but you can't abuse it. Don't use it too much.

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And as a law school professor who is pro-IP, Beth Noveck, she was quoted in an article about how to prove the patent system, and she says, "A patent is a pretty significant monopoly, so we want to make sure we're giving it to the right people." I mean I trust the government to give monopolies to the right people. And speaking of this, you will have IP advocates get indignant when you call it a monopoly. I mean they just stamp their feet and say, no, it's just a property right, or they'll say, well, you're right in your body is a monopoly. I mean so – but the problem is clearly they're monopolies. And Richard Epstein, who is a pro-IP says, "Patented goods are subject to a lawful monopoly created by the state to induce their creation."

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The Supreme Court refers to a patentee as having a monopoly. Arnold Plant talks about patents being monopoly grants. I mean this is common language. William Shughart from Independent, "Granting a temporary monopoly to the rare breakthrough is necessary to provide the inventor with an opportunity to earn a return on the investment that led to the idea," blah, blah, blah. Okay, so let's not get indignant. And here's something interesting I came across a couple years ago. Thomas Jefferson, in 1789, wrote a letter to James Madison who was, at that time, drafting the Bill of Rights. Now, you remember in 1789, the constitution had been enacted or was about to be enacted, and there was a copyright clause in there granting Congress the authority.

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But the Bill of Rights was being contemplated. And so Jefferson suggested this article be put into the Bill of Rights, never was. I don't know why. Article 9: Monopolies—again, recognizing them for what they are—remember, we used to have a Department of War. Now, we call it Department of Defense. Statists were more honest in the old days. "Monopolies may be allowed to persons for their own production in literature and their own inventions in the arts for a term not exceeding _____ years but for no longer term and no other purpose." In other words, he wanted to put in the Bill of Rights a cap on how long these can be. It probably would have been 14 or 28 years, which was common at the time, which means Mickey Mouse would be public domain by now.

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Copyrights wouldn't last for about 150 years as they do now. And some of you may remember. The story I heard is that when the income tax amendment was being put into the constitution to authorize the income tax system that we have now, there was a suggestion to put in there a cap of 10%, like income tax could not be – but the congressmen were afraid to do that because they thought that as soon as they did that, Congress would right away raise the income tax to 10%. They didn't want to give them any ideas. They were thinking it was going to be 1%, 2%. But if only they had done that, right?

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And finally, the coup de grâce to the stupid argument that IP is not a monopoly, the first modern statute that all patent systems come from was in England in 1623, the Statute of Monopolies. It makes me want to say McFly. Here's another. Well, liberty is good, but it's not – I hear this from non-libertarians, not only on the IP issue, but you'll hear this. They'll say, well, I favor liberty like you do, but it's not our only value. This is what conservatives say all the time, right? It's just one of many values. Again, the leper's bell comment. When you hear someone saying, oh, I believe in liberty, but it's not my only value, hold onto your wallet because they're coming for it.

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So what they say is we – oh yeah, I – that's what David Kelley's argument was basically. He admitted that scarcity is one criteria for one type of property, but it's not the only type of property. So it's just like positive rights in the welfare state. I mean liberals say, oh no, I believe in sanctity of property, but I also believe in the right to healthcare. So they want to keep adding these rights. What they don't understand or they don't care about is that these rights are not inexpensive. They come at the cost of liberty all of the time. Just like inflating money drives down the price of money. Inflating positive rights undermines real rights. Granting rights in non-scarce things always has to come at the expense of existing property rights in real things.

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And if you think about it, every time someone is sued for a patent infringement or copyright infringement, they're using physical force from the government courts directed against someone's physical body or their physical property, or they want to take their physical money out of their bank account. So it's really always a dispute about scarce things, and we already know who owns scarce things: the first finder or the person who acquired the good by contract. How much time? Five minutes? Okay.

00:40:15

1. NEIL SCHULMAN: Any Q&A?

00:40:16

STEPHAN KINSELLA: Well, first of all, we're having a panel tomorrow on IP, so let me – I have a few more things to get through.

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1. NEIL SCHULMAN: This is J. Neil Schulman. Can I have one question?

00:40:28

STEPHAN KINSELLA: Absolutely. Go ahead, Neil.

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99. NEIL SCHULMAN: Listen, Stephan. I'm not going to argue with you about morality or rights or values or law or any of that other stuff that you speak about (indiscernible_00:40:38). I'm probably 99.5% of the (indiscernible_00:40:41) applications of what you talked about. I may be more aggressive against the way you've been talking with patent laws being used to oppress against rights. I can probably find even more grievous examples from Monsanto and (indiscernible_00:40:54) and any images (indiscernible_00:40:56).

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We're so – as an anarchist, I am so supportive of what you're doing in these areas, but there is one fundamental question, which you, over the many years we've discussed this, simply cannot answer because it is not a question of rights. It's a question of – I know you're going to start thinking I'm going to Rand here. I'm not. I'm going to Aristotle. It's about the law of identity, and the question has been raised in various different forums, but I'll just state it once again like this. I have here a book. It says on the cover *Alongside Night* by J. Neil Schulman. I sell you this book, and when you open it up and get to chapter one, it says it was the best times; it was the worst of times. My question is did you get what you paid for? Now, if you say yes, you're saying that the pattern of words in the book is irrelevant. It was only the reductionist physical materials that are on here that have any market utility.

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If you say that you've got something different than what you paid for, then you're acknowledging then what you're calling pattern or composition or whatever term you want to use makes it a different good, a different thing, a different entity, a different thing than what you thought were you buying. So my question is, if the thing which is being traded can be transferred from various different carriers and is always the same thing, is that a thing or isn't it? And I maintain you deny it's thingness, and that's a problem because in essence what you're saying is that which may be unlimited copy does not exist at all as something real in reality.

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STEPHAN KINSELLA: Well, I think your argument is a very one of…

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M: Can you restate his argument? I didn't understand it.

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STEPHAN KINSELLA: His argument is that…

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1. NEIL SCHULMAN: And that's the problem. I've been trying to – I'm a great writer, and I've been trying to explain this simple concept for 30 years and are really failing.

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STEPHAN KINSELLA: I think your argument is basically that there are different types of entities, like Tibor Machan argues this as well, ontologically different types of entities, and scarce material things are not the only types of entities that exist and they're not the only types of entities that can be owned. That's the argument, which I…

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1. NEIL SCHULMAN: I eliminate the word scarce. I'm not even asking about whether it's scarce or not. I'm simply asking is there a thing which exists apart from the materials on which it is found.

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STEPHAN KINSELLA: I have no problem with conceptually identifying things if you want to call them things, like there is a poem. We can conceptually identify that. The problem is granting a right in it means you are using physical force, and it's always directed against some physical thing. And what that means is to give a right to information or to these things that are not scarce always, always ends up undermining property rights in already owned things.

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So you may not have been here in the beginning. I talked about the right way to classify patent and copyright in probably your logo rights idea is a negative servitude. Basically, it's a contractual co-ownership right. Some other party has a veto right over how you use your property. The problem is no matter how you spin it, if you're going to grant rights on these immaterial things, you're going to end up giving someone a veto right over how they use their own property that's already owned.

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1. NEIL SCHULMAN: I'm saying there's a secondary argument to be had at another time, but first we have to establish whether or not there is an independently existing thing.

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STEPHAN KINSELLA: We'll have to disagree on that. I think the time is up, so thank you very much. I'll be happy to talk about this later.

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Intellectual Nonsense: Fallacious Arguments for IP—Part 2

by Stephan Kinsella

(Transcript for the unfinished a speech delivered at Libertopia 2012 (San Diego, Oct. 12, 2012), Oct. 18, 2012) [transcript for Part 1]

00:00:02

STEPHAN KINSELLA: So this is Stephan Kinsella. It's Thursday, October 18. I intend this to be part two, or the conclusion of my Libertopia lecture. In Libertopia, I gave a talk, about a 45-minute talk on – well, it would have been 45 minutes. It was about 40 minutes because there was a question at the end by Neil Schulman the last five minutes. Anyway, the talk was on Intellectual Nonsense: Fallacious Arguments for Intellectual Property, or IP, and I had about 65 or 6 slides prepared of notes for myself of topics to discuss. I got to about slide 25, so there's several topics left to discuss. I thought what I would do is just go through those slides now, so I've already put the slides up on my website, c4sif.org, and you can view them there, download them, look them in Google Docs, etc. The – and there are several hyperlinks embedded in there.

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So the next topic I wanted to talk about is the common argument you hear quite often, which is that we could form intellectual property by contract or that intellectual property like patent and copyright are justified as a type of breach of contract. And I am on slide 26 of my set of slides right now, by the way. The title is "IP by Contract." So the basic argument, which I've addressed already, by the way, in my long IP article from 2001 in the reference given there. The basic argument is that imagine that imagine that you sell a book to someone or you sell a ticket to a movie to a customer.

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And you put on there some fine print or you make someone even sign a contract saying I promise not to do certain things with the information which I'm about to receive. So in the book case, you promise not to copy it. You promise not to learn from it in certain ways. You promise not to use it in certain ways. You promise that if you ever write your own novel in the future, if it bears too much of a "resemblance" to the novel you've purchased, then you have to pay monetary damages to the seller.

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If you go to a movie theater, you promise to not record the movie with a cell phone or with a hidden camera, etc. So I would say the first problem with these ideas is that you have to recognize that contracts only establish rights between the parties to the contract at best. That is, between the buyer and the seller or party A and party B, whereas the entire concept of intellectual property, patent, and copyright, is that they're what's called real rights. They're rights against the whole world, similar to rights in your body or your tangible property. You don't have to have a contract with someone to have a right that they don't trespass against your body or burgle your house, etc.

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That's a real right, a good against the world. So the IP proponents want patent and copyright, for example, to be real rights, good against the whole world, and that's how they're enforced now. So there's literally no way you can achieve that by contract. Contract you could at most have some kind of contractual regime against a certain number of people. But anyone outside of that regime would never be bound by it, so it's just impossible even in principle. As a practical matter, I believe that these contractual regimens would not get off the ground because they're not attractive to customers.

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So let's imagine Amazon and Barnes & Noble and iBooks and other different book sellers. If one of them or one of the publishers like McMillan or whatever, Penguin says we will only sell a physical copy of this book or even an e-book to someone who will agree to the following terms that you may not learn from, be influenced by, reveal secrets from, or make photocopies of, etc. the book that you're getting from us, that you're paying, say, $10, $12, $15, $20 for. And if you do, you agree to repay us monetary damages or pay us monetary damages in the hundreds of thousands or millions of dollars.

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So I'm going to buy a $15 fantasy novel from Amazon, and I have to agree to be liable for a million dollars or hundreds of millions of dollars of damages to the seller if I make a copy of the book or if I learn from it or if I loan the book to someone without their permission. Now, I believe most people would be very reluctant to obligate themselves to pay millions and millions of dollars of damages just for the privilege of getting a book, especially when you can get it in a pirated copy that is not subject to these conditions. So basically book sellers and other sellers of content would be driving legitimate customers away from just a standard book purchase.

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So they would have a dwindling and smaller and smaller set of possible customers who would actually buy their books legitimately and who would just be driven into the pirated world so they wouldn't be subject to these draconian enforcement penalties. On the other hand, if the penalties were very small, they wouldn't do any good because if I buy a book for $20 and the penalty is $5 or $100 if I posted a copy of the book, then I might do it because I'm not too worried about the penalties. So the contractual idea is problematic in that respect as well.

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I mean if you look at what's happening right now in the Supreme Court case that I mentioned earlier in the first part of the lecture, there's a case pending about the copyright first sale doctrine. And the idea there is that physical things that you've purchased like a painting or a piece of furniture or a watch, maybe an item of clothing, certainly a book, anything that has something, some pattern or design on it that is subject to copyright protection, you can't even resell the physical object anymore without the permission of the copyright holder if the item was produced overseas, outside of the US, because of the possible interpretation of the copyright laws first sale doctrine, which says that the copyright holder can only control the first sale of the item.

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They can't take a bite out of the apple after that, but the courts have now said, well, that only applies if the sales is in the US, which means if you buy something overseas like a foreign book that's in a library, now the copyright holder can still prevent you from using that copy for other than personal use basically. You can't resell it. You can't even loan it to someone else, etc. because that would be a copyright violation.

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So if these outcomes of copyright law had to be contractually negotiated, you can see that they would be very, very unpopular with consumers who want to just buy an object and own it and dispose of it. And the seller just wants to make a little profit off of the first sale and be done with it for the same reason that courts in – even modern courts in the US and other countries are reluctant to enforce specific performance in court awards. So, for example, let's say someone agrees to perform a magic show at your child's birthday party, and they don't perform or they refuse to perform. The court is not going to issue an order saying you have to go perform your magic show on contempt of court.

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What they'll just do is they'll award damages. They'll say you own $1000 damages or whatever to the person who – to the other party of the contract that you breached because it's easier to supervise for the court. And not only that, it's just infeasible to expect someone to do a good magic show when they're compelled by the court. The court realizes they don't want to have to get their hands dirty enforcing all this, and likewise I think that, look, if you want to sell a ticket to a movie or a physical book or a DVD or whatever, you want to get your money and go on.

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It's just too much hassle to go around policing how the person who purchases this item is going to use it afterwards. Even if you have a contract with them that lets you do it, I mean we're talking a few dollars' profit per item. It's just not worth it to have to get involved in this hassle of enforcing restrictions on how they use it, which is why I believe that it's just infeasible as a practical matter for sellers of objects that are valuable to customers to expect it to be not really a sale in which all the rights are transferred, but instead some kind of basically a lease or a co-ownership arrangement.

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To retain rights in the way a customer uses a book basically, you have to loan them the book or keep an ownership in the book. You have to say something like I am not selling you this book 100% outright. I am giving you a partial ownership right in it. I'm loaning it to you or leasing it to you or co-owning it with you so that you have certain defined rights, and I have certain defined rights. I'm selling you this $15 book, and you can only use it to read it in your bed at night or on the airplane. But you can't do X, Y, and Z with it. You can't even resell it. By contrast, I have all the remaining rights. For a very small sale like this, it's just too much to keep up with maintaining who owns – keeping track of who owns what. So for that reason I think these contracts would be completely impractical and unenforceable.

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Now, let's talk about sort of the most sophisticated version of this that I've seen, which would be Rothbard's view, which he writes about in *Ethics of Liberty*. And I'll be totally honest. I think Rothbard went down the wrong path on this one. I think he made a mistake. I think that if he would have lived past 1995 and we could have had a discussion about it, he would have realized he had made a mistake because he basically ended up begging the question and making some bizarre assumptions and contradicting other things he had written, which are clearly anti-IP like his chapter in *Ethics of Liberty* on defamation law and knowledge, which clearly implies and supports the anti-IP case.

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But his argument was that, look, the seller of a mousetrap could agree with the buyer that the buyer doesn't have the right to copy it. And then if some third party – and then he says, but the problem is what about third parties? So Rothbard recognizes that to really simulate anything like patent or copyright, you have to somehow get third parties bound by these limitations as well.

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Otherwise, there would be a whole class of people who weren't bound by the restrictions, and the idea would just be able to be copied by all these people. So he recognizes this, so he tries to come up with an argument for how the third party could be bound. And what he says is he makes an analogy to property law, and he says, well, in property law, if you own a piece of property or you have some rights in a piece of property they're not completely full rights. You can only transfer to a new buyer what you own. So, for example, let's say you have a lease in an apartment. You don't have full title to the apartment. Now, let's say the lease lasts for a year, and you have the right to sublet it.

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Okay, let's just assume that. So you could sublet the apartment to someone else, but if you tried to sell the apartment to someone else, then that sale would be null and void because you didn't own the apartment in the first place. And the person who bought it from you may have been swindled by you, but they wouldn't have a right to the apartment against the landlord because they can only get title from the seller the seller is entitled to give over. So Rothbard tries to make an analogy, and the analogy is that the buyer of the mousetrap, if he has contractually agreed not to copy the mousetrap, well, he doesn't have the right to copy so called. So, therefore, someone he sells it to doesn't get the right to copy either.

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Now, there are several problems with this argument, and so then Rothbard would say, well, in that way, third parties could be sort of ensnared. Now, there are several problems. Number one, even if he's right, only some third parties could be ensnared, not all third parties, maybe only second sellers or whatever, second buyers or whatever you call them, but not third parties who just observe or view the mousetrap and they learn from it. The mistake Rothbard makes here is he assumes that knowledge or information is an ownable thing because you have to assume that to assume that you need some kind of property right to make a copy of something that you've learned about.

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In other words, why would you need permission in the first place to just use your own property as you see fit to make a new mousetrap using knowledge that you've acquired? If you buy a piece of property – anyway, okay. I was interrupted. So the Rothbardian argument here just won't work. There's other problems with it. For example, he's talking about a mousetrap, which is an invention, which is the subject matter of copyright – I'm sorry, of patent. Yet he's talking about it being copyrighted. So it's like he's mixing together types of IP, and as an IP lawyer, I actually have no idea how he really expects this system to work. He says you stamp copyright on a product like a mousetrap. Well, I mean, first of all, patent right now covers things other than physical products.

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It covers other types of inventions like methods or processes, and I'm not sure how you're supposed to stamp the word copyright on a process. And the bottom line is if you reveal information to the world, then you have to expect people will learn from that. As Benjamin Tucker said, if you don't want your ideas to get out there, don't let anyone know. Keep them to yourself. Just like any type of free market activity, if you do something that is observable and physical and that people will see, you have to expect that they may learn from that and emulate or imitate you or compete with you.

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And if you don't want people to be able to do that, then don't make it public. But that's the choice you face when you want to make a profit sometimes. You have to do some things that are public. You have to advertise your product. You have to let people know what you're doing. If you come up with a new innovation on a mousetrap, you want your customers to know what it is. You'll put it on the label. You'll say this new mousetrap has the following feature, and you're hoping to attract customers by that.

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By the same token, you are alerting the world to what is unique about your product, and if it's successful and popular then you're going to send a signal to people, hey, come compete with me. So this is the dilemma in a sense that any entrepreneur faces. As soon as you are successful in any endeavor, you're going to make a profit, which is sort of an unnatural thing. It's a temporary, unnatural thing that is going to be reduced as soon as you attract competition, and this is just the way the free market works. So there are several problems with this. I discuss this in detail in my "Against Intellectual Property" article in the section "Contract Versus Reserved Rights," and I think that will address this issue as well, so let's go on to slide 27.

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Okay, so the next argument you'll hear quite often from different types of advocates is that it's in the Constitution. That is, the American argument that patent and copyright are justified because they're in the Constitution. I'm not sure what to say about this kind of argument. It's really nothing but appeal to authority and appeal to a weird authority at that because no serious libertarian would believe that the United States or the American founding or the Constitution are exactly libertarian.

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There are some pro-libertarian things about it, but it's not like a libertarian utopian document. I mean Ayn Rand, for example, who was a big pro-IP person, one of the original founders of modern libertarianism, and also a huge pro-American type and a minarchist and a pro-constitutionalist, was probably overly influenced, for example, by the Constitution and the thought of the founders. She did emphasize a lot of the good things about their thought, but she, like a lot of other pro-Americans, downplayed some of the negative aspects of, say, America. And you want there to be a libertarian utopia, and you look to the American founding as a reasonable facsimile of that, but of course it wasn't. There was slavery. There was women's rights not be respected. There was war. There was inflation. There was taxation, lots of defects of the Constitution, not to mention the state itself.

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Even – the story I've heard, and I believe there's some documentation to back this up is that Ayn Rand even initially thought that imminent domain, also called condemnation or takings, that imminent domain by the state, which is when the state takes some property, private property and uses it for some public use and compensates the expropriated owner. She thought that was legitimate because it was in the Constitution. It's recognized in the Fifth Amendment. The Fifth Amendment says you can take property only if you pay compensation for it. So at least it requires the government to pay compensation, so that is a good thing.

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But the fact that the government can take private property for public use is not a good thing from the libertarian perspective. And Ayn Rand initially thought that was legitimate because she comes here from Russia. She comes from a totalitarian system. She sees this wonderful, freer society with prosperity, and she sort of assumes I believe that the constitutional system we have set up was presumptively valid. And likewise, I think she made a mistake. Now, she changed her mind on imminent domain to her credit and probably on taxation and of course on slavery and things like this. So she recognized it wasn't perfect. If you remember in *Atlas Shrugged* at the end, she has Judge Narragansett, her sort of libertarian judicial figure, making a few small amendments to the Constitution to make it "perfect."

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Actually, I don't know if that's a quote, but the point is she clearly thought the Constitution was almost a libertarian blueprint for the right kind of – or capitalist blueprint for the kind of society that we should have. And I think she was overly influenced by the fact that the Constitution has inside of it a patent and copyright clause, which authorizes the Congress to protect intellectual creations and inventions by means of copyright and patent if the Congress wants to.

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Okay, so a few things I'll mention about this. Number one, it's important to understand that the constitution says that Congress can enact these laws to promote the progress of the science and the useful arts, of science and the useful arts. Now, back then, science meant not natural sciences, but it meant just knowledge like scienter.

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So it was referring to creative works, and the useful arts would be like what artisans produce, which is mechanical contraptions and devices, so that's the inventions parts. So actually the science part is what gives the right of Congress to enact a copyright law, and the useful arts part is what gives Congress the right to past the patent law. Now, there are other types of intellectual property like trademark and trade secret.

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Trade secret is still state law because Congress has no authority to pass trade secret law, although they have invaded this field a little bit with some types of domestic – sorry, national trade secret protections, but it's primarily state still. And in the field of trademark, there is no authority granted to the Congress whatsoever in the Constitution to enact a trademark law. So it used to be state-based, but the Lanham Act, L-A-N-H-A-M, the Lanham Act was passed oh, I don't know, in the – maybe the '40s or '50s, maybe earlier, which is the national federal uniform trademark law. It doesn't completely get rid of state trademark law, but it basically makes – it established a national trademark system, and the authority for that is claimed to be interstate commerce clause.

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Now, oddly enough, the patent and the trademark laws are administered by the same agency, the United States Patent and Trademark office, which is an agency of the Department of Commerce. So patent and trademark are lumped together under one agency even though one of them is protected by the Constitution and the other is not. And the copyright law is administered by the copyright office, which is part of the Library of Congress, which is bizarre because that's basically an arm of Congress, the legislative branch, not the executive branch.

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But we can't expect these things to make sense. But I would just say that we have to stop thinking that things are legitimate from a libertarian point of view just because they're in the Constitution. As I mentioned earlier, we have conscription. We have taxation. We have wars. We have slavery. We have central banks. We've had institutionalized racism and lots of other terrible policies and institutions and laws because of the Constitution itself and the federal governmental system.

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If you remember, if anyone's read some of L. Neil Smith's great anarcho-capitalist fiction like *Probability Broach* and *The Gallatin Divergence*, the word constitution is used in the sort of seeing he said so, a crumbling American confederation, which is almost anarchistic. The word constitution is used as a swear word. People will say constitution with an exclamation mark almost like a swear word. And I think that's really how we libertarians should think about it. Constitution is not a good thing.

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I'm on to slide 28 now. The other thing to recognize is that assumption among libertarians who argue for IP, they tend to be more rights-based or principles-based or deontological than utilitarian than – I'm sorry, than utilitarian about this. They tend to argue that intellectual property is a natural right, and they tend to – when they point to the US Constitution in support, they tend to assume that the founders viewed IP as a natural right as well.

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Now, Professor Tom Bell and other scholars like I think Ronan Deazley – I have links to this, by the way, on my – I think it's in the slide here, and it's on my website that show, contrary to the claims of some Randians like Adam Mossoff and others, Locke, who was a major influence on the founders, and the founders themselves like Jefferson, etc., Madison – none of these guys really viewed IP as a natural right. They knew that it was not a natural right, but they felt the government had the authority to put in some temporary measure for some kind of a narrow purpose. So they thought they were – it's a privilege basically. They were stimulating innovation.

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They thought the government should have the authority to, if it in its wisdom, thinks it's a good idea to give artists and inventors some kind of temporary monopoly just so they would be stimulated. So it was for a social end. It was a social policy tool. They were trying to intervene in the market. It's clearly un-libertarian, but they didn't at least think that it was a natural right. And yet on occasion they would use natural rights language in their lobbying attempts to sell these ideas or to defend them after people started wondering why the hell is the government granting these monopoly rights.

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So that's the first thing I recognize is that the Constitution – number one, the founders, the Constitution, Locke did not view IP as a natural right. You can even see that in the structure of the Constitution itself because it doesn't protect these rights. It only gives Congress the ability to pass a law about it if it wants to, so it's perfectly constitutional if the patent and copyright act were to be abolished tomorrow. There's no obligation on part of Congress to have a patent and copyright act. It's just an option that they have.

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So – and furthermore, these rights are going to be limited to a certain number of years, and they are limited to a certain number of years. The patents last around 17, 18, 19 years, 20 years max. Copyrights last the life of the author plus, I think, 70 years right now, which is, let's say, roughly 130 years, something like this, 130, 120, 150 years depending upon how long the person lives, so well over 100 years even though initially they were about 14, 28 years, something like that.

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Now, what kind of natural right expires after an arbitrary time set by Congress, 14 years, 20 year, even 100 years? This is not how natural rights work. You have a natural right to your body. You can – you own your body as long as you live even if it's 1000 years. You own your home, and you can leave it to

your descendants, and they can own it in perpetuity, same thing with other property like a car or a watch or money, etc. So it's clear that these rights were never viewed as natural rights.

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Furthermore, as I quoted, the original clause in the Constitution is explicitly empirical and sort of wealth-maximization-based. It says that to promote the progress of the sciences and the arts. Now, some people argue that, unless there is proof available that shows that these laws actually do promote the progress of the science and the useful arts, then the law is unconstitutional. I think that's kind of a weak argument, although I like it. I think that that's more what we call precatory language.

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I think it wasn't a limitation on the power, but I'm all in favor of the argument that it was. But in any case, it happens to be the case that there was no evidence at the time of the Constitution or at the time of the first patent and copyright laws enacted shortly after the Constitution was ratified in 1789. There was no evidence at the time. There was no empirical evidence whatsoever available that showed that patent and copyright law actually did lead to over – some kind of overall increase in innovation. And in the 230-40 years since, there's been no subsequent proof that unambiguously shows this either.

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So if you basically view these things as monopolies granted by the state, as monopoly privileges, special privileges granted to certain people, which at least on their face impede competition, restrict property rights, etc., and they're justified only insofar as they increase innovation, then you would think that the burden of proof would be on anyone who proposes these weird, temporary monopoly privileges, these sort of exceptional incursions into normal operations of the free market.

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And because there's no proof one way or the other – actually, there's a lot of proof on our side. There's a lot of reason to believe that the patent and copyright system cause hundreds of billions of dollars of damage overall to innovation and creativity to the economy every year, and at the very least, gross distortion and lots of individual unjust acts like people going to jail or suffering hundreds of thousands of dollars in damages because of otherwise peaceful actions.

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But my point is even if we couldn't prove our side and they can't prove their side, the question is who is the burden of proof on? If you want to argue that a given policy, which invades private property rights at least facially, and that hampers competition, if you want to argue that that's justified when it results in some kind of overall net innovative wealth benefit to society, the you need to show that it does. And if you can't show it, even if it's because it's impossible to show it for methodological reasons, which I think it is actually impossible to show it.

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I think it's impossible to show because of Rothbardian, Austrian methodological views. I think you can never show that an act of coercion benefits society because if one party gains, the other party demonstrably loses because they had to be forced to comply. But even if you overlook this, the point is there are no clear empirical studies even ignoring these other methodological problems. There are no empirical studies demonstrating the utilitarian case. In fact, all the studies that I'm aware of, they usually are either ambiguous. They say, well, we just can't tell. Now, there's a reason they can't tell because you can't add ordinal value.

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You can't add value between individuals. It's not intersubjectively comparable, and there's other reasons for this too. There's knowledge problems. There's measurement problems. So that's one reason they can't prove this, so some of these studies are ambiguous. They say, well, we haven't proved the case that IP is a good thing, or they will just say, listen, as far as we can tell, there is tens of millions or billions of dollars of damages being done by IP in this area.

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So pretty much all the studies are against the utilitarian argument for IP, and you would think that if you are really a serious, sincere, honest, utilitarian, and if your argument for IP was really that you thought it did – it made us wealth overall, made everyone better off, then you would think that if you saw the results of these studies, you would say, hmm, I guess I was wrong, and you would withdraw your support, which leads me to believe that most people are not really serious that claim to be utilitarians.

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They don't really have any evidence. They know they don't have any evidence, and it's just sort of a make-weight argument. It's not their real argument for IP. Their real argument is something else. It's either intuitive or it's conservative in the sense that they just know we have this system. They don't want to change anything, or special-interest related. They are maybe an author themselves, or they – there is interests that have arguments on behalf of the movie and the music industry, etc. And clearly they're self-interested, and they have an interest in keeping the system alive, or you have the patent bar, for example, and patent attorneys like myself make a good deal of money off the system.

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Of course, you're going to just argue that of course it's a good idea, etc. But the bottom line is the utilitarian case has not been proven, so the constitutional argument falls on so many grounds. It's an appeal to authority. It's an appeal to legal positivism, that is, what someone else said, but it's a just a committee of bureaucrats issuing edicts. It's an appeal to some kind of wealth-maximization criteria, which has not been proven by any kind of studies that are reliable, etc., so the case just falls on so many grounds.

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And I'll go to slide 29 in a second, but one final comment here is we shouldn't be surprised by this because the – given the history of patent and copyright, they arose from historical attempts to censor, to establish monopoly privilege, and a type of protectionism. So it's no surprise that the modern outcome of these original systems is the same, maybe a little bit more sophisticated, a little bit more institutionalized, a little bit more de-personalized and fancier, but no different. So we shouldn't be surprised that modern copyright law still results in censorship as does patent, by the way, and that the patent system, which originated in protectionism and monopoly privilege still ends up protecting certain entrenched industry players from competition and helps establish monopolies.

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It's no surprise that when the state grants a legal monopoly dressed up in the form of a patent – and by the way, patents originated in England in what's called the Statute of Monopolies. It's no surprise that when the state grants these monopolies that monopolistic practices and oligopolistic practices emerge from this.

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Oh, I see on slide 29 here I've already mentioned some of this about Ayn Rand and eminent domain. But Ayn Rand, if I recall correctly, and some of her supporters still do this, supported the practice of the state having the power or the authority to compel, number one, jury duty service, and also witnesses. So if you're a material witness in a case, civil or criminal, then under the current law, the government has the power to compel you by subpoena to appear and to give testimony, even if it's dangerous to you like if you testify against the mafia or something like that.

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They can force you to do this, and this is supported by the Sixth Amendment to the Constitution, by the way. And also, of course, she believed that we have – the jury is a – the jury system is a good system. She had some arguments there. But that means she also believes the government has the right to compel you to become a juror even if you don't want to perform. So that's another example of the perils of relying upon a legal – a positive legal document issued by the decree of basically a bunch of state actors, to rely upon that as an authority form, a standard of morality. I think she's wrong about that. She's wrong to rely upon them for anything. We need to evaluate it.

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Some parts of the American system, for example, are justified like a law against murder, but it's not because the government says it's wrong. It's because it is wrong. The government just happens to be right here because they've co-opted something that is a natural rule that people would adopt without the government in the first place.

00:35:57

Okay, so – okay, I see earlier I talked about utilitarianism, and I did this before I had actually gotten to my slides on this. I'd forgotten I hadn't gotten to that yet, so I'm on slide 30 now. Let me briefly go through the utilitarian argument on IP and why there are many problems with this argument.

00:36:18

So the basic utilitarian argument or the wealth-maximization argument, is the idea that we can adopt certain legal rules or laws or policies that will tweak sort of the baseline set of rules that we have, and it will shift what's going on in society, shift behavior. And it will make us all better off overall. And even if on occasion a given person might be disadvantaged by the operation of a given law, overall a society is richer and theoretically – and this is Richard Epstein's argument, by the way, in his *Takings* book. Theoretically, you could compensate the people who are harmed with a surplus.

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So, in other words, if you imagine society as having a pie of wealth of a certain size and everyone's got a certain slice of it, different-sized slices, if we could adopt a law that will grow the overall size of the pie by a significant amount, even if you have to hurt one person to do that like taking someone's land to make a road, for example, then the overall surplus in wealth that you generate, you could take a part of that, compensate the person you've expropriated.

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So, for example, let's say we want to build a highway system, and we think it will generate $100 billion worth of economic activity because we'll have more traffic. But you have to take the land of a thousand people to do this, and you have to pay them, let's say, $10 billion to pay them back. Well, if you get a 100 billion in increased value and you take 10 billion of that to compensate the people who have been expropriated, then they're no worse off.

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And society is worse off by $90 billion, and you can use that money to fund the government or to redistribute back to the people or whatever. That's Epstein's idea. Now, it suffers from a lot of problems, but that's the basic idea also behind IP law. The idea is that if we restrict people's rights in a certain way, then we make certain activities more profitable like publishing books, making paintings, making movies, coming up with new, innovative, and inventive ideas, etc. because people can now use their monopolies that the state gives them to make a profit for 10 or 15 or 20 or whatever years and that, although some people are harmed a little bit, overall we're made better off. And so overall, this is a good idea. In other words, the government can actually make us wealthier by shifting and adjusting and tinkering with the economy.

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So the first problem with this idea is what's called methodological. It's the Austrian – it's based upon the Austrian idea, the idea of – the approach that Mises had, for example, to economics and value. Mises recognized that value is not a substance. It's not a thing. It's not a quantity that you can measure. Value is just what he called demonstrated in action. So when you choose among different things you could aim at in a given limited amount of time with a limited amount of resources, you choose among a number of ends. You choose to do A instead of B or C. So when you choose a, the opportunity costs of that action would be B or C, which you could have done. But all you show is that you value A more than B, but you don't value it more in a numerical sense.

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These are not numbers. They're orders. Like you have your first preference would be number one, would be A. Your second preferred thing would be two or B, but it wouldn't be like you have 110% on A and 92% o B. All we know is that, in action, you demonstrate the one thing that you prefer more than the others, so that's the first idea.

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The first idea is that all value is subjective. That is, it's the result of your subjective preferences. It's demonstrated in action. It's ordinal, and it's not interpersonally comparable. That is, you can't say that person – John prefers an apple 2.2 times, and Sally prefers the apple 2.1 times. Even if there's a money price on an apple in a given market of a dollar an apple or $0.10 per apple, that doesn't mean the apple is worth $0.10. It only means that's the result of the market's interplay of all the subjective valuations resulting in a number, but it's not a measure of the value that people put on the apple, as Mises explicitly says.

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So the first problem with utilitarianism is that it wants to add up all the values people have and to choose legal policies that will somehow shift these values around and result in an overall sum total of utility to society that is greater than before. So the first problem is that that's not how value works. It's just not a number. It's not cardinal. It's only ordinal. And, by the way, at Libertopia I had a long discussion with David Friedman about this who is a – more of a Chicago wealth-maximization type, and he believes that von Neumann proved that you could cardinalize value. I don't believe it. I don't buy it at all. [Update: see Robert Murphy's devastating critique of Friedman's contentions, at Why Austrians Stress Ordinal Utility.]

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Even if you could, we go on to the next problem, which is ethical. The ethical problem is that even if you could attach numbers somehow, objective cardinal numbers to value, that doesn't mean that it is valid for – to transfer property from one person to the other. So let's take an example. Let's say that we could prove that Bill Gates values his marginal dollars of his top million dollars out of his billions of dollars. He values each of those – each dollar in his top million dollars out of his $70 billion of wealth. He values each one of those dollars less than a poor person values it and, of course, there's arguments that this is actually false, that poor people value them even less than he does. Otherwise, they would have worked to get them or whatever, but the point is the Austrian view is that there's no numbers associated in the first place. So these interpersonal comparisons are meaningless.

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But let's say that we assume that Bill Gates, if we take a dollar from Bill Gates and we give a dollar to a poor person that Bill Gates is harmed less by that act of theft than the poor person is benefited. Well, this still doesn't mean that it's ethical to do it because it's still an act of theft. You could take the more extreme examples. You could take cases where some person or group of people really desire to do something very, very horrible like murder or rape or kill someone else.

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I mean let's say there's some person who expresses some religious view that is out of sync with the community, and it really offends everyone in the community. So let's say we have 100 people in the community who are so offended by this one heretic who recanted their religion or whatever. I mean you could argue that if they stone the heretic to death, then the heretic suffers of course.

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But they only suffer once, and they only suffer one human's experience of death, whatever that is. Let's say it's 100 negative utiles. And let's say every person in the crowd gets ten utiles of pleasure out of knowing they've vanquished this heretic. So if you add up the sum, ten positive utiles per person for 100 or 1000 people, it's much greater than the negative damage that they – the victim suffered. It's still not ethical according to libertarianism because you basically are violating someone's rights, and you're making those suffer when they've done nothing wrong.

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So the first two hurdles that utilitarians have to face is this. It is that, number one, there are methodological problems, and basically that's the Austrian take on it. And number two, there's ethical problems. But finally, even if we forget these two problems, there's the empirical problem, and that is that, as I mentioned before, the numbers just do not show their case. You would think that if you're arguing for an intervention into the natural free market propertarian system on the grounds that it's justified because it causes an increase in wealth that you would have some evidence, some kind of study, some kind of measurement, some kind of argument for what the – to prove that your patents and copyrights system actually does increase overall wealth.

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So, for example, if you say we need a patent system to cause there to be more innovation, it's a reasonable request for me to say, well, what would be the total value of innovation in a patent-free society? What is the value of the innovation when we do have patents? What's the difference? What's the cost of the patent system, and how do you know these numbers? Where did you get them from? Instead, the advocates of the patent system, for example, never ever produce these numbers.

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True, there have been some attempts to come up with some of these numbers, but as I mentioned, by all the people who study it, they pretty much conclude we have no way of proving this whatsoever. Or they say it looks like to us this system is causing billions or tens of billions or even hundreds of billions of damage every year or whatever relevant period of time that there is.

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So if you'll go to slide 31 of my slides, which is entitled "Utilitarian Arguments for IP," I've got a few quotes here. You can read through them yourself. So let's just go through it. Like I mentioned, the founders in 1789, when they put these clauses in the patent system, they didn't do a lot of empirical

studies first. They just were putting in place in the Constitution the authority for Congress to continue what the European system had been doing for a couple of centuries in the name of censorship and monopoly privilege and protectionism. They made it a little bit more institutionalized, but – so they didn't really do a lot of studies, and of course, there weren't a lot of sophisticated, modern, econometric, or empirical studies done by – in the, say, the next hundred years, in the 1800s.

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In the 1900s, the 20th century, people started looking into this. There was actually lot of controversies. Most economists used to believe that monopolies were a bad thing, which is the impetus behind the anti-trust law, etc., but they made an exception for these types of laws. In any case, Fritz Machlup, who's an Austrian economist who was commissioned by the Congress in the US in '50s to do a big study of this whole issue, in 1958, he concluded that "No economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or loss on society.

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The best he can do is to state assumptions and make guesses about the extent to which reality corresponds to these assumptions." And then he concludes, "If we did not have a patent system, it would be irresponsible on the basis of our present knowledge of its economic consequences to recommend instituting one." So what he's saying is even 160 or so years after the original patent system, we have no reason to have a patent system.

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Another economist named George Priest in 1986 says that "In the current state of knowledge—so this is 30 years after Fritz Machlup's landmark congressional study. George Priest says, "In the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property."

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Okay, and maybe ten years, eight years ago, 2004, two French researchers concluded that "The abolition or preservation of intellectual property protection is not a purely theoretical question. To decide on it from an economic viewpoint, we must be able to assess all the consequences of protection and determine whether the total favorable effects for society outweigh the total negative effects. Unfortunately, this exercise is no more within our reach today than it was in Machlup's day in the 1950s."

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So what they're saying is even as – even in the 2000s, we still don't have any reason to believe that IP contributes this net gain to society that its proponents say it does. In 2008, just four years ago, two Boston University Law School professors and their economists as well, Michael Meurer and Jim Bessen, they concluded that on average, the patent system discouraged innovation. They said, "it seems unlikely that patents today are an effective policy instrument to encourage innovation overall."

And in fact, they said it seems clear that "patents place a drag on innovation" and that "the patent system fails on its own terms."

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Okay, and finally, in the paper that's a draft working paper right now, it's still a draft form by Boldrin and Levine, the authors of the landmark empirical anti-IP study against intellectual monopoly, not to be confused with my book, *Against Intellectual Property*. My case is more principled and rights-based and based upon libertarian principles and propertarian principles. Theirs is simply based upon examining the empirical arguments for it and showing why they all fail. And in their recent study, they said that "The case against patents can be summarized briefly: there is no empirical evidence that they serve to increase innovation and productivity."

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And then they conclude that "there is strong evidence that patents have many negative consequences." So the point is that if you are really a serious utilitarian, if that was really your approach to policy, you would actually be against IP law because all the evidence is either inconclusive or pushes against it.

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Okay, so let's talk – but as we're talking about numbers, let's look at a few other things just to put these things in perspective. Again, the main case against IP is that it infringes property rights and liberty, not the empirical case, but the empirical case itself for IP falls – can't sustain itself. On slide 36. There was recent – I think that the IP defenders know that they're on the ropes, and they're trying to pull out every argument they can.

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And they know there's no good studies in favor of IP, so whenever something comes out, they try to color it as contributing – arguing for IP. So there was a recent Commerce Department Patent Office study, and all the advocates of IP said that this study showed that intellectual property can attribute $5 trillion and 40 million jobs to the American economy I think every year.

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Now, all they meant was that they looked at what part – how much of the United States economy, which I think is around $14 trillion a year in GDP, $14-15 trillion a year, how many of the industries that generate part of this GDP have aspects of their industry that are protected by IP. And then they said, well, then IP contributes to that. Well, there are, first of all, so many problems with this. Number one, correlation is not causation. Just because the computer industry or the car industry is affected by patent rights, for example, it doesn't mean that patent rights are the cause of their prosperity.

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It could be that it's a neutral effect, or it could be that they're successful despite it. In fact, that's my view. I believe that the American industry – American economy would be much stronger without

patent or copyright. I think it's strong despite intellectual property just like it's strong or it's prosperous to a certain degree despite taxes and wars and conscription and regulations and tariffs, etc. So that's the first thing. And another example of the flaw of the study, the number-one intellectual property-intensive industry that was identified in the study was grocery stores.

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Now, usually you would think of Apple or IBM or some high-tech or the movie industry as being more affected by IP law. This just goes to show you that every industry is basically affected by IP law. I mean grocery stores have food. Food is made by companies that have patents on corn or genetic patents or trademarks on the brand names they use like Crest toothpaste, etc. So this is supposed to be some kind of proof that patents and IP contributes trillions of dollars of gain. It's just not even a serious argument at all.

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Okay, now, what's the reality? As I mentioned, there's no studies that really show that it imposes any benefit on society. My own estimate as a patent lawyer, as a libertarian, as an Austrian economics student working on this area for a long time, my estimate is that the patent system in the United States alone imposes at least $100 billion of net damage to the economy, probably far more. My guess is probably far more. I don't think it's possible to know these numbers exactly, but we do have some cost: patent lawsuits, research and development dollars that are diverted towards acquiring patents or defending against patents, reduced competition, etc.

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There was also a fairly recent study done showing – it was talking about software patents only. And the question is – the question was regarding software patents, which are fairly recent innovations. They last 15, 20 years. And a lot of people that want patent reform want us to get rid of software patents or patent trolls. They are never principled of course. They never look at the root issue. They never strike at the root. They never want to get rid of patents per se. They always want to just nibble at the edges.

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So their focus is on patent trolls and software patents. So they say what would it take for the American software industry to comply with all the software patents out there and to avoid infringing each other's patents? And the study concludes with some numbers, and I have scaled them up for the whole industry because they were conservative numbers. But based upon the study and my understanding of the industry and how the patent system works, the study basically would back up the idea that the software industry needs to hire six million patent attorneys and take almost $3 trillion per year just to examine, to take a look at, and be aware of all the patents out there and to change their products to avoid infringing them.

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So we're talking an industry that would have to hire six million patent attorneys and spend almost $3 trillion a year. Now, this is an industry – let me go to slide 38 now. I don't have the number here. I have it in my original post, which I have linked here about this, but basically just the revenues alone of the software industry are not anywhere near $2.7 trillion.

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Just think about it. That would be about one – I don't know. It would be about one-eighth of the entire US economy just from software. And there's only – I don't know – 40-50,000 patent attorneys in the entire American legal system right now because you have to have an engineering degree and a law degree to be a patent attorney. So you would have to multiply by tens or hundreds of times the number of patent attorneys and the budget spent – it would have to be more than even the revenue the software industry makes just to let them avoid infringing patents, which means it's impossible to avoid infringing patents basically. It's just impossible. So this is to put some perspective on – and this is just software patents. If you scale this up to the entire patent system, we're talking probably tens, maybe hundreds of trillions of dollars a year would have to be spent by everyone to avoid infringing patents.

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Now, how can this be a real property right? Regular property rights, they are very easy to avoid infringing. You observe a physical, publicly available border, and you just don't cross it, very simple. This is not what patents are about. There was a recent study that if Google, which owns YouTube I believe, were to prescreen all the YouTube videos to prevent any copyright-infringing videos, it would cost Google alone $37 billion a year. Now, Google's revenue last year, 2011, was $38 billion, revenue, not profit. So in other words, it would take all of Google's revenue to just make sure that YouTube is not having the wrong kinds of videos up.

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Okay, so we have lots of huge, horrendous costs from the copyright system and the patent system. Copyright is causing people to be jailed for uploading movies or extraditing foreign students to face federal prison fines in America for just having links on their website, which are legal in their own country like in Britain with the case of Richard Dwyer. We're having invasions with SWAT squads with 59 federal and other officers in other countries in the Megaupload case, ratcheting up the police state, choking back on internet freedom with attempts to – attempts like SOPA and PIPA, which have been defeated but only temporarily, the TPP, the Trans-Pacific Partnership, ACTA and other laws coming down the pike.

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And if you go with this empirical mindset that we – the government is justified in passing laws to try to tweak incentives to maximize or to optimize or to at least increase valuable, innovative behavior, where is the stopping point when, number one, I mean we can always make the patent and copyright terms even longer? Why stop at 17 years for patent and a hundred and X years for copyright? Why not go to a million years? Why stop at civil penalties in the case of patents or treble damages for patents and civil penalties and some jail fines for copyright? Why not go to ten times penalties for patents or public executions?

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Why not – how about public torture? I mean there's no limit to what you could do to try to increase these incentives to make the holding of these monopoly privilege rights more valuable to give a higher profit opportunity to the innovators so they would come up with even more innovations that they're not coming up with now because they can't make enough money. And what if having a monopoly by the government, even if it's very strongly enforced, even if the penalties are draconian, what if that monopoly right is just not enough?

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What if there's a life-saving drug that a large pharmaceutical company could come up with, but even the prospect of monopoly sales for 50 years, monopoly-priced sales of the drug, what if that's not enough to make it up? Well, hell, there's a drug there that we could be making that we could be benefiting from. So why not take some money from the taxpayers and give it to these companies to give them a little bit more cushion, give them a little bit more ability to engage in research and development?

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Apparently, the only goal of public policy is to just keep increasing the amount of innovation and creativity so – and the cost is irrelevant since people that promote IP and patents don't care about the cost and don't have any idea about what the cost is. They don't take it into account in their arguments, so what would be their opposition to having a taxpayer-funded, say, prize system? Well, it turns out that they don't oppose this actually. In fact, I think I mentioned it earlier in the first part of the talk.

01:01:13

Nobel Prize winners like Stiglitz, socialist – the Vermont senator, Bernie Sanders have proposed, and this has been endorsed by a quasi-libertarian. I don't know, quasi-Austrian, Alexander Tabarrok, they say that they would like to either augment or replace the United States patent system with this prize system. And they were talking about medical innovations only. So what they said was for medical innovations, it would be reasonable – I don't know how they get these numbers – but to have $80 billion a year of prizes, that is, taxpayer dollars, that some government-appointed committee of scientific experts can dole out.

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It's like an American taxpayer-funded, huge, huge Nobel Prize award except – so instead of giving patents or maybe in addition to giving patents or maybe in addition to giving somewhat weaker patents – who knows what they're in favor of – every year the government would announce here's our 5,000 award winners or 10,000 award winners. And they would hand out checks ranging from, I don't know, $1000 to a $1 billion or whatever. They've got to get rid of this $80 billion, and they're doing that to incentivize people.

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You figure if you engage in some heroic research, then the government is going to recognize your work and give you an award for it. I mean the idea is so ludicrous and so un-libertarian, but at least it's honest. But if you think about it, they're talking only about medical innovations. That's only one narrow sliver of the entire innovation space that the patent system, for example, covers. The patent system covers genetics and chemical and electrical and software and computer and hardware and lasers and mechanical devices and watches and any number of types of technology.

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So if you were going to be consistent, then you value all types of innovation. You would need to have the prize system ratcheted up to cover all types of innovation, not just medical devices. So this is – we're talking tens of trillions of dollars a year. Now, we have an economy of $14-15 trillion a year in the US, the richest on the planet. Even if we expropriate 90% of our wealth every year and use it all on innovation prizes, we have $10-12 trillion. That's not – even that's not enough. The idea is literally insane and obscene I would say.

01:03:46

Okay, enough on that. Let's go to slide 39. So here's another argument I've heard before, and I've been at small companies, general counsel at a small high-tech company for awhile. And I've dealt with venture capitalists, people who invest money in these small companies. So what they do is they will – they'll look at your business plan. They'll look at your sales. They'll look at your potential customers, your products, and they'll look at everything. They'll look at your numbers. They'll look at your employees. They'll look at your intellectual property. So the argument is that, well, without intellectual property, venture capital won't invest in companies.

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Now, there is a little bit something to this argument, and that is in today's society, a VC is not going to invest in a company that's a high-tech company that hasn't done their homework and gotten the right amount of patents. In other words, who isn't playing ball and playing the game as it's supposed to be played? But this is – doesn't mean that there should be a patent system. It only means that, if there's a patent system, then it causes certain behaviors.

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It gives rise to certain behaviors. It gives rise to the risk, number one, of being sued for patents, and it gives rise to the need to have a potential defense in the form of having patents. This is why these companies waste millions of dollars every year on patent attorney salaries and patent office fees, etc. or on buyouts of other companies' patent portfolios to increase their patent holdings. Sometimes they're doing it to get weapons to use for aggressive reasons like patent trolls do or like larger companies like Apple do. Sometimes they're doing it for defensive reasons, and that's usually the reason.

01:05:24

You want to have – it's called sometimes the porcupine defense, like you want to imagine you have a bunch of quills or weapons on you that are defensive and that your big competitors know that if they

sue you for infringing their patents, you can sue them back for infringing your patents. Well, you can only do that if you have a big arsenal of patents, which is too expensive for them to take time to dig through. They just assume if you have a big stack of patents, there might be something in there that they're infringing if you're in the same sort of technical space. So that's why these companies acquire these patents. It's almost like the nuclear weapon – the Cold War – during the Cold War time that the USSR and the United States both acquiring thousands of nuclear weapons only to dissuade the other side from firing first at you.

01:06:14

Of course, what this does is this causes the large companies to either not sue each other in the first place because they're afraid, so they just compete, or if they sue each other, they finally settle, and one pays the other a few billion dollars in royalties, and then they go back to business. They just raise their prices because they don't have any competition from the outside, outside these few small, large companies with the big patent arsenals because the smaller companies can't compete. They can't compete because they'll get sued for patent infringement. They get sued for patent infringement because the big companies like Apple and Microsoft know that they're not going to get sued back.

01:06:53

They're not going to get sued back because the small companies haven't had time and money to acquire a big patent arsenal themselves, or they can't even afford the $3 million, $5 million they need to pay lawyers just to defend themselves in a patent lawsuit. So basically the patent system gives rise to these small number of players in an oligopolized or even monopolized industry. There's lower competition, higher prices partly because the prices of all the patent acquisitions and patent lawsuits and the royalties that they pay each other are passed onto the consumers.

01:07:26

Consumers can't go to the smaller players because the smaller players don't exist. They don't exist because they can't compete, so this is one big problem with this whole argument. So the whole VC idea is just a ridiculous argument. You know, given the fact of the drug laws, a VC is not going to invest in a company run by someone who is selling cocaine openly because they're going to be arrested. That doesn't mean that cocaine laws are justified.

01:07:54

What about tax laws? If there's a notorious and open income tax cheat like Peter Schiff or someone – not Peter Schiff, sorry, his father, Irwin Schiff. He's not going to – a VC is not going to want to deal with that. They're not going to invest in them because they know the guys is about to get arrested maybe. That doesn't mean income tax law is justified. It just means that VCs are rational, and they respond to the effects of these laws. It doesn't mean the laws are justified at all. And, in fact, my view is that in a patent-free society, it would be at least as easy if not easier to get a venture capitalist to invest in you because now the VC knows that the risk of your small company being sued for patent infringement is zero.

01:08:43

That's a huge risk that small companies face now, small start-up companies. In fact, it's a common technique for the established companies to observe a small competitor, a small startup, about – becoming more and more successful. And when they file – they start filing the papers for their IPO, their initial public offering, right before they go public, they'll get slapped with a lawsuit, a patent infringement lawsuit.

01:09:12

Now, why do they do it? They time it like this on purpose because they know that it's going to delay or maybe ruin or reduce the success of the IPO. So they hit them with these lawsuits last minute, and that's why, if you look at the prospectuses of all these companies that are small companies that are filing their IPO statement, they always have these big sections saying we can't know that we're not infringing on anyone's patents.

01:09:38

There's always a danger that we'll get sued for patent infringement. In fact, there's a danger we'll get sued for patent infringement ten days before we're going to price our IPO, and that's quite often what happens. So without that risk – and look, seriously, a lot of these companies, even if they're successful, a lot of small companies don't have $3-10 million of cash sitting in the bank. They're lucky if they're paying their suppliers. Even if they're profitable, they're trying to expand.

01:10:04

So if they get sued for patent infringement, even if they're in the right under the law, they don't have $3 million or a million or $5 million to take a gamble on a patent lawsuit to defend themselves when it's up to a jury who doesn't know much about technology and who's interpreting vague, ambiguous, hyper-technical, weird, arbitrary legal standards in the patent law. I mean they might lose even if they're in the right. And even if they don't lose, they've lost $3 million, and they won't be able to keep going on. So they cave in of course, or more likely, they don't get engaged in this business in the first place.

01:10:43

This is what Hazlitt or Bastiat would talk about, the seen and the unseen. There are lots of marginal small businesses that just don't exist now that would exist if they weren't afraid of the terrible, damaging effect of the threat of a patent lawsuit. Just think of the smartphone space right now, which is dominated by, say, Samsung and even Android, Google, and Apple and Microsoft maybe to some degree. Some small company who wants to innovate in this area, there's almost no doubt they would be sued into oblivion by some of these players. So there's no wonder there's not a lot of small companies selling smartphones.

01:11:22

Okay, let's go on to slide 40. Here's one of my favorites, which I've been dealing with a lot lately. The slide is entitled "Questions as Arguments." So the important thing to point out here is to let people know and to be aware of the fact that having a question is fine. You can have questions. You can ask

questions, but questions are not arguments. Now, what do I mean by this? What I mean is I will come up with an argument like I've done here that patents and copyrights are unjustified for the following reasons, for whatever reasons. And the implication of that, of course, is that we should get rid of patent and copyright.

01:12:07

Now, instead of saying, well, here's what I disagree with or here's a mistake in your argument, I will often hear someone respond with, but how would people make money in an IP-free world, or, but how would – or, sorry – but what is the incentive of someone to come up with a new software product or write a new book if there's no IP? Now, they ask it like they're asking a question, but they're not asking a question because a question is not an argument. It's just literally not an argument. But they're responding to an argument with a question as if it's an argument. So what's going on here is that they're implicitly saying this. They're implicitly saying I think that the purpose of law is to tweak incentives to make sure we have certain social goals achieved to a desirable level.

01:13:08

And I think it's possible for the government to do this, and that's what makes law justified. Now, they don't want to say that because they don't really think in those coherent terms. If they did, they'd probably be libertarian instead of utilitarians, and they don't put it that way because if they did it would be – it would make it clear that they need to come up with a whole argument about social theory and legal theory and this is how laws are justified, and they don't want to do that either. So they want to sort of just assume that we all agree with these kind of common assumptions a lot of people share.

01:13:36

So that's the first problem. And then they would have to – so what they're really saying is if you don't answer my question adequately, then it means your argument is wrong. Now, that's just a bad argument, so I never answer these questions unless I first establish it's fine to be curious. It's fine to wonder what a future free world would look like. But we need to establish right now that it's not incumbent on me to predict that or to satisfy you that my predictions are accurate. And it's not incumbent on me to even be able to predict it to know what laws are wrong or right.

01:14:15

So on slide 40 here, as I mentioned, imagine the USSR under communism in the '70s or '80s. Let's say you made the standard arguments that communism is evil. It's uneconomic, it's a bad idea, and we should abolish it. We should allow private property and freedom. It wouldn't be a rebuttal argument for someone to say, but how many types of toothpaste would there be in a free market? Even if we don't know what the answer is, even if there was no other private economies of the world to look at to get some idea, even if the whole world was communist and we had no idea what the toothpaste market would look like if we freed up things, that doesn't mean that we have to keep communism until we know these things.

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Sometimes the only way to know is to free things up and see what happens. And another example would be slavery in the south or slavery in Ancient Greece, etc., slavery in the antebellum US. Someone proposing abolition of slavery could have been met and probably was met with questions like, if we get rid of slavery, who's going to pick the cotton? I mean it seems like a – almost a joke now, but that probably was a real question because the slaves actually did pick the cotton, and a lot of the industry at least in the south was plantation-based and farm-based and cotton-based. So who would pick the cotton? I don't know. Maybe no one would pick the cotton. Maybe cotton wouldn't be a viable industry without slavery or maybe…

01:15:54

But the point is if you make an argument against a given practice and argue for freeing people's lives up and say you argue against slavery and someone says, but who would pick the cotton, that question is literally not an argument. We have to recognize the same thing is true for intellectual property. When people have questions about what a free society would look like, what a real free economy would look like, free of these government monopoly privilege in shackles, that's fine that they have questions. But they have to recognize that their questions are not arguments to keep the current system unless you basically are the ultimate conservative, which in a way, Fritz Machlup was.

01:16:39

Remember I quoted Fritz Machlup earlier. Let me see if I can find this quote here. I don't see it on slide 40 or 41, but the earlier quote by Machlup was that if we didn't have a patent system, the current economic knowledge that we have wouldn't justify putting one in place. But he also said that we also don't know enough to get rid of it. If we have a patent system, we don't have enough knowledge to know that we should get rid of it.

01:17:07

Now, to me that argument makes no sense whatsoever. It's basically retreating to conservativism, like whatever laws we have in place, we should keep unless we have a good reason to change. Now, I might agree with that for certain social practices and traditions. You could make an argument for that but not for artificial laws decreed by the Congress, a bunch of bureaucrats and politicians.

01:17:28

Okay, I'm on slide 42 now. Here's another argument I've heard. Advocates of IP, especially authors and others, they get really upset when people say they're against IP. Now, I don't know why they're upset in the first place because they won. They have an IP system in place. They are forcing us to comply with their IP system. They have their copyright. They have their patents. It doesn't look like they're going away any time soon. So they're upset that other people disagree with them even though they are forced to go along with it.

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I would much rather switch places with them. I would be happy to have no patent or copyright and have a couple of socialist, fascist people griping about it on the sidelines. I would be so happy to have

– switch places. I would let them gripe about it to their heart's content. But in any case, they'll make this argument. They'll say, oh, all these young kids now, they just want something for free. Now what kind of argument is that? First of all, it's – I don't think it's honest and right. Maybe there's a lot of young people who want something for free.

01:18:31

Everyone wants something for a smaller price. That's why there's Kmart and Walmart and grocery stores that advertise they have the lowest prices because people bargain shop. They want something for the lowest price possible. That's called economic action. There's nothing wrong with trying to achieve something for the lowest cost. That's called economizing action or efficiency. But it also disparages the motives of, say, the bulk of people that are pirating.

01:18:59

But what it does is it just changes the subject. It assumes that they're doing something wrong and then goes on to address their low motives, which is merely material or crass or materialistic or profiteer. People just want to reduce their bottom line, and that's not a good motive to do something wrong. Well, that presupposes that it's wrong in the first place, so it's just a bad argument.

01:19:21

And most advocates of IP, people like me, are not going around pirating. Some of us are successful and we have money and we – I'm happy to pay iTunes for a song. I don't care. I'd rather it be a lower price, and I think it would be a lower price in a free society. Maybe it would be a penny a song, maybe a tenth of a penny a song, maybe a nickel a song. It wouldn't be a dollar a song, and I wouldn't have a DRM restriction, and it wouldn't be a license. It would be a real sale.

01:19:47

But in any case, I'm happy to pay six bucks for a movie on iTunes, not just me. But the point is people that have a serious, sincere argument to make, they are generally – there's no reason to assume they are making this argument just to – just for economic self-interested reasons. I mean it's not likely we're going to get rid of the IP system any time soon. We're making these arguments because we think they're right.

01:20:15

And in fact, in my case, for example, I'm a patent attorney. I practice it for a living. It's really not in my narrow economic self-interest to let the world know that I believe that the patent system should be abolished. I mean 99% of my fellow patent lawyers hate this idea. It doesn't – when they hear it, they're not really happy about it. It doesn't help me in my career. So not that that makes my argument stronger, but the point is the argument that people just want something for free is not an argument they shouldn't be free.

01:20:48

Another thing you can think about is – I think I might have mentioned this earlier in part one of this talk is that, in human life, there are two aspects of successful action. That is, the actor has to have knowledge, knowledge that informs him as to what ends are possible, and knowledge as to what causal laws there are in the world that lets him choose available means, scarce means, that will help him causally achieve his end. So you have to have knowledge, and you have to have means. You have to have actual physical control, causal control over these means to help you achieve what you want.

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And the scarce means of action are scarce. There's only so many of them to go around. That's the way the world is. The free market heroically despite this is always seeking to increase abundance. Even though we don't have infinite abundance, the free market is trying to increase abundance, trying to always find more efficient means of producing goods, lowering costs, increasing abundance, basically making things in a sense less scarce even though we'll never get away from that completely.

01:22:03

So the market is trying to overcome this challenge that we have, which is that there's scarcity in the physical world. There's lack of super abundance. The free market tries to make things more abundant, but that's one ingredient of action. That's having available these things that we need to achieve our ends.

01:22:23

But the knowledge luckily is already non-scarce. Knowledge can be multiplied or copied infinitely. Everyone in the world can know how to bake a cake at the same time. That's why we have an increasing body of human knowledge every generation because the more things people learn, the more it's recorded and transmitted, learned by others down the ages. We have this almost infinitely duplicable body of knowledge that we can dip into and use, and the more of it, the better. So the free market tries to overcome the problem of scarcity in the physical world, and the law tries to impose scarcity on knowledge, which is already non-scarce, so it's sort of a complete perversion.

01:23:11

01:23:15

Here's another one, slide 43. Well, the people that are against patent and copyright, the IP abolitionists, the only reason they're for that is because they've never created anything themselves. So it's another sort of ad hominem argument, you saying that you're not self-interested. You don't want there to be patents because you wouldn't benefit from them anyway. I mean I've had this argument with people before, and I've said before, well, I don't know what to tell you.

01:23:43

I mean I'm a patent attorney. I've made a lot of money by being a successful patent attorney, and I've also been an author, and I've written some things for free like scholarly publications, which also can't be explained by their theories. Why would all these scholars and thinkers and bloggers, commenters

on blogs, why would they waste time writing if they're not getting paid for it? They do it anyway. Anyway – and I've written a lot of things for a lot of money as well, legal publications for some major commercial legal publishers. I've gotten paid lots of money over the last decade or two, which is basically a refutation of their idea that someone who is vested in the system wouldn't be against it, or on the other hand, someone who's not vested in the system has no reason to favor it.

01:24:30

And so when I point out, well, you say that the only reason you have to oppose the system is – or the copyright system is because you have nothing to contribute that would be of any value anyway. And I say, well, that's just – in my case, for example, it's false. I've made lots of money off of selling books that are copyrighted. And then they'll say, well, then you're just a hypocrite. So in other words, you can't win. There's nothing you can say to satisfy these people. Either you're a completely creator-less loser who has no reason to want there to be a patent system or a copyright system, or if you actually are successful like they say is important and you're still against the copyright system, then you're a hypocrite.

01:25:12

So in other words, they're the ultimate conservatives. If there's a law in place and you benefit from it, even if you don't want to benefit from it, then you oppose it, then you're a hypocrite. I don't know how we're supposed to ever have any law overturned ever if anyone who's at all affected by it can't speak out against it. I mean this is the same argument used against blacks who are against affirmative action, let's say. So one argument against affirmative action is that it tars – it makes – it gives blacks who would normally be successful a bad reputation because the whites in the work place assume that the black is only successful because he's benefited from affirmative action. So that's one of the arguments conservatives and some libertarians use against affirmative action, and the left says, well, that's not true of course. They deny this effect.

01:26:07

And on the other hand, whenever a black comes out against affirmative action, the liberal will then make that assumption and say, well, how dare he oppose a system that benefited him? So which way is it? And are you saying that if some statist, coercive government program confers some narrow benefit on you, even if it's manifestly unjust, that you are – that you're prevented from objecting to it so you're forced to comply with the system, and now you're prevented from arguing against it? I mean what about slavery? What if you are, I don't know, the son of a slaveholder in the south and you know slavery is immoral? Can you not argue against slavery because you were educated or raised by a family that had money from the slavery industry? I mean the argument is just completely dishonest and incoherent.

01:27:00

All right, let's go to slide 44. Okay, this slide – well, this is more of the same. They'll say something like you say you're against patents, but you're a patent lawyer. I don't know what this argument is supposed to mean. First of all, it's personal. It's directed against me, Stephan Kinsella, as a person. And I can guarantee I don't have the metaphysical ability to change the moral status of different rules or propositions in the universe. Whether I was born or not, whether I have an opinion one way or the

other or not doesn't affect whether or not patent law is valid. Even if I'm a hypocrite doesn't mean patent law is valid or that it's not valid. It's either valid or invalid or legitimate or illegitimate, just or unjust on its own terms.

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And second of all, it's just a weird argument. It would be like saying that a cancer doctor, an oncologist, is hypocritical for opposing cancer because, after all, he profits. Maybe he makes hundreds of thousands of dollars a year as a successful cancer doctor. He profits from some evil that he wishes wouldn't exist, or a defense lawyer who defends people who are accused of income tax evasion or, let's say, violating the narcotics laws. Let's say he's a libertarian. Can I be a libertarian and defend people from the state trying to put them in jail for doing something that's a victimless crime? Does it mean I'm a hypocrite because in my ideal society I would have – I wouldn't have this job? This job wouldn't exist? No. It means that, given the existence of an enemy to people, given the existence of the state, there is a need for people to navigate the system and to defend themselves from it.

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And it's unfortunate that money is wasted and has to be wasted on certain people. It's unfortunate that I have to hire a patrol company to patrol my house to stop robbers. It's unfortunate I have to lock my front door all the time and have sophisticated locks on my house and have an alarm system in my car. It's a waste. It's made necessarily by the possibility and likelihood and existence of crime, which we all wish wouldn't exist. That doesn't mean that car alarm companies and locks, people that sell locks, are hypocritical for selling these locks even if they say they're against crime too. So this is yet again another bad argument.

01:29:37

I'm on slide 44. Let's go to slide – oh, this is another good one, slide 45. So I've had this happen before. I'll have someone – and this is not really a serious argument. I've seen them do this many times. It's kind of a smart-ass argument. What they'll say is they'll say, oh, well, if you're against IP, how about if I just take your articles and sell them for millions of dollars? Now, again, it's not even really a real question. It's more of a rhetorical question, but it's a smart-ass question. But as I noted earlier, a question is not an argument. But it's not even really a serious question. It's not even an argument. It's not even a serious proposal.

01:30:16

They don't really want to take or copy my article and sell it. They don't really think they can take one of my articles that's free online. They don't really think they can sell it for a million dollars. They probably don't think they can sell it for anything at all. And sometimes I say, fine. Go ahead and do it. And then they shut up and they change the subject, so they're not serious at all about this.

01:30:43

The other problem with this argument is they – what they often do in this kind of argument is they'll say, well, what if I take your article and I change the name, and I put my name on it? I'm plagiarizing.

I mean what am I supposed to say to that? Well, then you're going to look like an idiot for lying to people. I don't know how they think you're supposed to get along as a society if you have a reputation for being dishonest. This mistake is made quite often in arguments for IP. You'll have people say, well, if you're against – if you're for IP law being abolished, if you're not for IP law, you must be in favor of plagiarism.

01:31:22

Now, this argument is completely false and disingenuous for many reasons. Number one, again, I don't think they're serious about it because if you really know the difference between types of IP like copyright and patent and you know what plagiarism is, then you know there's almost no relation between them. And if you don't know, then you shouldn't be arguing until you figure this stuff out. But in fact, plagiarism has almost nothing to do with copyright or patent and wouldn't be a real problem in a free society in the first place.

01:31:53

So as an example, I can take – plagiarism just means being dishonest about who the author of something is or not crediting your sources, which is more of a scholarly rule than a copying rule. So for example, I could take one of Aristotle's books, and I could publish it on Amazon tomorrow, self-publish it, and put my name on there. Now, that is literally plagiarism, and it's not a copyright violation because Aristotle's works are in the public domain. No one would buy it. I would look like an idiot, and it doesn't need any kind of law to police that.

01:32:31

At best, it would be a type of fraud on my customers because if they think they're buying a new work called *Nicomachean Ethics* and they're not, then I've defrauded them, but fraud law is there to cover that already. And on the other hand, most aspects of copyright infringement have nothing to do with plagiarism. For example, if I take the latest *Transformers* movie and I make a copy and I put it online and I either put it online for free or I sell it, I'm not going to put my name on it.

01:33:03

I'm not going to say this is Stephan Kinsella's *Transformers*. Why would I do that? Because no one is going to download it then. They're going to think I've messed with it or I've tampered with it or it's a joke. No. People want the original *Transformers* by Michael Bey or whoever is in charge of it. They want the movie. That's why I put it online. That's why I sell it. That's why pirated copies are desirable because they're a duplicate or a close duplicate of the original. So most copyright infringement wouldn't be plagiarism, and most plagiarism wouldn't be copyright infringement, or it doesn't necessarily involve it. So they have really nothing to do with each other. So the reason that the IP proponents bring this up is they're trying – they know plagiarism is a little bit dishonest or usually a contract breach like at a university or something. So there's something about being a plagiarist, so they're trying to associate dishonesty and shadiness of plagiarism with competing in the free market and copying and sharing and learning information, which have nothing to do with each other.

01:34:06

Okay, slide 47. Let's get back to – a little bit to the discussion about a utilitarianism and wealth maximization. So quite often the proponents of IP will say something kind of extreme and hyperbolic like without patents and without copyright, there would be no new art, novels, movies, no new inventions ever created again. Now, if they were right, then a lot of people would have pause. They would go, oh, we can't live without future innovations and future discovery of knowledge and future creative works being made. But of course there's no evidence whatsoever for this contention at all, and in fact, it's completely implausible.

01:34:57

Even if they're right that there would be less innovation, they could not argue there would be none. Even if we stopped copyright and patent tomorrow, some companies would still innovate and some scientists would still do research. Some artists would still write. In fact, most people research, write, and innovate today with little or no financial payment anyway, so you would still have some. So really their argument is that we wouldn't have enough or that we would have less. But so what they're saying is that in a patent-free world, let's say, we have level X innovation. And in a world with patents, we have X plus Y, and more innovation is better. Having extra Y innovation is better.

01:35:41

But the problem with this argument is that, first of all, they have no proof that there is a Y that's positive. Maybe Y is negative actually. Maybe patents skew and distort innovation and reduce innovation, which I actually think it does. But even if Y is positive, how do we know that it's worth it? In other words, the patent system has a cost. Let's say it costs Z. Now, is Y greater than Z or is Z greater than Y? They don't know. They have no idea what these numbers are.

01:36:09

In fact, they have no – they don't even make an argument about what the numbers are. They just make the hypothetical case. They assume that we're all going to agree that there is going to be a Z, that the Z – I'm sorry, that there's going to be a Y. But the Y is going to be positive and more innovation is always better. And they assume that the Z is zero.

01:36:25

They assume there's basically a trivial or negligible cost of the patent system even though a recent report that just came out shows that the top tech companies like Apple, etc. spent more money last year on defending or acquiring patents than they did on research and development in their own companies. I don't know the numbers, but let's say it's $10 billion of R&D for Apple and $15 billion for patent acquisition. Now, I don't know how anyone can believe that the $15 billion that was spent on patents, some of that couldn't have gone to more R&D or at least been returned to their – to the public in the form of lower prices or to the shareholders in the form of higher dividends or higher share price, etc. And then that extra money in the hands of consumers or shareholders could have been used for something productive and maybe more R&, maybe more economic activity, etc.

01:37:18

The point is there's no way you can argue that this money is not a diversion from the overall amount of R&D or human prosperity and satisfaction that we enjoy at all. And on slide 47, this – I mentioned Alexander Tabarrok earlier. He's a free market guy, but he's not anti-IP. He wants to reform IP, and he had this recent post called "Patent Policy on the Back of a Napkin." And he sort of drew like a Laffer curve, which is like a bell-shaped curve, which shows the relationship in his mind and in the mind of most people who favor IP, the relationship between the strength of patents and the amount of innovation we get.

01:38:03

And his idea is the curve starts at some non-zero number on the left side, goes up to a peak, and goes down. And the idea is that if you have no patent system you have some innovation, but if you have a patent system you can increase the amount of innovation. But then if you make the patents too strong, then you start suppressing innovation, and we're past that point, so we should reduce the patent strength. I guess that means the patent term from 17 roughly years to, I don't know, five or whatever or ten. Then we get closer to this optimal. Now, he has no reason whatsoever for thinking the shape of the curve is a bell curve. And even if it was, he's not taking patent cost into account because the patent strength comes with the cost.

01:38:46

So even if you have a patent system and it increases the amount of innovation, the value of that extra innovation might be less than the cost that the patent system opposes on the economy as a whole. In fact, I think it is. But I don't think it actually increases net innovation at all. I think it actually decreases innovation and distorts the market. I think the line would be sloping downwards. You have innovation, and the more patents you have, the worse everything gets. So the lower you make patent strength, the better off you are. You don't have to go to this optimum peak he points to. You go all the way down to zero. And unless they have an argument otherwise, that is the default position.

01:39:27

Another argument is that you just can't make money without IP. This is completely false. There's lots of ways you can make money. Kickstarter is around now. Lots of other ideas will no doubt come about in the future. There are videogame companies. There are recording artists. There are documentary makers who are getting funding for their projects through Kickstarter and other projects. I – the thing is everyone has to be an entrepreneur and is an entrepreneur, and you have to realize that in a world of competition, you have to face competition. And you have to be aware of that and try to come up with mechanisms and ways and practices where you can make a profit or achieve your goals.

01:40:09

And if that's in the face of people being able to easily compete with you by copying what you've done, either identically or by improving it or tweaking it, then that's the world we face. I was listening to a podcast with two economists, and they were talking about J.K. Rowling, the author of the Harry Potter books, and she's worth about a billion dollars now because of all the money she's made off of her books and the franchising of her books and the movies based upon her books.

01:40:42

Now, I believe that in a free market, she probably wouldn't be worth a billion dollars for writing seven books. But it's easy to see how she could be worth tens of millions. So let's say she writes the first book, which she did as a labor of love, which is how most such books have to get made in the first place, not for money. And she sells it on Amazon as a self-published Kindle book or something like that. Let's say she makes $100,000.

01:41:08

And soon the profits go down because there's pirated copies, which are legitimate everywhere, but the pirated copies actually give her more fans, so she has a large number of fans because the books are great. And she has even more fans because everyone – even more people can get them than could the first time she sold the books in the real world because the price was too high for some people. So she probably has even more fans than she otherwise would have. So anyway, she has a lot of fans.

01:41:33

She made some money. She publishes a second book and becomes even more of a bigger phenomena. At a certain point in time, she sketches out all seven books, and she says, you know, to all my fans out there, I've got book number four written, and as soon as I get a million people agree to pay $10 each for this book, I'll release it to the world. Well, I guarantee she's going to get a million people that are going to salivate at the prospect of getting this book. So she makes $10 million right there, and then she can repeat this and maybe in escalating terms with each book.

01:42:07

And then when the movie – and people start making movies of her books. Let's say someone makes a movie of her first book, which they won't need her permission to do. You could have five movies made in the same year based upon her book. It's a free market. She can't stop it because there's no copyright let's say in a copyright-free world, but what she could do is she could get a phone call from one of the producers who says we're planning to make a movie based upon your book, and if you will cooperate with us on developing the script and say that it's authorized, promote it to your fans, tell them this is the authorized version, we think we'll get twice the ticket sales of our competitors because all your fans are going to want to see the movie that's blessed by you because it will probably be better, and they'll believe it's going to be better, and they'll think it's more authorized and legitimate.

01:42:56

We'll give you, I don't know, 5% of the ticket sales. So there's another $10-20 million, whatever. I mean there's lots of ways, or maybe someone writes a smaller novel, and it helps them to land a job teaching literature at the local college because they have a reputation now. There's just so many ways you can profit from your activities. It's just not the government's job to figure that out for you.

01:43:21

01:43:25

Here's another one, slide 49, identity theft. So some people would say, well, without IP, then what's to keep you from just using your name and stealing money in your bank account or whatever? Well, you don't really need IP for this. Let's – now, this story is complicated in today's world because money is not a tangible, physically ownable thing because the government has corrupted it. So let's assume that we have world where there's honest gold money and everyone has, say – I have a certain amount of gold coins stored in a bank, which I pay a hosting fee for.

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And I have a warehouse receipt, or I have some kind of identification key that allows me to access and transfer the ownership of the gold when I want to, to pay for something or to access the money. Now, someone pretends to be me. They go to the bank. They pretend to be me, and they're able to bamboozle the bank into opening the vault and letting them take my gold out. Now, this has nothing to do with identity theft really or with intellectual property. It simply is a means of committing a type of theft or fraud.

01:44:33

Basically I own the gold. I'm the owner of the gold, and the bank has some kind of ownership relation too in the sense that they're the custodian, and this person has taken control of something not owned by them without my permission. That's called theft or trespass or conversion or something like that. It's basically a type of trespass. They probably also violated the bank's rights by using the bank's property under false pretenses and in violation of the bank's implicit rules where they make it clear that you have to be who you say you are. You can't be lying to us. You guarantee that you're telling the truth when you sign on the dotted line, etc. So you don't need IP law to stop people from committing various types of theft, so that's another bad argument.

01:45:18

Okay, and then we have arguments by grammar or semantics or even emotion – so I'm on slide 50 now – where people use the argument that – they use the argument that IP is called property, intellectual property, or they just use these synonyms that are bandied about now by the IP lobby like theft or taking or stealing or ripping off or piracy which, if you think about it, piracy means going onto someone's boat without their permission and killing them and taking their stuff. That's a clear violation of tangible property to your body or your stuff or your boat.

01:45:58

They use that now to refer to people copying information, which doesn't take anything. And, in fact, one of the first pirates was – pirates use to be authorized. They were called privateers or something, authorized by the state by what's called a letter patent actually. So patents actually were authorizing piracy back in the 1500s, etc. like Sir Francis Drake. So it's kind of ironic that they claim they're against piracy, but anyway. So you can't just – you can't say something is property because it's theft to take it. That's begging the question. It's only theft if it's property in the first place. You can't justify it that way.

01:46:39

And of course copying is not theft. If you learn some fact from someone, if I make a copy of a book or if I make a copy of your iPod and compete with you, I'm actually not taking your iPod or your book from you. I'm – and then the IP proponent will retreat and they'll say, well, yes that's true, but you're taking from me the money I could have made. So now they're kind of getting a little bit more honest, so they're admitting that really it's about money.

01:47:09

It's about revenue and things like this. So – but what that means is their argument is really that they're saying if you have a business where you're making a certain profit or you expect to make a certain profit or you could make a certain profit if you had a monopoly that you have some kind of property right in that future uncertain income stream. But the income stream is not just a stream. It's money that's owned by future people, money that they own, not you.

01:47:35

And you don't have a right to money in customers' pockets. They have the right to spend it if they chose to. This is exactly why competition is permissible. This is why, if Walmart competes with a drugstore in a little town and "steals their customers," that's not really an act of stealing even though the word is sometimes misused there. In fact, there's nothing wrong with stealing customers because the drugstore doesn't own those customers. The customers own those customers. If I steal your girlfriend by persuading her to date me instead of you, I haven't stolen your girlfriend. I know the word your is used, and it's possessive. This is another dishonest argument.

01:48:18

People say, well, whose idea is it if it's not mine? It's my idea, isn't it? This is argument by semantics or by possessives. It's ridiculous. Just because the English language or some languages use possessives to identify things doesn't mean they're ownable. Just because there are things and concepts that we can identify in the world doesn't mean they're ownable. I can identify a poem. I can say it's my poem, which means I am the one who came up with the poem, doesn't mean that I should own it in some kind of legal sense anymore than I own my girlfriend or a drugstore owns its customers.

01:48:55

Okay, so this is – and by the way, the patent and copyright used to be called monopolies. They were – the proponents were quite honest about this. As I mentioned, the modern patent system originated with the Statute of Monopolies in England in 16 – I want to say 1623-1624. And a lot of economists and free-market types were against them for this reason or at least thought they should be severely limited because they knew they're a derogation from or an exception to the normal free market property-type system.

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But in response to sort of mounting a tax on the legitimacy of this cold, corrupt system like, say – I don't know exactly the date. I think it was in the early 1900s, maybe late 1800s. I think it was early 1900s. The proponents of patent and copyright and to some extent trademark and trade secrets but

primarily patent and copyright started using the word industrial property or intellectual property. So they started using the word property because people had a positive connotation with property. They thought property was a natural right. It's what you're entitled to by law and by justice, etc. So if you call these entrenched interests, these monopoly privileges, the government grants, you call them property rights, the people are going to sort of assume they're legitimate and just and part of the capitalist or property system, and that's exactly what happened.

01:50:27

Now, of course, there are lots of people now that argue that you have a property right in your social security benefits or that you have a natural human right to a job or to education or to medical care or to welfare. Well, they're wrong. Just calling something property or a right doesn't make it justified, so we need to be aware of these sort of argumentative tricks.

01:50:55

Okay, slide 52 now. You hear this all the time, the continual refrain of the non-principled person who has really – everyone is utilitarian now. It's the problem. So there's never any kind of bright line about anything. So they'll say the patent system is broken, and they'll usually say it used to do a good job, but now it's been broken, so therefore we need to do what? We need to fix it. We need to reform it. So then you have people like Tabarrok and others saying, oh, we – or Judge Richard Posner recently saying, oh, the system has gotten out of hand.

01:51:29

Now, they're implying that it used to work fine. I don't know how they're supposed to know this. But anyway, so what they want to do is they want to reduce the scope of patent or copyright. They want to reduce the terms. They want to reduce the economic or the civil penalties or even the criminal penalties, but they don't want to go down to zero. They have no reason for this except they're either hunches that we need some system, but they sort of know we – they know that it's messed up. They know it's bad. They see egregious examples, but because they can't think in principled terms, they don't want to abolish it.

01:52:06

Oh, I found the quote now I mentioned earlier by Machlup. So what Machlup said, as I mentioned earlier, he said if we didn't have a patent system, it would be irresponsible to say we should have one. But then he said, but since we had had a patent system for a long time, it would be irresponsible on the basis of our present knowledge to recommend abolishing it.

01:52:26

Now, why is this? I mean by this reasoning we could never get rid of slavery if we had it. We could never get rid of the drug war. We could never get rid of income tax, never stop war. I mean after all we have these policies and institutions and laws. The same type of person would say don't throw the baby out with the bath water. Well, of course this kind of stupid, non-serious argument, this argument by

bromide, argument by slogan assumes that there's a baby there and that the bathwater is bad, but the baby is good.

01:52:59

In other words, they're assuming that the core idea of patents and copyright is good. We need some. We're better off with some reasonable small amount of patent or copyright but not too much. So we need to get rid of the bathwater and not the baby. Well, first of all, even if they're right, they're assuming it's possible to get rid of the bathwater but not the baby. I don't know why they assume that. They sound like these republican and democrat candidates every presidential election who say we need to get rid of waste in the government. It's impossible to get rid of waste in the government. This is part of – this is what you get when you have that kind of system.

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So even if some small amount of IP would be a good idea, it's evidently impossible to keep it from being beholden to and corrupted and distorted by the special interests like Disney and the movie industry and the pharmaceutical industry and the software industry, etc. and having it metastasize and get worse and worse every year, where we started with 14-or-so-year terms for patent and copyright, and now it's grown to 17-20 for patents and over 100 for copyright.

01:54:06

But second of all, they're assuming there is a baby there. In other words, they're assuming the patent system – some patent and copyright system is good. And as the quote goes, which I borrowed from – actually I didn't borrow it from Harry Brown, but I found out later that Harry Brown had an ad for when he was running for president 15, 20 years ago where he said something like don't throw the baby out with the bathwater unless it's Rosemary's baby, which was – which is a line I use, something like that. I said in response to people who say we shouldn't get rid of the – we shouldn't throw the baby out with the bathwater, I said we should if it's Rosemary's baby, which is how I view the IP system. It's evil.

01:54:46

So slide 54. Another argument I hear is that – is more the argument about intuition where people say we – it just seems wrong to me to take people's things. Well, first of all, you don't take people's things. You make a copy of it. The original person with the original mousetrap in the case of inventions or a novel or a movie still has it as do all the other people who have gotten copies of it in the meantime. So your making a copy doesn't take it from them. All you take from them is the money they could have made if they had had a monopoly, but that begs the question to assume they have a right to that money, and that's just wrong to assume they have the right to that money.

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So anyway, it's just not really an argument. And furthermore, sometimes they'll do the thing I talked about earlier. They'll mix it up with plagiarism. They'll say, well, it's wrong to plagiarize. Well, what do you mean by that? Well, it's wrong not to give credit to an author. It's like, okay, well, then give

credit. I mean you might have an argument that it's maybe wrong or unprofessional or unethical in some sense to extensively quote from someone in something you're writing with, say, and not to put quote marks around it and give credit to the author.

01:56:05

Okay, that's got nothing to do with copyright. All it means is you should be honest about where you're getting substantially quoted material. Copyright doesn't just prevent literal copying, by the way. Copyright prevents derivative works like if I wanted to make *Stars Wars* #12 – well, number – let's say #7 myself with my own plot based upon these characters, that's not copying at all. It's what's called a derivative work, and everyone would know that it's a derivative work because I'm saying this is Stephan Kinsella's *Star Wars* #7. It's my interpretation of what I think would have happened after *Star Wars* #6. It's not dishonest. It's not failing to attribute. It's not even a literal copy. It's simply fan fiction. What's wrong with that? Nothing's wrong with it.

01:56:57

Slide 55, I've already talked about this a little bit, the question you get: how would I get paid for writing a novel? And as I've mentioned, number one, a question is not an argument. Number two, there are some possible answers to this. I gave a possible example of J.K. Rowling. Ayn Rand and the Randians – they have this confusing way of talking about all this where they talk about – I think I mentioned this in the first part of the lecture. They talk about man's way of living on Earth is to create values. It's a weird way of arguing. I agree that man is – man needs to use his mind to be – to understand reality. He doesn't live by intuition. The Randians are right about that.

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So the – putting it this way is bizarre. A value in the Austrian sense is a subjective phenomena. It's more of a relationship between a human actor and some desired goal, which sometimes could be a scarce resource or a scarce means either valued directly to achieve it or to acquire it or as an indirect means of achieving some goal down the road. But when the Randians talk about man creates values, it's a little bit ambiguous, and of course – so the problem is with ambiguity and at least to equivocation and to sloppy arguments, it is true that when we are creative, that means we take existing resources that are owned, scarce resources, and we manipulate them using our intellect, our creativity, our labor.

01:58:42

And we make them more valuable. They're more valuable means we regard them as more valuable, means we create wealth. You could say that we create wealth, but we don't create new property. There's no new property rights. It's just property that's owned. It's rearranged. So when Rand says we create values, it's a little bit ambiguous – or it's a lot ambiguous because it makes you think of some thing that exists. Sometimes the value is an object like a new car, and I guess sometimes the value is a reputation, and sometimes it's a novel or a poem. So basically what they're saying is anything that's a thing that you can conceptually identify with a word that has value, that is, that's the end of action, is an ownable, existing entity.

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See, that's the implicit assumption, and that's their mistake because they're wrong about this. Not any thing that I can conceptually identify is ownable. And, in fact, to own a poem, let's say is literally impossible because to own is to have the legal right to exclusively control. It's impossible to literally own a non-scarce thing like a pattern of information. I mean it's just literally impossible. There's just no way to do it. It would be like having a one and a zero at the same time.

01:59:53

You cannot control a pattern of information. What the law actually does is the law uses that metaphor of ownership of information as an excuse to justify transferring real resources from one owner to another. So, for example, by saying I own this poem or this movie or this novel or this invention, I'm able to persuade a court to use physical force against some other person who has not made a contract with me and has not trespassed against me or my property. So in other words, those things would justify taking property from them and giving it to me if I had agreed to it. But the government is basically able to use the metaphor of pattern ownership as an excuse or a fake justification for taking your money and giving it to me to pay me "damages" for the "trespass" I did to your "intellectual property." But really it's just a complicated way of taking your property from you and giving it to me, which is normally called theft or redistribution of wealth.

02:01:03

Okay, so this is the problem with the Randian focus on values is they lose sight of what property relates to. It relates to ownership. It controls – interrupted by dogs, but the point is they lose sight of the fact that property is a relationship of exclusive control, a legally recognized ownership relation between a human actor and some scarce resource that otherwise people could fight over or conflict over. It has nothing to do with non-scarce patterns of information. And it doesn't mean that ideas don't have value if you don't recognize property rights in them.

02:01:44

Love has value. We don't put a property right on that either. Just because there are not property rights in some thing doesn't mean that there's no value in it. It doesn't mean we don't value it. But it does – and the same thing with the intellect. The Randians like to deride people who are against IP as being some kind of anti-mind looters and materialists who don't appreciate the role of the mind. Of course we do. The mind is extremely important. It's what makes us human, and the – as noted, human action, as Mises looked at it in the praxeological lens, is a physical human actor living in the world who's not only physical by the way.

02:02:24

We have a – by the way, human action is distinguished from human behavior in Mises' epistemology. He's a dualist. He sees both sides to human life. We have a physical body. We have a brain. We also have a mind. We're actors. We have behavior, and we also have action. We have goals we pursue. We need our intellect. We need our understanding of the world. We need creativity. We need labor to understand the world so that we know how to have successful action and how to live good lives. And

we also need to successfully use physical things in the world. Even Ayn Rand recognized this when she said man is – he's not a ghost.

02:03:01

He has a physical body. He has real needs in the real world, and that's why in her kind of libertarian view of the non-aggression principle, she recognized that physical force is a thing that we're opposed to in terms of interpersonal ethics. She said man may not use force against each other's physical stuff. So she recognized this physical aspect of life and the spiritual or the mental aspect, and so does human action in the Misesian sense because it recognizes we need to have a teleological framework for understanding action.

02:03:36

We have goals. We have ends, which are subjective, and we have to understand the causal laws of the world to know what ends we can achieve and what causal scarce means can help us achieve those ends. And we need control over those physical causal means as well, and that's what property rights are for. So by speaking kind of loosely about man's purpose, his creating values, and therefore – they basically just jump to the question, well, if you create a value, who's supposed to own it? Well, the answer is naturally the person who creates it. That's if we assume that values are ownable things. Values are not ownable things unless by values we mean scarce means that are subject to conflict and dispute.

02:04:19

02:04:23

And a related error made quite often by people who advocate IP just like an error made by lots of non-libertarians is this idea that not only do you own values, but you own the value of things. So that you not only have a property right in the physical integrity of physical objects that you are the owner of, but you have some kind of – you have a property right in the value of these things, which is the Randian argument for a right to a reputation. You put effort into it. You put your labor into your reputation. It has "a value to you." It's "a value you created." Therefore, you "own it." This is another confused argument. You actually do not have – as Rothbard showed in his argument…

02:05:05

Okay, interrupted again. So this mistake is what a lot of people make is the idea that you own the value of things that you own. But as Rothbard showed in the *Ethics of Liberty* when he talks about owning knowledge and information and when he talks about reputation rights and defamation, first of all, value is subjective. It's what – it's how people regard something, and the value of something on the free market, sort of the fair market value, is how other people regard something or how they appraise it, how they are willing to pay for it, how much they would be willing to pay for it, etc.

02:05:38

And you can't own how other people regard something. If you have a house, let's say, its value may go up if your neighbor chops his rose garden down. But that doesn't violate your property rights because it's not a trespass against you. And the value of the house anyway in this sense is what other people are willing to pay for it. You don't have a right to that either. You only have the right to the physical integrity of your property, that is, to not have its borders invaded against your wishes, to not have it used without your consent. And, in fact, this mirrors perfectly Ayn Rand's idea of the non-aggression principle where she said no man has the right to use force against other people's property rights or bodies. So she was recognizing there this. She just was inconsistent on this whole issue.

02:06:33

Another bizarre argument I've gotten – I'm on slide 57 – is that I'll have patent lawyers or others or patent proponents. They'll – if I have – when we talk about…

02:06:45

Anyway, this argument is kind of silly. What they say is that – when we say IP is about protecting ideas and that's illegitimate, they'll say, well, it's not really about protecting ideas. So they basically just keep hiding the ball on you. They'll – it's just like some of the arguments of the – some of the proponents of IP say it's not really a monopoly. And then others say, yes it is a monopoly, but it's justified. These guys say it's not about ideas. It's about implementation of ideas. I mean it's just a little detail that's kind of really irrelevant, and it's basically however we want to describe the system they're in favor of. We try to do it in accurate, descriptive, honest ways, and they, of course, object to that because they don't want us to shine light upon this bizarre system that they're in favor of.

02:07:29

The other one is kind of an arcane matter that I get into debates with other patent people who know a little bit about the patent system. And they'll say that, oh no, you're wrong in saying that the purpose of the patent system is to stimulate innovation and that it's unjustified because there's no proof that it does that. The real purpose of the patent system is to stimulate disclosure. I mean what can you say to these people? They keep changing the goal. It is true that the original – the patent law as written – I mean the patent provision in the Constitution implies that this limited monopoly is justified to promote the useful arts. Does it mean to promote their creation or their disclosure? Well, probably both, and that's what the patent act does.

02:08:19

The patent act gives a monopoly in exchange for disclosing in a patent disclosure a description of your invention. But the idea is also that you can charge a monopoly price for it for some period of time, and therefore, you have a higher incentive to engage in the research and development of the idea in the first place. So that is their argument. If that's not their argument, then I guess they don't have any argument for IP.

02:08:44

Slide 59. Well, the other one is you must be a leftist if you're against IP. What, are you against capitalism? Are you against property? And of course the main argument against IP is that undercuts real property rights. It is because – like I am in favor of strong, undiluted private property rights in scarce resources that I oppose IP because it undercuts the libertarian – excuse me – the libertarian, Lockian basis of owning property, which is that every scarce resource, we can identify who should own it, who has the right to own it by asking either who was the first one to use it or find it in the Lockian sense, or who did you – who was the one who acquired it by a contract from a previous owner?

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It's one or the other. That answers the question. If you come up with a third rule like, or who invented the idea that's embodied in that thing, then you're undercutting the first two rules, and you're transferring ownership of an existing thing to a third person who didn't find it and who didn't acquire it by contract. This is why one of my first IP articles on lewrockwell.com was called "In Defense of Napster and Against the Second Homesteading Rule" because what I was pointing out was that the only way to enforce IP rights is to basically come up with a second property allocation rule that undercuts the basic Lockian homesteading rules like a second homesteading rule, which is, of course, what any criminal or socialist does.

02:10:25

They come up with yet another rule for redistributing property. They're saying instead of the first user or the person who acquired it by contract, then instead of that first person or the person who acquired the property by contract from a previous owner, someone else gets it instead. That's why – that's the argument behind, say, taxation or conscription is that no, you're not yourself owner of your body. We are. We're going to put you in jail if you don't go fight in this war. We're going to put you in jail for smoking marijuana or whatever. So basically every criminal act and every un-libertarian law deviates from the Lockian property rules that libertarians adhere to.

02:11:08

Okay, slide 60. Well, sometimes you'll have an argument that patent and copyright could exist under anarchy or common law. Usually this is based upon this contractarian argument I talked about earlier where they say, well, you could have something like IP formed by contract, which I've already discussed. Other people would say that it could be done by some kind of court decisions. I find it inconceivable that people are serious they could really believe that anything like the arbitrary, artificial, legislated schemes of state grants of monopoly privilege in the form of patents and copyrights could just spontaneously or gradually somehow or organically emerge from court decisions.

02:11:54

Basically, you would have someone publish a book, and they make it public and other people make copies of it. And then the publisher or the author would go to a private arbitral tribunal. They would have to accuse the copier of either committing a tort, which is like a type of trespass, or being in breach of contract. But they wouldn't be able to show that because the copier, number one, doesn't have a contract with him, and if he does, it's just a contract case. It's not really a copyright case, or he would have to show that they committed some kind of trespass, which is basically the use of or invasion of the borders of the tangible, scarce, real resources owned by the original seller.

02:12:43

But they won't be able to because they didn't do that. He released the information into the commons – not the commons. I mean he made the information public, and as Benjamin Tucker says – I'm going back to slide 51 – if you want your invention to yourself, keep it to yourself. You can't go making knowledge and facts available publicly, which has certain benefits to you to make it public. You get fame or you get fortune or you sell a product and you tell the world my new mousetrap has this feature. You can't reveal this information and make it public and expect people not to learn from it and be able to use the information that they've gained.

02:13:21

Okay, finally 61 – well, not finally but almost. Pharmaceuticals is one of the common cases. Almost every patent reformer says, well, at least in the case of pharmaceuticals, you can admit that we need patents because it's so easy to make a copy of a pharmaceutical that takes billions of dollars of research and development to develop. Well, in the empirical case for pharmaceuticals is just simply false. There have been countries in the past that have had strong patent – strong pharmaceutical industries without a patent system in pharmaceuticals like Italy and Switzerland. And if you look at chapter 9 of Boldrin and Levine's book, *Against Intellectual Monopoly*, they go through this whole case exhaustively.

02:14:03

And they just show that all the assumptions about the necessity – so-called necessity of patents for the pharmaceutical industry are just empirically false. There's no reason to believe that we wouldn't have a very strong pharmaceutical industry without patents. In fact, I believe it would be much stronger, especially if the government got out of its way in the other areas like taxes and regulations and the FDA, etc. So we have the federal government imposing untold billions of dollars of red tape and cost on capitalism and industry, and we can't expect that government to make things better by imposing handing out little patent monopolies. The government needs to get out of the way. We'd all be richer. There would be more money for investing.

02:14:49

I mentioned the Francis Drake thing earlier. I have a little bit of this on slide 62 talking about how letters patent were used in the 1500s to give pirates like Francis Drake the authority to engage in legalized piracy. I'll skip that one for a second. One more on slide 63. This idea that you can have conflict in ideas is actually – again, this is false because conflict is always conflict over scarce resources. This is what scarce resources mean. A scarce resource in the economic sense is what we call a rivalrous resource, that is, something that there can be rivalry or conflict over. That is, only one user or actor can use this thing at a given time. If two people could use something at the same time, it wouldn't be a scarce resource, or it would be two things or something like that.

02:15:40

It's like when people say people fight over religion, it's – again, this is the danger of sloppy or overly metaphorical discourse. What they're – when people say there are wars fought over religion, it's accurate if you understand what they're really saying is that disagreements over religion are the

motivation that people engage in the war. But the war is always over scarce resources, that is, over the physical control over land or resources or people's bodies. So if I want you to say you are a Christian and if you don't admit you're a Christian and you instead say that you're a Muslim, I will kill you, then the dispute is really over who gets to control your body.

02:16:28

I'm saying I have the right to control it. You want the right to control it yourself. If my threat to you to do something to you if you don't change your mind about religion was just words and I wasn't threatening to use your body, then you wouldn't care. I'm just saying you better change your mind, and you say, or what? And I say, well, you just better. So all disputes, all conflicts are always over scarce resources, which is why in a patent suit, for example, or copyright suit, it really comes down to something that the defendant, let's say, controls – his printing press, his factory, his body, his money.

02:17:06

The IP plaintiff, the copyright plaintiff, or the patent plaintiff is trying to use – get the court to use physical force directed coercively against the physical body or bank account or property of the defendant, victim, to tell him you have to hand some of this over to the plaintiff, or you have to stop using your property in a certain way. Otherwise, we will hurt you. So it's always a dispute about who gets to control what, and when you put it this way, you see that this is why intellectual property is incompatible with libertarianism because libertarian rules already give us the answer to the question, who gets to control that guy's body.

02:17:46

Well, the answer is he gets to control it unless he's using it to commit an act of trespass or aggression against someone else. So then the IP advocates sometimes will get sneaky and they'll say, well, but IP is my property. But you see, this is question begging because they can't use the conclusion that IP is property in an argument meant to show that it should be recognized as property. So again, they just end up with a circular, dishonest, question-begging argument.

02:18:17

And I have some useful quotations starting on page 64, but I think I've covered all the main objections I get from IP. So I will end this here, and it's been kind of a long series of discussions. I, as always, welcome questions. Feel free to email me or post them on my blog or talk to me on Facebook, etc. So thanks a lot, signing out now.

02:18:43

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—✦— TRANSCRIPT —✦—

Resolved: All patent and copyright law should be abolished.

A Soho Forum Debate

Stephan Kinsella vs. Richard Epstein

Soho Forum, Manhattan, Nov. 15, 2021

00:00:01

M: The United States Constitution explicitly calls for copyright and patent laws to promote the progress of science and useful arts by authors and inventors. But would getting rid of all intellectual property laws actually encourage more creativity and innovation by inventors, writers, and artists? That was the topic of the November 15 Soho Forum debate held in New York City. Stephan Kinsella, who spent 28 years as a practicing patent law attorney, argued in favor of the proposition that all patent and copyright law should be abolished. He believes that government-created intellectual property laws empower patent and copyright trolls and powerful corporate interests while limiting the free flow of information, thus reducing the right of innovation and creativity.

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Richard Epstein, the Laurence A. Tisch Professor of Law at NYU, says that our current system isn't perfect, but he sees copyright and patents as a natural extension of private property rights and believes that they should be defended by libertarians accordingly. The debate took place in New York City in front of a live audience and was moderated by Soho Forum director, Gene Epstein.

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GENE EPSTEIN: Now, for the main event. The resolution reads, and again, you have voted on it, all patent and copyright law should be abolished. Here to defend the resolution, Stephan Kinsella. Stephan, please come to the stage. Opposing the resolution, Richard Epstein. Richard, please come to the stage. If Richard could climb over a couple of bodies, he will come to the stage, and – that's okay. All right, don't get too friendly. Stephan, sit here. Richard, you sit on the far seat.

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RICHARD EPSTEIN: You want me to sit on the far right.

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GENE EPSTEIN: Far right, yes, absolutely. Richard Epstein is no relation to Gene Epstein, but – because there are a lot of Jews named Epstein. And – but we now have to close the voting. Jane, please close the voting. And Stephan, you can take the podium, which I assume you'd like to do. You have 17-1/2 minutes to defend the resolution. Take it away, Stephan.

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STEPHAN KINSELLA: All right, thank you very much, Gene. It's a pleasure to be here, especially with Professor Epstein. I'm really grateful you agreed to discuss this with me. You're one of my intellectual teachers, and I've learned a lot from you over the years. The resolution is all patent and copyright law should be abolished. Why? I want to briefly say I'm a patent attorney. I've been doing it for about 28 years.

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I've been a libertarian for far longer than that, and I actually wrestled with this intellectual property issue because patent and copyright are types of intellectual property law. I wrestled with this issue all throughout college and law school and as a young attorney, and around the time I passed the patent bar, I decided that it should all be abolished. So I came to it through a lot of hard thought, and my 28 years of practicing has only deepened my feeling about this. The bottom line is these laws violate property rights. They violate freedom of speech in the press.

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They distort culture. They impede innovation. They literally kill people, both copyright and patent, and they impoverish the human race. There's literally nothing whatsoever good about patent and copyright law. They're complete abominations, and they harm humanity. They're a mistake. That's why we should abolish them.

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Now, what are these laws? Okay, these are arcane laws that specialists like me learn about and Professor Epstein teaches about. Copyright is – protects the right of authors, like creators of artistic works, for original works of authorship like novels, paintings, movies for the life of the author plus 70 years, which means the term of copyright now lasts about 120, 130 years in many cases. And, by the way, originally it was 14 years at the beginning of the country. Copyright law is enforced by injunctions and by legal protections like statutory damages of up to $150,000 per act of infringement.

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Patents are granted by the state to inventors of practical devices like machines or processes, and they last for about 17 years, and they can also be enforced with injunctions unless the government takes it back with what's called a compulsory license, which they threaten to do sometimes. Now, there are obvious objections to these laws. The first objection is that they obviously violate natural property rights because they prevent people from using their own property as they see fit. Copyright, in effect,

prevents you from publishing a book or singing a song because someone can a court force to stop you from doing it.

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Patents prevent you from making products, competing, or even improving on other people's products. Legally speaking, in my view, these laws should be thought of as what's called a negative easement or a negative servitude, which you guys are familiar with in the term of a – in the form of a restrictive covenant or a homesteading association policy where your neighbors can prevent you from painting your house a certain color.

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So negative servitudes or easements are fine if they're consented to, but these are not consented to. The state just grants this negative easement, which is a property right, so it's a taking of property. It violates property rights. I'm not 100% sure, but I believe Professor Epstein even agrees with that. It's just that he doesn't think property rights are absolute. So the idea is that, generally, so why would you favor if monopoly privilege grants by the state that violate property rights, protect people from competition, and censor speech? Because they think that property rights and the free market, while generally good, sometimes they fail.

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There's what we call market failure due to various problems as Professor Epstein points out repeatedly in some of his writing on intellectual property and in his *Takings* book like the free rider problem or holdout problems or coordination problems. So the idea is that, on occasion, the state can identify these problems and come in, and they can do a taking of private property, which is the power of eminent domain or some kind of regulation, and they will solve this problem and make society better off. And when it does this, it generates a social surplus because it makes us richer. And out of this surplus, you can now compensate the person that you took property from.

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So like in the case of building a road, you need to take someone's house to build a road. They're compensated for the fair market value of their house by tax receipts, and everyone else is better off. That's the theory, but the point is, as Professor Epstein points out in his *Takings* book, most government regulations are takings, but they don't make us better off because they're not solving a real problem, and they're doing damage to us all, and therefore, they're unconstitutional under the fifth amendment.

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Okay, so the question is, in the case of intellectual property, why do we – why does this logic apply there? Why can you violate property rights in the name of helping out – helping – granting a monopoly privilege to an artist or to an inventor? Okay, so the idea is that, because of the unique nature of certain types of products and services that are intellectual based like if you write a novel,

paint a painting, or if you come up with a new mousetrap or a new iPhone, it's too easy for other people to compete with you.

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So, generally, competition is accepted and tolerated. As a libertarian, I think it's generally a good thing, but the Chicago people think it's tolerable if competition is difficult. If competition is too easy, then it's going to be difficult for the first guy to recoup his investment costs, so then he'll never invest in it in the first place. So that's the basic idea, and this is the idea, by the way, behind the copyright clause in the Constitution of the United States, which says Congress has the power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries. So that's where patent and copyright come from, from that clause.

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Now, historically, the origin of patent and copyright come from thought control and censorship and protectionism. The printing press threatened state and church control of what could be printed, which led to the Stationers Company and eventually – and its monopoly on printing books and then culminated in the Statue of Anne in England in 1710. And the origin of patents lies in mercantilism and protectionism where the king would grant open letters or a letter patent because the word patent or patente means open, granting someone the exclusive right to sell a given product in the region, like you're the only guy who could sell playing cards or sheepskin. It's pure protectionism. That culminated in the Statute of Monopolies in 1623. This finally led to the US Constitution authorizing Congress to pass similar laws, which we have now.

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So let's talk about copyright. Copyright has its origins in censorship and thought control, so it's no wonder that's what it still does today. So I'm going to give some examples. These are just some examples, and I'm going to go to some data in a little bit. So the seminal German silent film *Nosferatu*, which some of you may have heard of and even seen was deemed a derivative work of *Dracula*, and courts ordered all copies destroyed. Now, luckily, someone preserved a copy, and that's why we still have it today. Shortly before his death, the author, J.D. Salinger, author of *Catcher in the Rye*, convinced US courts to ban publication of a novel called *60 Years Later: Coming Through the Rye* as a sequel, unauthorized, and it was a derivative work, and copyright law prevented the publication of a book.

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There was one time, about 2005, a grocery store in Canada mistakenly sold 14 copies of the new *Harry Potter* book a few days before its official release. And so a British Columbia Supreme Court judge ordered customers not to talk about the book, copy it, or even read it before its official release date. Copyright also threatens freedom on the internet, which is very serious because the internet is one of the most important tools we have in the fight for freedom, to fight state – the state tyranny. And just a few years ago, the Stop Online Piracy Act, or SOPA, was only narrowly defeated by an internet – an uprising on the internet.

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Aaron Swartz, who some of you may have heard of, was a brilliant young inventor of RSS, the technology behind blogging and podcasting, and he was an anti-SOPA activist. He uploaded some academic journal articles to the internet, and he was facing life in prison for federal copyright infringement, and he killed himself.

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A guy named Gilberto Sanchez bought a copy of an unfinished version of the 2009 movie *X-Men Origins: Wolverine* in The Bronx, uploaded it to the internet, and was sentenced to a year in federal prison. There was a grad student in Britain named Richard O'Dwyer who had a website with hyperlinks to other people's pirated movies. And the US went after him and finally got a judge to order him to be extradited to the United States to face federal prison. He finally escaped it, but his life was almost ruined and derailed for many years.

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In 2011, there was an interesting paper by law professor, John Tehranian, where he talks about how the normal activities – because of the statutory damages clause of copyright that I mentioned earlier, up to $150,000 per infringing act, a typical internet use like an average American law professor, like maybe named Richard, who doesn't even engage in P2P file sharing, could theoretically result in up to $4.5 billion in liability annually for copyright infringement. And you might remember the singer, Susan Boyle – okay, the singer, Susan Boyle from American Idol, was prevented from singing a song because of copyright.

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Now, patent law – let's take some patent law examples. Patent law is rooted in protectionism, so it's no wonder that's what it does today. It protects people from competition. Back in 1999, at the dawn of e-commerce, Amazon had a patent on one-click, which was clicking once to complete an order, and they sued Barnes & Noble right at the beginning – right before the Christmas season for daring to let its customers complete a purchase with a single click. By the way, these are not abuses. These are how the laws work and are supposed to work.

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In 2008, a patent holder threatened to use court injunctions to force Ford not to use various technological safety measures like active park assist, stability control, blind spot detection, and hands-free voice control. So this is another example of how patents can prevent safe measures from being implemented and can cause injury or death. And, by the way, Professor Epstein is all in favor of patent injunctions because, after all, if it's a property right, you need to enforce it.

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Even though – here's another one. Even though the practice of saving seeds after a harvest to plant the next season is as old as farming itself, patents prevent farmers from saving patented seeds. Monsanto

even – and others even come after farmers for growing patented crops just because the wind carried it from a neighboring farm.

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Back in 2010, there were people who were literally dying who had Fabre's disease, and they could be treated with a drug called Fabrazyme made by Genzyme. It was in very short supply because it was being sold in Europe for a higher price. No one else could make it because of the patent, another example of how patents kill people. And for a more recent example, some of you may know this. It always turns to Bitcoin, by the way, in Gene's opening remarks.

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On Saturday, Taproot was activated, which implements something called Schnorr signatures in Bitcoin, which is going to make it much more secure, more efficient. For 12 years, we've had Bitcoin, and we haven't had this because of a patent, which expired right before Bitcoin came out. Okay, but what's more important here is what is the empirical evidence? Because, in my view, if the argument is we need to infringe property rights for this limited purpose to make society better off, where's the evidence for this?

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Does patent and copyright – do they promote the progress of science and the useful arts? So it was first – it wasn't even a hunch at first. This wasn't done in England to promote progress. It was done to bribe court cronies to collect taxes for the king. So the English parliament never did a study before the Statute of Anne in 1710 or the Statute of Monopolies in 1623 to see if these things benefit society. So we've had 230 years. The founders didn't do a study when they put it in the Constitution. So it's been 230 years. Where's the evidence? Where's the proof?

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So back in the 1800s, there was a growing reaction against patent and copyright law by free market economists who were wondering what the hell are we doing limiting trade and limiting competition? And in response, because they were being attacked by free market defenders, the defenders came up with a term like intellectual property to make it sound like these are natural property rights, but they're not.

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Now, the first big empirical study was in the '50s. The Austrian economist, Fritz Machlup, who actually did his PhD under Mises, in 1958, after commissioned by Congress to do the study, concluded no economist on the basis of present knowledge could possibly state with certainty how the patent system, as it now operates, confers a net benefit or net loss on society. If we did not have a patent system, it would be irresponsible on the basis of our present knowledge of its economist consequences to recommend instituting one. That was in 1958.

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1986, George Priest, an economist and attorney, a law professor: In the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property. Wesley Cohen and Stephen Merrill in 2003: There are theoretical as well as empirical reasons to question whether patent rights advance innovation in a substantial way in most industries. The literature on the impact of patents on innovation must be considered emergent. And then he says: An economist analysis of the cost and benefits of IP is no more within our reach today than it was in Machlup's day in the '50s.

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Boston University Law School professors and economists, Meurer and Bessen in 2008: It seems unlikely that patents today are an effective policy instrument to encourage innovation overall. Patents place a drag on innovation. There is clear empirical evidence that the patent system is broken. Law professor, Andrew Torrance, 2009: Little empirical evidence exists to support the assumption that the patent system spurs innovation.

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Economists Boldrin and Levine in 2013: The case against patents can be summarized briefly: there is no empirical evidence that they serve to increase innovation and productivity. Petra Moser, 2016: when patent rights have been too broad or strong, they actually discourage innovation. Heidi Williams in 2017: To summarize, evidence from patent law changes has provided little evidence that stronger patent rights encourage research investments. And, finally, law professor Thomas Cheng's view: Theory and empirical studies firmly refute the notion that patent protection is necessary for securing innovation.

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So in my view, the evidence is on our side, on the patent abolition side. There is no evidence that shows that the takings done by patents benefit society. My own estimates, based upon estimates of the cost of patent trolling, is that patents cost at least $100 billion a year on the economy. And it's not like we're hurting people to the tune of $100 billion and then we're getting $300 billion of innovation out of it. I believe we're actually getting less innovation because once you have a patent on a product, you have less of an incentive to keep innovating because you can rest upon your laurels for 17 years.

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And your competitors have less of an incentive to innovate by improving your product because if they make an improved product, they can't sell it. So I believe patents actually discourage innovation. So we're paying $100 billion, and we're getting less innovation for the bargain. So I believe it's clearly time to abolish these monstrous regimes, and I welcome Professor Epstein refuting what I said because then I can feel better about the career choice I made 28 years ago. Thank you very much.

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[clapping]

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GENE EPSTEIN: That's the maximum. You can take less if you want.

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RICHARD EPSTEIN: Oh, I never take less.

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GENE EPSTEIN: Okay.

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RICHARD EPSTEIN: I do not believe transferrable trespass. I want to thank Stephan setting me up in a way. Let me see what I can do in order to answer him. And let me begin in effect by reminding everybody what the resolution was. It's a rather extreme resolution. It calls for the abolition of the system. And I don't think that you could establish the abolition of any particular system for any reasons if what you can show is that the system, as it now exists, contains certain kinds of excesses, which need not be put there.

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So to start with the copyright example, the so-called Copyright Term Extension Act did give people copyright protection for 70 years after death. It is one of the dumbest statutes that has ever been drafted. There is no reason whatsoever to tie any exclusive right, however it may be created to the life of the author so that Gilbert outliving Sullivan gets longer protection for his part of this thing than the other. But the question is, can you make the same argument that about a statute, which has a 14-year term and a 14-year extension with respect to original work, and that's going to be a much more difficult kind of thing to do.

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It's certainly correct if you talk about copyrights and the kind of statutory damages that are given that in many cases are absurdly high because they bear no relationship to real losses. But it doesn't follow that a regime, which has been tempered a little bit, is going to have those difficulties. It says that sometimes what you do is you issue injunctions that shut down very useful situations, but it doesn't follow from that that you can't put together a rather effective regime with either copyrights on the one hand or patents on the other, which gives limited injunctions and conditions them in various kinds of ways so as to permit the uses that are truly necessary with respect to the patented or copyrighted technology while avoiding wholesale exploitation.

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And so what you have to do is to figure out from first principles as to whether or not you want this thing and why do you want it. Well, what we're told by Steph is that, if you look at the world, what you will see is that it's a system of natural rights as one that we protect in a system of copyrights and patents, given the fact that they're always going to be created by some kind of statutory authorization, offend the system of natural rights.

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If you go back and you start doing the classical history on all of this stuff, what you find out is that many people made exactly the same arguments associated with having property rights and land acquired by first possession. So if you want to go back to the **[indiscernible_00:21:02]** type theories, what they said is the moment somebody takes a piece of land, puts a fence around it, and claim it's his, what happens, he has now prevented the rights of other people to move various places across the face of the Earth. And so, therefore, a system of private property is necessarily unjust because of the way in which it takes the normal rights of mobility.

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I was trained in Roman law, and what I discovered is, amazingly enough, these yokels managed to get it exactly right when they said that there's certain kinds of resources that should be left in common rivers and beaches and so forth because the holdout problem was too great, but there are other kinds of resources, mainly land, chattels, animals, and so forth in which private property rights are going to be necessary, even if you take things out of the nature because what happens is the incentive to create and to develop these things is only going to exist if you have exclusive rights to them.

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This started off as an agricultural metaphor, most famously in the expression—those – only people who are to be able to reap are those who sow, and if, in fact, you had only common land, nobody would ever be able to plant anything because somebody else would be able to snatch it away. And when you start dealing with various kinds of intellectual property, you have exactly the same kind of distribution. There are, in all systems of natural property, things which cannot be reduced to private possession by any form of grant or administrative application, and these are generally called abstract ideas and natural elements.

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These are the two main categories. And the theory is you try to run a world in which you could patent or copyright the Pythagorean Theorem, it means that anybody who wants to do a proof for the next 20 years is going to have to pay him. There are going to be thousands of theorems that you have to buy, and the whole thing will break down. And so what you do is you say these things are held in common, and you give a system of prizes or rewards or something if you try to stimulate that stuff.

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But if you're then starting to talk about various things that could be made using these mathematical theorems, algorithms for the designs of various medicines and things of that particular sort, all of a

sudden, the dynamics start to change. If you decide that you're going to leave these things in the public domain no matter how much work is put in, you get the following kind of fatal disequilibrium, which is – are going to really hurt innovation. I spend a billion dollars to develop a brand new drug. I get no protection for it. Somebody else can figure out what the formula is quite easily by reverse engineering. I have to recover my fixed cost when I try to sell this stuff.

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This particular fellow doesn't have any fixed costs, and so what he can do is outsell me in the marketplace. I understand this going in, and once I understand it, I don't engage in the kind of investment you're talking about. Steph is quite right to say you want to look around, and you can do things by trade secrets, and that is certainly a dominant mode with respect to formula and various kinds of processes, but if you're trying to sell a drug and so forth that could be easily reverse engineered, you've got to have a patent system. And so the way in which the intellectual property space is organized, you have things that are kept in the common domain.

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You have things that become trade secrets. You have things that become copyrighted and patented, and all of these things, if they work together, are going to create some kind of greater efficiency. Now, I've heard that there's no empirical evidence that supports this particular position, but I think on balance, that's probably not the case. If you start looking at this, one of the things that I would refer to is a well-known statute called the Bayh-Dole statute, which was introduced back in 1980, and Bayh-Dole had the following proposition.

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It said the government gave lots of money to various universities in order to sponsor research, and the theory was that you now have something, which is sponsored by the government, and the government could say there's a condition of this particular grant. It wants you to leave this stuff in the public domain so that anybody can use it in whatever way, shape, or form that they happen to see fit.

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And if you go back to a famous book by Vannevar Bush called *Science: The Endless Frontier*, back in 1945 at the beginning of the period of American dominance in science and research, and what he said is he wanted the following kind of patent regime. He wanted to make sure that when you were working with things up to the proof of principle, that is, general arguments about how various things in nature start to work, nobody ought to be able to get a patent on that. But when it came to talking about compositions of matters, for example, particular kinds of drugs or various kinds of processes with industrial application, at that particular point, he encouraged people to patent these things because of the incentive effects that it had and that they would hope that they would give the government a license to use them free of charge, itself a rather tricky situation.

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Well, the question is, can we figure out whether this is a good or a bad thing? With Bayh-Dole, the general rule was that stuff was left unto the public domain, and so therefore, without patents and without any copyright protection, what you should be able to say is a-ha, we're going to get an enormous amount of innovation coming out of this stuff. But in fact, they found exactly the opposite. They found out that there were many **[indiscernible_00:25:59]** that had all sorts of very clever techniques, but when it came to commercialization, nobody was prepared to commercialize something, even though it was left in the public domain.

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And so what the statute said under these circumstances is that we are now going to create a device to incentivize people to privatize this stuff and to patent. So the way the system started to work is that you work with a university on a government grant, and then the school makes an elaborate kind of contract. The author gets a certain percentage. The department gets a certain percentage. The university itself gets a certain protection, and all of a sudden, out of nothing, you see all sorts of research arms developing in universities, the sole purpose of which is to market these kinds of patents into various kinds of spaces.

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And the question is, well, why is it that they want this kind of protection? And it's a kind of a subtle argument because the empirics were very clear. There was a massive growth in innovation that took place in the early '80s in response to this kind of development, and the attitude I think most people had is, if this thing is out there and it's not being protected by patent, we have no idea who our competitors are going to be. There are going to be so many of them in so many different directions, and that has a very substantial chance that if we develop this stuff, there's going to be somebody else who's going to try to sell the same thing.

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There are going to be too many people who are coming in. They'll compete the price down to zero, and none of us will be able to recover the fixed cost associated with the operation and development of our patent. And on the other hand, once you start to give patent kinds of protection, it's very important because it changes the game. Now that you have this particular kind of protection, what you do is you have an exclusive right to the invention that comes there. It may well be that you're going to get competition from somebody who has a different device and a different patent, but you don't have to worry about the added risk that the particular technology that you are trying to develop through the patented resource is going to be the **[indiscernible_00:27:54]**. It's going to be misappropriated and taken by somebody else.

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And so what happens is now you start to see people really springing to action, and the level of increase in various industries that have taken place was nothing short of spectacular in virtue of this particular situation. Innovation now became institutionalized. Proof of principle was left in the university, and the development of various kinds of goods and so forth was taken and put together in this other kind of system.

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And now, when you start looking at this, the question is how do you describe these things? And here it's very important to draw an intellectual distinction between two ways of thinking of the patent system or the copyright system. Those people who think about this system in a hostile fashion almost always call it a system of monopoly power. Those people who think about it in a more positive light, as I tend to do as a classical liberal but not a hardline libertarian, we tend to call them exclusive rights.

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What's the differences between the two of them? Well, every system of private property has to have a system of exclusive right. So I happen to own unit 8E in my particular building on Central Park West. Actually, I don't own it. The university does. It's there, and there are lots of people who own their own homes. They have a monopoly, as it were, over their own house, but when you look at a real estate market, everybody calls this market highly competitive, even though there may be no two houses that are identical if only because they're all – each of them is located in a different place from the other.

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But they're close enough substitutes that in organized markets with brokers and intermediates taking place, and nobody would want to say that the guy owns 430 Walker Drive in Los Angeles has a monopoly over that particular property given everything else that is done. So essentially, the creation of a system of exclusive rights with respect to land is an absolute prerequisite for trying to create a competitive market. What you have to do is to have strong exclusive rights, and then there have to be enough close substitutes out there so that you do not want to call this thing a monopoly.

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So, for example, you compare the system of private property that I'm just talking about with the system of common carriers where it turns out there's only one carrier that can take you in 1400 letters, say, from Oxford to London. This fellow was under a duty to serve because he does have a monopoly position. He's entitled to get revenue, and what you then do is develop a very different kind of system than you have with competitive markets.

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Namely, there's a system in which regulation is going to be permissible, and you're trying to dance between **[indiscernible_00:30:24]** figuring out how this guy can change enough to cover his costs and make a reasonable profit but making sure that he doesn't engage in a form of monopoly exaction. Those sorts of risks do not exist when you start dealing with ordinary people.

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Now, when you start coming with respect to drugs and chemicals
and **[indiscernible_00:30:40]** and so forth, it's exactly the same thing. I may have a monopoly of writing my new book on Shakespeare, but there are other people who could write other books on the same topic, and so you start looking under S in the bookstore, you'll find 50 or 100 books, all which are

in competition with one another. If you start trying to say, well, I really need to have some kind of a drug to control my high rate of cholesterol, well, you could find a number of drugs that do this, all which are in competition with one another. And so what happens is the competition between these drugs drives the prices down.

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It's also the case that when you think about this, particularly in the patent space, the way the system is organized, there is now an enormous incentive on the part of people that piggyback off of everybody else. So one of the important features of a patent system is what it does is it requires you to make a full disclosure of the various methods that you have used in order to develop the particular device in question and to give a complete specification of the product design.

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Now, why are you required to do that? Well, for one thing, what it does is now somebody reads this. Two things happen. They can use this, and then they could try to develop complementary products, or they can try to develop substitute products. The complementary products are ones that you want to put into place and to deal with the first guy, and the substitute comes back on the other side to give you a competitive market. It turns out there's a very nice work by Jonathan Barnett who says as follows: If it turns out you are a big company, you really don't care as much about patent protection because you can internalize things through contracts and trade secrets, but he says it has ample evidence empirically to show the point that if, in fact, you're a small guy, you want patent protection because the network of contracts that a large firm has is not available to you.

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So contrary to the conventional wisdom is sort of things that big guys must allow little guys. The actual empirics of the situation goes in the other direction. The little guy is the one who needs the patent protection because he can't resort on the other contractual network, and these guys come in, and if they're pioneers in their new area, they're going to get extraordinarily high rates of return because they will be "a monopolist" for a short period of time.

00:32:49

But the system of disclosures and the narrow limitations on the patent mean that other entrants can come in and try to fill the same space because you're only allowed the patent you have devised for your medicine. You're not allowed a patent to protect yourself with respect to the way in which you have a particular end. So if you have something like Celebrex as the drug, you can't use beta-cox drugs or whatever the hell they're called, and blame everybody else from putting arrival, and what you do is you develop a competitive market out of these things.

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Now, it turns out this is a competitive market that is given to you for a reason. The reason is to create this innovation, and when they found out, for example, with respect to the Hatch-Waxman Act in 1984 that if, in fact, you had to get a patent before you applied to the FDA for drug approval, that your

patent term would essentially run before you could get the drug to market, and the patent would become worthless. And so what they did is they passed another adjustment, which essentially extended at that time for five years the patent for a long enough period so that you could go through, at the time, the FDA process and still have the full term.

00:33:58

Unfortunately, the FDA, no surprise, has become more complicated, and the Hatch-Waxman offsets have become somewhat inefficient, but this was, again, clearly market driven. Everybody said, you know, it cost me $1.2 billion to make a drug, and if the only thing I can do with this drug is to do it under these circumstances, I won't get any return from it. So when you look at all these systems, what's going on is you're talking about a copyright bargain, and you're talking about a patent bargain.

00:34:26

You're talking about situations where the folks who come in and get this particular protection have to supply something in exchange for it, and then just to make sure that it works really well, what you make sure is that these patents and these copyrights are for limited terms. They're much too long today on the copyright space, probably too short today with respect to the patent space, particularly with respect to pharmaceuticals.

00:34:48

And when you do that, the things then go into the public domain because having given the incentive to create for a long enough period of time now allowing a drug that has already been created to be used at zero price is going to have reasonably desirably effects because you no longer have to worry about the problem of how are you going to create the darn thing. It's already been created, and so you can try to reduce the level at which it's done.

00:35:11

And so there is another additional source of competition, which is that off-copyright drugs and off-copyright patents and so forth, all of these things can be in competition in which things are created the other way. The system looks a little bit messy, but it really, in fact, works amazingly well, at least if you get rid of some of the distortions and the errors that are associated with its application. And this is violently different—and I'll end on this point—than some of the practice that you had in England where the patent system was worthless because it was so expensive to use that nobody could rely upon it, and where it was also so corrupt that these things were given not in exchange for a new invention. They were given to people simply to allow them to raise revenue, which they could then kick back to the crown.

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And so the useful invention requirements associated with the patent clause are designed to get rid of all of that stuff, and when you do get rid of that stuff, the current system, with all its warts, is better than no system at all, and it could be made a lot better if, in fact, we prune away the excesses and

basically return to the theory of patent and copyrights that animate the original design of the system. Thank you.

00:36:16

GENE EPSTEIN: Thank you, Richard. Five minutes of rebuttal if you would like to take the lectern.

00:36:24

STEPHAN KINSELLA: Sure. I'm sad to say I'm still a little bit depressed about my career choice. A slightly technical matter, Gene – I mean, Professor Epstein, I'm familiar with – the patent bargain refers to the idea that the patent law grants an exclusive right to an inventor in exchange for him disclosing everything.

00:36:49

Okay, so that's to overcome the practice of people using trade secrets where they kept things secret, so that's the patent bargain. I have never heard of a copyright bargain, so I don't know. I look forward to reading up about that. I never claimed that patents grant monopolies, but they are called monopoly privilege grants, and the Supreme Court actually refers to them as monopoly privilege grants just in a case last year.

00:37:11

And the purpose, as you say, is to allow these drug companies to recoup their cost. How are they going to recoup their cost if they can't sell it for a higher price than they otherwise could? I mean sometimes that's called a monopoly price. It doesn't mean that they get a monopoly that would classify as a monopoly under the antitrust laws, which have a different standard than economists do. As for the idea that payments help the little – that patents help the little guy, first of all, most patents are owned by employers, not the little guy who's the inventor who invented it.

00:37:39

Okay, so it's almost always owned by the employer. And as for helping small companies and not big companies, I think it's exactly the opposite. What happens is you have large companies amass huge patent treasure troves, and a good example of this was the recent smart phone patent wars about seven or eight years ago between Apple and Samsung and Motorola, and they all – Apple is suing because they – someone else had a smartphone with a touchscreen and rounded corners because they had a patent on that, and then they're being countersued.

00:38:10

What you do is if you're a large company, you have tens of thousands of patents, which you've paid lawyers like me to get for you, and you didn't reward your inventors for. And when someone sues you for patent infringement, you look through your pile of patents, and you sue – you countersue them for some. So the patent lawsuits go on for five years, and they finally settle with each other, and they grant a cross-license, and in the meantime, little companies are left out in the cold because if they tried to

enter this fray, they'd be sued into oblivion because they don't have 10,000 patents to go after the large companies with. So patents, of course, help big companies, and they basically help form cartels and oligopolies, which is not surprising because they are monopoly grants of privilege.

00:38:51

As for pharmaceuticals, the idea – first of all, anyone who's interested, we can't do this while we're debating, but you should read chapter 9 of Boldrin and Levine's book, *Against Intellectual Monopoly*. They completely explode all the myths about the pharmaceutical industry needing patents and being – and requiring patents.

00:39:07

So let's take COVID as an example. Right now, there's 11 different vaccines that have been approved for emergency use somewhere in the world. And as of December 2020 last year, there were over 200 vaccine candidates of COVID being developed, and at least 52 were in clinical or human trials. So there was lots of innovation going on, and Moderna, on October 20, waived its patent rights. So if it needs a patent to recoup its cost, why did it waive its patent rights?

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Look, Italy and Switzerland didn't even have drug patents until the late '70s, and they were some of the leading creators of drugs. Just as an example, Boldrin and Levine – they did a study. They looked to a poll at the British Medical Journal's readers on the top medical milestones in history. They found that almost none of them had anything to do with patents. Penicillin, x-rays, tissue culture, anesthetics—I can't read that one—public sanitation, germ theory, evidence-based medicine, vaccines, birth control pill, computers, oral rehydration therapy, DNA structure, monoclonal antibody technology, and the discovery of the health risks of smoking.

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Of the top 15 entries, only two had anything to do with patents. And the Centers for Disease Control in the US, they had a list of the top ten public health achievements of the 20th century. None of them had anything to do with patents. A review of the – even a review of the most important pharmaceuticals reveals that many came about without the motive or the possibility of requiring a patent including aspirin, AZT, cyclosporine, digoxin, ether, fluoride, insulin, medical marijuana, methadone, morphine, oxytocin, penicillin, phenobarbital, prontosil, quinine, Ritalin, salvarsan, vaccines, and vitamins. So you don't need patents to develop drugs. Thanks.

00:40:52

00:40:55

GENE EPSTEIN: Five minutes rebuttal.

00:40:57

00:41:01

RICHARD EPSTEIN: Let me start with the first point that he raised about the question about employers in large firms and domination. There is a key distinction between small firms that have employees and large firms that have employees. In both of these cases, the patent is always filed for by the particular inventor, and they're assigned over to the firm, but they're going to be assigned in very different ways to large firms and to small firms.

00:41:23

And one of the things that we now discovered is that to the extent that patent rights turn out to be weak, the small firm no longer can be confident that it can get injunctive relief against the large firm that blizzards it with respect to suits, and so they can be put into difficulty. If, in fact, when you started to have a patent and you knew that it was protected, you're not going to be suffered by the particular difficulties at hand.

00:41:47

The second thing to understand about all of these things is that the so-called monopoly risk associated with these patents and the coordination problem is handled in other ways. One of the most important institutions associated with patents is the system of licensing. This can work in many different ways. Sometimes it's one person just gives a license to another person to use it on a non-exclusive basis, and then what happens is you can get this out to many other people and see the exact same method that you used with respect to trade secrets, only you don't have quite the same confidentiality problem.

00:42:20

But the more important development with respect to these various licenses is one which allows you to have license pools of one kind or another in order to develop various kinds of technology. So you take something like telecommunications where the particular cost of transmitting and collecting various kinds of information has dropped exponentially for the last 40 or so years. What you discover, in fact, is that these things are all organized by **[indiscernible_00:42:45]** patent pools. They have all sorts of rules which tell them how it is that you're going to figure out what you put inside the particular standard, how it is you enter into agreements with various companies so that they restrict their monopoly price if, in fact, one of their elements is in the standard.

00:43:00

It turns out that the number of companies that you now need as the patents become – or the products become more **[indiscernible_00:43:06]** it increases, and yet the continued rate of decline in prices has all been driven by the ability of these licensing arrangements to start the work to create these kinds of standards or you would never get these devices to begin with if you didn't have a patent system. And in addition to that, you would never be able to get the coordination without the licenses.

00:43:25

To understand how this system particularly works, what you have to do is to understand that when you're dealing with real estate and other kinds of situations, it will give people as a property right only the exclusive right to use something, and you don't give them the right to enter into various leases or mortgages or gifts or other kinds of transactions, or they're going to be relatively useless. And the patent system essentially overcomes the holdout problem that you get by having an extremely developed institutional set of arrangements, which works in this particular fashion.

00:43:55

And when it comes to the invention, it's important to understand that there's a distinction. Many of these drugs were discovered in earlier and simpler times where it turns out that you didn't have the kind of massive develop costs that are associated today. But even then, it may be that the device wasn't discovered through a patent system, but its marketing, in fact, probably did require some kind of additives or other stuff, which may well have been protected by a patent.

00:44:20

And so the question you have to ask is whether or not the unprotected stuff will make it into the marketplace faster than it will with some degree of protection, and I didn't hear any response to the statements associated with Bayh-Dole, which took a situation where everything was, in fact, in the public domain and found that it did not work particularly well, and there was an enormous uptake in the number of drugs. If you're trying to figure out what it is that blocks innovation, it's the same kind of standard regulatory arguments that all libertarians and classical liberal makes.

00:44:51

It's essentially something like the FDA, which comes along and in the name of safety and effectiveness, imposes requirements that keep drugs off the market for so long that it turns out that their healthy qualities are not going to be exploited. And there are all too many cases of drugs that are left on the market only after years, when in fact, if they had been introduced earlier, they would have produced the same benefits ten years before and ten years longer than had otherwise had been the case. So putting this whole system together, the question is not whether you can find devices that we develop without patents in one form or another. The question is do the patents add to that?

00:45:29

We mentioned about Moderna and other kinds of companies that do this. The point to remember is you may not need patent protection if you're going to get tens of billions of dollars of payment guaranteed by the company – the government for the property that you create because if, in fact, you have a guaranteed buyer of the particular situation, all the incentive problems aren't there.

00:45:48

The issue you have to worry about in all those cases is whether or not the government is paying too much, and it may well be if you ran a patent system, you could actually get the things for less total cost after you subtract out the tax subsidies and put into place the patent protection. So it's much more complicated, I think, than Stephan has said. Thank you.

00:46:06

[clapping]

00:46:13

GENE EPSTEIN: Thank you both. We now go to the Q&A portion of the evening, and as you know, in this particular case, we're going to give either of you the option at any time to ask the other a question. Would one of you – Richard or Stephan, would you want to exercise that option now?

00:46:35

RICHARD EPSTEIN: I'll wait for the question first.

00:46:36

GENE EPSTEIN: Wait for the question first. Do you want to waive the opportunity, or do you want to ask Richard a question?

00:46:40

STEPHAN KINSELLA: I'll him one.

00:46:41

GENE EPSTEIN: All right. He wants to ask you a question. Fire it. Go head.

00:46:44

STEPHAN KINSELLA: Okay, so Professor Epstein, you seem to believe with me that 130 years or so for a copyright is absolutely absurd and ridiculous. Now, apparently if you have a copyright system, that's what happens. So would you prefer to have no patents or 130 – or I mean – sorry, a zero copyright term or 130 years if that was your choice?

00:47:06

RICHARD EPSTEIN: I'd take the 130 years even though I hate it because it turns out…

00:47:10

GENE EPSTEIN: Excuse me. I'm sorry.

00:47:12

RICHARD EPSTEIN: I would take the second of the miserable one of these alternatives because most of the value with respect to any literary work, most of it for most of them, are going to be concentrated in the first ten or 15 years. So essentially the distortions **[indiscernible_00:47:27]** from the years 20 to 120 may matter with respect to Mickey Mouse and a few other things like that, but with most things it turns out it doesn't.

00:47:36

And remember, it's not just books and literature that are subject to copyright. A software is subject to a complicated regime, but it's often protected by copyright, and the useful life of a software copyrighted device is sort of five, ten years at most, usually less than that. And so essentially I think that the overage is harmful, but I think the most important years are the in years, not the out years, and so I would keep the system, and I would do everything in my power to get rid of the silliness, all of which was introduced by international agreements because I think what I would answer is I'm talking about an ideal patent system, which doesn't have the terrible risks that are associated with the public choice dimension that we have in the current law where the ability to take things out of the commons and to put them into these things are – is completely up to legislative discretion.

00:48:24

There was, in fact, as I tried to make in one of these cases that were brought early on that if something is already in the public domain, to put it back and to say it's now going to receive copyright protection or patent protection is just crazy. And the culprit there is the constitutional system, which is so weak that when it says we use a rational basis test, which in my *Takings* book I attack and allow them to be re-protected.

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And this was the case that Larry Lessig argued in 2003. Somehow the name seems to have escaped me, but I thought that it was exactly right to say that if you want to extend it for no quid pro quo whatsoever, which is what they did with the Term Extension Act, that should be unconstitutional. So again, I think the simplest way to put the point is I'm trying to defend an ideal system, not the current system, and the only way you can get to that system paradoxically is to do what I wanted to do in the *Takings* book, which is to create a strong and stable system of property rights, which would also mean that things that have been put into the public domain will be kept there.

00:49:25

GENE EPSTEIN: I want to inform. The microphone is over there, and so please, if you want to answer – ask a question of either one, please line up at the mic, and so – do so with that microphone over there. And I wanted to ask – exercise moderator's prerogative to also ask Richard a question. I guess pertaining to a similar one where you – there seems to be a notion on your part that when you give government power, it won't abuse it.

00:50:03

I mean that's an accusation where, obviously, in eminent domain, for example, notoriously you defend eminent domain. But you're saying, oh, well, Donald Trump exercising eminent domain in Atlantic City, that's not an inevitable part of the system that when you allow government to exercise these actions, that the crony capitalists and the corruption won't take over and that therefore it's – we can always imagine an ideal system. Have you heard that kind of complaint before to your view, and what do you say in response to it?

00:50:36

RICHARD EPSTEIN: I have to say that I have not heard. It would commit gross perjury on my part. It is, I think, in fact, the central objection that you made – that has been made to my system about eminent domain. They said the problem about you, Richard, is you prefer to have corrupt judges doing this stuff, and I prefer to have corrupt legislatures. My answer is in effort to try to stop the corruption on both sides, I want A) to divide the powers, and B) to resort to a title which I'm now associated with, *Simple Rules for a Complex World*, that will start to delineate when it is that the government can and cannot take.

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And so what happens is you see the errors going both ways. There's a case called Monsanto, and what they did is they had a series of devices that were pay trade secreted, and they had to essentially get government approval for their use. And the government tried to condition their approval of this thing on the grounds that they allow other people to use it for a license fee that was either zero or set by the government.

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And my view was that if you're doing things for health and safety, you're not allowed to – under the doctrine of unconstitutional conditions, to permit somebody in the government to give it to your rival for – as something below market cost. So that's the trade secret system. It's – Stephan is in favor of that. And you have exactly the same kind of corruption that could exist there. My view about this is I spent my life trying to argue for a system of coherent property rights and just compensation and limited public use to control those particular public choice problems. Have I been successful?

00:52:07

I think that question answers itself, but it's not because the system has been tried and failed. It's because it's never been tried at all, particularly after a famous case called Penn Central, which says there's a rapid distinction between "regulations" on the one hand and takings of property on the other. And the government rolls over and dies with respect to regulations, so zoning and also to their rights are now at risk, and I think the answer is we don't want to mess around with the intellectual property system, which works very well between private parties by and large, although there are obviously huge cases of error. But what you want to do is to make sure that the government can't corrupt it by taking these rights and giving them to somebody else.

00:52:47

So the culprit in all of these endeavors is, in fact, a weakened and definite system of property rights sponsored by the courts who essentially give up on their constitutional function. And by the way, they do it with land. Zoning laws are a classic illustration of gigantic government overreach with respect to use because they don't follow the common law prescriptions on zoning and reciprocal covenants but allow huge wealth transfers to take place. So this is a problem endemic across the entire system.

00:53:14

GENE EPSTEIN: And you don't think that the endemic nature of it is what you're up against, Richard, that that's the system.

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RICHARD EPSTEIN: It is – but it is if you grant them, and it is when you don't grant them. The government is essentially a promiscuous beast. You put any system of rights together whether it's a good or bad one, and they have the infinite capacity, if left to their own devices, to make it worse. And so what I'm trying to say, quite simply, is you have to attack the monster at the other end. What you have to do, and the reason I wrote the *Takings* book was you have to stop the rent seeking, which, of course, is exactly what we both agree on.

00:53:46

And what happens is you have a bunch of courts out there who believe that all government agents in the legislature are well intentioned in what they do, and so they defer to what it is that they want to say. And if you're going to get a regime of judicial deference, no matter what the system of property rights you start with, you're going to end up with something that's truly horrible. And so either you tighten up the constitutional system, or we're going to have to fight it through – and sometimes it will be better. In the '80s, we actually had a bit more sense on this.

00:54:14

You just come to a Biden and you come to Obama and you come to everybody afterwards, and it's been pretty much downhill since that time, and it will continue to be so unless there's a fundamental change. And on that issue, constitutional limitations on the government to confiscate, I think we're at one. I mean I've spoken too long, but I think we're at one.

00:54:32

GENE EPSTEIN: You guys agree the government is a whore, Richard just said.

00:54:34

RICHARD EPSTEIN: I didn't say that. I said the government is **[indiscernible_00:54:36]**. I prefer to be much more delicate.

00:54:38

GENE EPSTEIN: You said it's a promiscuous beast. But anyway, do you want to comment?

00:54:43

STEPHAN KINSELLA: Just a quick comment. I actually would abolish trade secret law too, but that's a different argument.

00:54:48

RICHARD EPSTEIN: Oooh, tough guy.

00:54:49

STEPHAN KINSELLA: It's a little ironic that I believe you have argued—correct me if I'm wrong—you have argued that you think there might be some use for antitrust law, but generally you would oppose it because it's going to be abused. So to say…

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RICHARD EPSTEIN: No, no, no, no, no, no.

00:55:02

STEPHAN KINSELLA: I can send you the quote.

00:55:03

RICHARD EPSTEIN: Let me…

00:55:05

GENE EPSTEIN: You guys are talking about antitrust now. It's a little bit off topic, but anyway – but if you want to say something.

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RICHARD EPSTEIN: Just the one-sentence answer is the only area in which antitrust law seems to work at all well is with respect to horizontal arrangements, and the big uncertainty is whether you render those unenforceable or put the Sherman Act behind it. And the actual history of this stuff started very badly, but I think it got a little bit better, so by the time you got to the 1990s, it was a terrible body of law. You're seeing systematic decline coming back again. My former student, Amy Klobuchar, just put forward a bill to end all bills.

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GENE EPSTEIN: That's a Richard Epstein sentence. Thank you very much for that Richard Epstein sentence and…

00:55:44

RICHARD EPSTEIN: Period.

00:55:45

GENE EPSTEIN: And question. You don't have to identify yourself. Lay it on these guys. Who do you want to ask the question of? Go ahead.

00:55:51

M: Hi. My question is for Stephen, and I came to this debate…

00:55:56

GENE EPSTEIN: Stephan.

00:55:56

M: Stephan. Inclined to try to be sympathetic to your view, but I – and then I heard the debate, and the debate is more about efficiency and what produces the greatest amount of wealth and things like that. And I wonder how you answer the argument that doesn't it seem fair that, if somebody writes a 2-or-300-page book and tries to sell it for $20 a copy, that there ought to not be – that it ought to be prohibited that for some period of time that person not have a competitor who can say, well, I'll sell it for $10 because, hey, I have a copier, and what the heck. And so there is a moral element other than just an economic element, and I wonder how you meet that.

00:56:43

STEPHAN KINSELLA: I don't think it's fair. I think that if you choose to make information public, then you can't complain if people copy it, period. That's the principled argument. And not only that, there are ways to make money. Creators find ways to make money off of novels, for example. I've pointed out – take the *Harry Potter* example. J.K. Rowling writes *Harry Potter*. She writes it on a train because she has a passion. Let's say she sold it on Amazon for $0.99, and she got a million fans, and then she was knocked off the next day, so then her profits tailed off right away.

00:57:17

Okay, so now she writes the sequel, and she tells her fans, I'm going to publish this as soon as I get – five million people give me $5. And then there's a movie made, and they consult with her. They pay her some of the ticket box office because she's going to be a consultant, and this is the legitimate movie, not all the other knockoffs that are coming out.

00:57:34

She could have still been a very wealthy woman. So people can find ways to profit off of their artistic creativity, but I think if you reveal information to the public, just like if you sell a product which pleases customers, you're choosing to make your new invention public, and if people compete with you, no, I'm a libertarian. I believe in the free market. I think competition is good, and I think learning is good.

00:57:57

RICHARD EPSTEIN: Well, I think there's more competition between *Harry Potter* and some other book rather than having knockoffs sell for the price of originals. You can use ingenious schemes to overcome some of these difficulties, but the revenues you could get from those schemes are far less, so you put the scheme together and say I'll put this thing public the moment I get 1,000 readers each to pay me $5. Okay, you do very fine on that. Then the book turns out to be a hit, and the next generation there are a million people who agree to pay nothing but the marginal cost. The productions are going to clearly go down with respect to that, and I don't think there's any particular social reason to do that.

00:58:36

To put it another way, the problem about libertarianism, it has the first correct move, which says the prohibition against the use of force and fraud is an improvement over the license to do everything in the state of nature. And so what really happens is there's a consequentialist argument given what we know about human beings.

00:58:53

GENE EPSTEIN: Of course, the – go ahead.

00:58:54

RICHARD EPSTEIN: Given that we know what we know about human beings, can we create pareto improvements by changing legal systems without cash transfers? And the argument in favor of patent and copyrights is we could do exactly the same thing in areas where physical possession does not give you adequate control. And so when we do that, we give you the right, and then we try to limit it so what is a powerful right does not become a complete monster.

00:59:17

And there are always – what is a derivative work? There's a lot of abuse on that. But *Abie's Irish Rose* was not a derivative work of whatever it was that somebody said it was and so on it goes. Get good judges. You can control it. And the issue is where are you going to get more abuse, and I think in effect an open regime with contract gimmicks won't do it nearly as well as a copyright regime. And what you then have to do is to try to make sure that it doesn't go off the rails. So the correct answer is we do recognize these things, and then what we try to do is to figure out where the abuses are and propose something to do it.

00:59:49

And for many years, these techno committees that work on patents and copyright really did it. The work that was done for the 1952 Patent Act by Giles Rich and Federico, I mean these guys were geniuses, and they did it with two guys. They sat around the kitchen table, and they did a much better job on this than the – well, I would ask you the question. Do you prefer the 1952 act or the America Invents Act?

01:00:12

STEPHAN KINSELLA: I think the America Invents Act only made trivial changes to patent law.

01:00:15

RICHARD EPSTEIN: You think only trivial?

01:00:16

STEPHAN KINSELLA: Yeah, only trivial changes. The whole system is basically the same.

01:00:19

RICHARD EPSTEIN: Well, I hope you're right.

01:00:22

STEPHAN KINSELLA: One quick point to make following up on that. If you think about it, copyright is basically dead already because the internet is the world's biggest copying machine, and thank God for that. So encryption, file torrenting—you can go get the next *Harry Potter* book the next day. You can get music, movies. It's rampant. So basically copyright is dead. And do we see a reduction in the supply of artistic creations today? We probably have more books being printed and published every year than in the history of mankind. So the idea that copyright – without copyright we wouldn't have artistic creation is obviously absurd because it's happening right now.

01:00:59

RICHARD EPSTEIN: On the other hand, when you have these various books that command these enormous advances, it's because essentially there's a belief that there is some exclusive right even though there's going to be some leakage associated with it. And people take enormous steps in order to make sure that these things cannot be distributed in an illicit fashion. Clearly, you have to worry about that when you put the system together, but because it's a worry doesn't mean that you want to say the system is now 60% effective. Drive it down to zero.

01:01:28

What you do is you keep it at the 60%, and you recognize the leakage. And to answer what Steph says, for example, on the next thing is yes, I mean, you're a great artist, and people start stealing your stuff, so the record business goes. You do recover some of it by going on tour. On the other hand, after you reach 40, you don't like going on tour anymore, and if it turns out it's your back issues rather than your new issues, going on tour is not going to do it for you at that point. So these are very imperfect substitutes, and it turns out that the protection does induce the production in all of these industries. How you release them, movies and Netflix and so forth, all that system is still driven by copyright.

01:02:09

GENE EPSTEIN: Question.

01:02:11

M: Thank you two speakers for coming out. My question is for Professor Epstein. You mentioned Mickey Mouse and how most inventions have some kind of natural death that occurs, whereas Mickey Mouse has lasted forever. But you also mentioned how a corollary to private property whereby you have exclusive rights to those forever. Why isn't – why shouldn't Mickey Mouse last forever with rights to the original owner or to the corporation? Why should the expiration change, and how is that different from private property?

01:02:49

RICHARD EPSTEIN: Okay, I think that's great. I'm attacked on both sides now, so I feel extremely comfortable. One person says, for God's sake, Epstein. You don't want any of this system, and the other says if land rights are perpetual, why isn't the same thing true with respect to copyrights and patent? Well, the explanation is, I think, best understood by comparing both of these things to something known as a trademark, and a trademark is, in fact, a form of intellectual property, and it's a form that lasts forever because what it is, it's a beacon that warns the potential user that you can be associated with the reputation of the party so that if the people start to chisel on the thing, you're going to be hurt because your brand is going to be compromised, and I think that's a very good system.

01:03:29

But the copyright system doesn't have that reputational signaling function, and what you want to do is to say there are two goods that you have. One of them is if you put this thing into the public domain since it's a thing that could be non-rivalrous and reproduced every time, you get a large number of people who could use it for zero, and that's a good. But if you do that at the beginning, you don't get the thing. So it's a balance, and what you try to do is to figure out how long a protection do you have to give to induce the production at a satisfactory level.

01:03:56

Given what I said before, the out years are much less important with respect to the production than the early years. And so there, after you put into the public domain, it turns out that the thing continued to be used. Take land, and you own it for 100 years, and then you put it into the public domain. The whole thing is going to become an absolute mess because I can't farm if you're going to farm and so

forth. So exclusivity is needed to make sure that land holds its value. It's not needed to make sure that patents and copyrights are produced. They're different situations.

01:04:27

And if you try to think of this as a kind of a sort of social engineering based on empirical hunches, some of these hunches are better than others, and this one seems to work. And the question then is how long, and nobody in his right mind would say 115 years is necessary to induce the production. The 24 – or the 14, 28 was probably pretty good. Most people on drugs, if you know their profile, understand that good drugs actually become more valuable in many cases towards the end of their term rather than less because they now have a history of use, which means that the side effects are understood. So in the last year of a cholesterol drug going out there, it may have its highest level of sale.

01:05:07

So if you knock that down from ten to – from 12 to 10, that's a huge difference, and generally speaking, I think what you want to do is to extend those a little bit longer, modify Hatch-Waxman. And then as these things become generic, they place a necessary price constraint on the next guy who has to make an improvement large enough to justify the premium and the research costs that he has to put together. So I think they're perfectly good reasons for the way the system works if you understand it. What you have to do is to understand that all of these things require judgments at the margin, and when you get politicians, they're not very good at marginal judgments.

01:05:44

GENE EPSTEIN: A comment from you on that.

01:05:45

STEPHAN KINSELLA: So I would abolish trademark too, by the way, but for different reasons.

01:05:49

RICHARD EPSTEIN: Okay.

01:05:49

STEPHAN KINSELLA: Professor Epstein…

01:05:51

RICHARD EPSTEIN: Good. I like it. I mean you're a brave man.

01:05:56

STEPHAN KINSELLA: The reason that you don't want patents and copyrights to last forever is because you don't really think they're property rights, which means they violate property rights, although you call them property rights in your writing. And one of your arguments in the structural unity of intellectual property and real property, you analogize it to property – to normal property, and you favor injunctions because it's a property right. So you're all over the map, I believe, on that. But there are some insane libertarians who do take a principled approach, a consistent approach like some Randians, Galambos, Spooner. They wanted these things to last forever. Hey, if it's going to be a property right, it should last forever. And if that had happened, we would be dead now. The human race would have died out because you couldn't do anything. You'd have to get permission from the descendants of Ug from cavemen days.

01:06:41

RICHARD EPSTEIN: Well, that's why I don't want perpetual rights. I mean in the Constitution, when they talk about limited rights, they do not mean that you could create a copyright for a million years and say that it's limited. They meant this in a much more functional way about, in real time, how long makes sense, and the 14, 28-year kind of principle is there. The whole point here is utilitarian on both ends. If you basically keep these things perpetual, people will, in fact, die off in a terrible way because everything new will be derivative or dependent upon everything before and putting into the public domain.

01:07:14

So you're trying to figure out how it is that you've maximized over the long term the sum of the incentives to create and the sums for the incentives for effective dissemination. I think it's perfectly principled to do this. What it is, is it introduces an element complexity at the middle, but it's worthwhile because if you have the zero alternative, you won't get enough of the stuff that you want into commercialization, and if you keep it perpetual, essentially the patents and the copyrights will become strangulation devices. So what you do is you try to go for a transition. This has always been the history. So I will put the question back to you in the other way.

01:07:50

If everybody who's ever worked in these fields on a day-to-day basis believes in limited copyright and patent protection, why is it that the extremes are correct? I think the correct thing to do is to figure out how it is you take that middle and figure out how you massage it? And I don't mean this as an abstract matter. I mean I'm pretty confident that if you were to ask serious people, there's nobody who's going to start wanting to have 50-year patent terms. The longest you ever hear in any discussion is going to be 20, and I think that that's a perfectly good compromise. Life is filled with tradeoffs. I just want the right people to make them, which in this case means me, not you.

01:08:28

GENE EPSTEIN: But he won't run for office unfortunately and…

01:08:32

STEPHAN KINSELLA: One quick comment.

01:08:34

GENE EPSTEIN: Okay, go on.

01:08:34

STEPHAN KINSELLA: You may not be aware of this, but when the Constitution was being drafted, Jefferson wasn't there, but he sent a letter. I think Madison, proposing an amendment to an article in the Bill of Rights, which would have said the monopoly grants—I think he used the word monopoly—of patent and copyright can only be granted for X years. So he wanted to put a time limit in there. It was rejected, but I wish it had happened.

01:08:57

RICHARD EPSTEIN: Well, I mean my answer is a bit – it had been 18 months. God forbid if it had been 20 years. I would have been comfortable with that.

01:09:04

STEPHAN KINSELLA: It was a blank. I read it as a zero.

01:09:06

RICHARD EPSTEIN: And that's always the problem. I mean a number beats a principle. That's why they have statutes of limitations and so forth, and you could ask the same question about that. Why is it, if you have a good situation, to sue a trespasser sitting on your land? One year, you've got a million. Two years, you've two million. You get to 20 years, you get zero. And that's because the statute of limitations is put in there in order to basically make sure the security of titles will take place and that these disputes will resolve themselves in the time we have it. And so having limits like that is everywhere within the law, and you have sometimes soft limits, the estoppel doctrines, and sometimes they're hard limits. And if you get them wrong, it's catastrophic. A one-day statute of limitations isn't going to cut it, and 100-year statute of limitations isn't going to cut it either.

01:09:50

And so what happens is it started at 40, went down to 30. Now, it's down to about 10 **[indiscernible_01:09:56]**, and why is that? Because the devices for detection are more powerful, so there's less reason to allow for longer periods of uncertainty. And again, it's a question of finding transitions. Hard transitions are needed because you can't live in the middle space where a patent is 60% valid. That doesn't make any sense. So it's an on/off switch, and the correct thing to do is to figure out where you put that particular switch rather than to pretend that you don't have the patent at all or that you don't have an on/off switch once you do have a patent.

01:10:25

GENE EPSTEIN: Next question, yeah, next question.

01:10:26

SAMUEL MARX: Samuel Marx, Harvard Medical School. I'm really convinced, Kinsella, by your argument. I've been taught everything. I invent new medical devices. How do I convince my comrades, so to speak?

01:10:42

01:10:46

STEPHAN KINSELLA: When I figure that out, I'll let you know. I have been doing this since 19 – I've been writing on this since 1995, and I just keep trying to beat people over the head with it and doing this, hopefully. Tell them to watch the video.

01:10:58

RICHARD EPSTEIN: I can say. I mean there are several of these cases, Mayo and Alice, which starts to play very tricky games. The exception is to what counts as a natural law. There's always been a convention, and everybody agrees that $E=MC^2$ is something you can't protect, but suppose what it is, you make a device which allows you to put together certain kinds of chemicals in a thing. This is done empirically. And do you call this thing a law of nature, or do you, in fact, call it a new invention? And when this thing actually came up, Justice Douglas was a very strong anti-patent guy in the 1940s in a case called Funk, basically said it was a law of nature.

01:11:38

And Giles Rich and Federico, they came back and said, now, we're moving this to the other side of the line because we want to have incentives to create it, and we could have all sorts of nice stories, after Alice and Mayo, the two cases on this, which indicate, in fact, that there's a serious risk of the decline in innovation that could take place in the medical business if you can't protect certain kinds of algorithms that start with natural events and then lead to natural cures.

01:12:03

So I'm on the other side of that. I think, in fact, every time I write one of these briefs is try and say please get rid of these two particular kinds of cases because if you expand the notion of natural law to the point at which it's currently done, you're going to get many techniques, which were introduced in profusion on going the other way.

01:12:20

And remember, Rich and Federico are the two best patent lawyers of the 20^{th} century, and to have two guys write a statute, it was a great intellectual achievement. I agree with Steph to some extent that the 2011 act didn't change as much as it purported to do, although it did some harm seriously with various

kinds of business method patents. But what they did is it was a zoo. They had billions upon billions of dollars' worth of entry and public choice nightmares by a bunch of guys who didn't know what they were talking about.

01:12:50

GENE EPSTEIN: Question. You had a question? No? You do. Okay, go ahead, yes. Go ahead.

01:12:56

RICHARD EPSTEIN: Up to the microphone. This is so civilized.

01:12:58

GENE EPSTEIN: Go please.

01:12:59

M: So I've always found – I love the theoretical aspects of this debate, but it seems like we've had a solution sitting right in front of us, and that is compulsory licensing so…

01:13:09

RICHARD EPSTEIN: No.

01:13:09

M: Okay, we're done. I've always thought the way it works in music publishing or with – or performance royalties, every – you can play these on radio now, but you can't reproduce them. You can't – theoretically, wouldn't this work for any aspect of intellectual property? And I'll leave that to either one of you.

01:13:26

RICHARD EPSTEIN: No. I mean it works for ASCAP and BMI, and what happens is the first thing to note about the system is that there are multiple uses, all more or less identical, of relatively small value so that the transactions cost to negotiate in many cases are simply not worth it. But the fly that you have in the ointment is how do you set the rate? And if it turns you set the participation rate too high, nobody is going to do it, so that's generally not the risk. Inventors will always – or composers will go down. But if you set them too low, there's a real risk that this stuff will not be produced in sufficient quantity.

01:14:03

The other key feature about that system is for large users, it is always permissible under the current law to negotiate a side deal with them so that you have a customized rate when it turns out that you have large consumption. But if you start using, for example, the compulsory license system with respect to drugs and so forth, it turns out that there are going to be real wipeouts associated with their particular operation so that what works in one area doesn't work in the other, and this is generally the case with intellectual property. The systems of use and licensing and exploitation are very sensitive to the kind of intellectual property that you have.

01:14:40

So just as a kind of an empirical verification for that, it turns out that when people work in either patents or copyrights, there's almost nobody who does both because it's too difficult. They work in very narrow fields, so if you're a guy who's doing it, you will do cholesterol drugs. You won't try to do diabetes stuff because you don't know the science well enough, and they're very different conventions of efficiency that work in different markets, both on the licensing side and on the compulsory licensing side.

01:15:06

GENE EPSTEIN: Next question. We have time for only one final question. That final questioner, please take the mic and ask a question. Thank you.

01:15:14

M: I would like to add a bit of a practical and realistic question, which I have missed so far a bit. We have had, at some point in time, where there is for the small companies who benefit most from patents even though the large companies have the most, and I don't think that is a contradiction. We develop drugs, and we are a small company. And the experience is if you don't have a patent or only a use patent, nobody is going to talk with you.

01:15:53

RICHARD EPSTEIN: That's correct.

01:15:53

M: So you have no chance of ever getting that to the market. So without a patent protection, there is no way small companies can ever approach even a large company and get some of their inventions brought to a larger public. We have a drug to prevent children who develop autism from becoming nonverbal. Nobody was interested until we had the patents granted. So even having just applied for a patent is not enough. Nobody is interested. So how do you overcome that?

01:16:32

GENE EPSTEIN: Thank you for that question. We've run out of time, but you each have seven and a half minutes for summary. I suggest Stephan and Richard address that question in your summary. Thank you for the question.

01:16:44

RICHARD EPSTEIN: Amen, brother.

01:16:45

GENE EPSTEIN: We now go to the final part of the evening, and take it – no, no. Take it, and address the question that was just put to you.

01:16:56

STEPHAN KINSELLA: Sure. In today's world, we have a patent system. Given that system, investors want to see your patents, and large companies want to exploit patents so, of course, they have value. If there was no patent system, people wouldn't demand that you show them your patents. So in my concluding remarks, let me just say if I happen to win tonight because I've done so well in my career because of the largesse of the system Professor Epstein is in favor of, I'm going to donate my winnings to charity. The Tootsie Roll will go to charity. Okay, we've been talking practically. Normally, my defense of my position has been on more principled and propertarian-type grounds, not on the utilitarian side so much, although I think the utilitarian argument just fails because they haven't met their burden of proof. All the studies that I read or all the studies that I'm aware of, I'm actually not aware of any solid, reliable studies that prove that Professor Epstein is correct. You heard the quotes. He didn't counter any of those quotes.

01:18:00

So the way I look at it is this. I'm going to a little bit into Austrian economics. Mises is my favorite economist, and Ludwig von Mises looked at human action from his praxeological lens, which very simply means he understands what we do as humans by viewing us as human actors that employ scarce resources in the world to achieve ends or goals. This is what we do in life, and economics studies this.

01:18:27

But one thing that's overlooked in all these discussions is that there's a second key ingredient to successful action, and that's knowledge because if you don't have knowledge, you can't do anything. And the reason that we're so wealthy today as a society is not because we've discovered more things in the Earth. The Earth is basically the same, and we're not really any smarter than the Romans.

01:18:44

It's because we've accumulated technological knowledge over the years. This is what's made us rich. Hayek calls it the fund of experience. Now, the scarce resources are things that only one person can use at a time. This is why property rights emerge to ration those efficiently and to let us use them peacefully and cooperatively in trade without having violent conflict. So property rights emerge as a response to the scarcity of these means. But the knowledge that we have is not scarce. It can be copied freely.

01:19:13

This is why China got rich so quickly because they're copying some of the things that we've done. This is not a bad thing. This is a good thing. This is how the human race advances, by emulating, by learning, by seeing what people do to please their customers, and you compete with them to do the same thing or something better. These are all good things. To try to apply a property rights model to the second key ingredient to human action, which is the main source of our wealth today, is suicidal and homicidal and genocidal. It's insane.

01:19:41

Okay, I'm going to just close with a couple of quotes. Cory Doctorow, science fiction writer, wrote: Three or four billion years ago by some process that we don't understand, molecules began to copy themselves. We are the distant descendants of those early copyists. Copying is in our genes. We have a word for things that don't copy—dead. As for the American founders, Thomas Jefferson, himself the first commissioner of the patent office, famously observed that he who receives an idea from me receives instruction from me without lessening mine as he who lights his candle—taper—at mine receives light without darkening me.

01:20:22

And finally, as the very amazing polymath and creative inventor himself, Benjamin Franklin, realized: As we enjoy great advantages from the inventions of others, we should be glad of an opportunity to serve others by any invention of ours, and this we should do freely and generously. So for the sake of property rights and liberty and innovation, the patent system and the copyright system should be abolished. Thank you.

01:20:45

[clapping]

01:20:52

RICHARD EPSTEIN: I'm going to have to get myself up.

01:20:51

GENE EPSTEIN: You don't have to carry that.

01:20:52

RICHARD EPSTEIN: Each time – oh, there's two mics, basically two mics. Well, thank you so much. Let me start answering the question about the autism, which I think is exactly on point. I'm trying to be a very practical person when I say that there are tradeoffs associated with these systems, and that if you give too much protection, it's going to have a negative set of consequences. If you give too little, it's also going to have that. And the situation that you talk about is exactly the one that Jonathan

Barnett wrote about in his book on innovation. He's saying little inventors, either they have a copyright, or they can't negotiate with anybody, and so therefore, the information will remain private. And if you want to talk about dead information, private information is going to be like that, or you really want to find other ways to do it.

01:21:37

There are other systems that you could try to put into place. One of them is you could try to use a contractual system to do it, but you will never be able to keep the information private, and once it's leaked, it's going to go out there. And even if you kept it private, you would never be able to reach the volume of people you want. There is also an effort in many cases to start using various kinds of prizes because they don't associate themselves with any deadweight losses in the sense that if I give you a Nobel Prize or some kind of prize for making some kind of innovation, it doesn't increase the cost to the public at large.

01:22:09

There is a recent book on this by Zorina Khan, and I think she's a little bit nuts when she says that, oh, we don't want to have any prizes at all or draw that implication. But by and large, prizes essentially have very, very soft limitations associated with their operation. One is that they're very tiny. So if you develop a cholesterol drug like Lipitor and so forth and you can get $11 billion sale, if the government is going to stand up there and say, well, we want this thing to be freely competed.

01:22:37

We're going to give you a million-dollar prize to develop this stuff. It's just not going to happen. You do it for a mathematician who proves Fermat's Theorem. The thing is going to be proved, and you couldn't copyright it anyhow or patent it anyhow because it's a general idea. So sure, you want to have prizes that are built into the system, but they are not going to be able to replace the patent. So you give the prize to the first person who comes up with an invention, and there's somebody else behind him.

01:23:02

He doesn't get the prize, but it turns out that the second iteration is far better than the first. If you had a patent system, the second guy patents his because there's enough distance between it and the first guy, and he can then make a bloody fortune, whereas the first guy won't make anything. So if you're relying on prizes, you're relying on centralized knowledge ostensibly either by a government party who pays for the prize or a private guy, and in fact, they don't get the benefit of any kind of information coming out of it. Now, I fully agree that when you're dealing with these systems, what you're doing is you're trying to create knowledge. Well, the patent system and the copyright system actually do that.

01:23:39

You write a book, which you wouldn't otherwise have written. Now, anybody else can read it, and whereas there are certain reproduction limitations on it, if I have a copy of my particular book, I could let my wife read it even though she didn't buy it because there's a very well-understood set of limitations that people can share these books around them. What they cannot do is re-commercialize

it and go into the market at the same level as the first guy. So you're going to get information coming out of that particular system, and the same thing if you have to disclose best mode of invention with respect to something for which you patent. That information is out there, and it could be used, and then once the copyright or the patent runs out after a sensible limit of time, all of that stuff goes into the public domain.

01:24:19

So it's not as though, when you start to create these systems, you're basically denying the importance of knowledge. What you're trying to do is to figure out an efficient deployment, which takes into account both the cost of the creation of the knowledge and the cost associated with its dissemination. And the only way in which you can do that is to have a limited term of years, which is the constant point that I took, and then you have to figure out how it is you organize this.

01:24:43

And so if I – when I teach patents or copyrights, what you always do is you start worrying about the situation of when an exclusive right starts to become some kind of a monopoly. And if you see the latter thing, then you want to move it. So, for example, to give you one case is in a very gifted set of rules—this government sometimes does something right—and in the early '90s, what happened is they were trying to figure out the rules associated with the question of when it is that you could put copyrights into a pool – rather, patents into a pool one to another. And what they did was as follows. If it turns out that you wish to put tools that are – patents that are substitutes for one another into a pool, that's the creation of a cartel, and we're not going to allow it.

01:25:26

But if, on the other hand, what you do is you want to take patents that are complementary to each other in the sense that there's a vertical integration—each one leads to the next one—putting those together in a pool will essentially eliminate what is called the double-marginalization problem where each person essentially having his own patent will try to maximize the revenue on that patent. So by the time you have to go through six or seven patents, what's going to happen is the process will be worth nothing.

01:25:52

And the first person who saw the way in which you put this together was none other than that arch progressive Louis Brandeis who, when he put together the United Shoe deal around 1900, figured out that by having different stages of production put together in a single merged company allowed you to have better products at lower prices than you would if you had them separately. So you want to allow that to take place, so what you do is you then figure out when you have these patents, some forms of interaction between them are monopolistic, and some of them are pro-competitive, and this is an overtly consequentialist theory. So just to end, it was mentioned earlier. What do I think about the antitrust law? Well, I'm schizophrenic about the antitrust law because, frankly, what happens is it runs in both directions.

01:26:36

There's a recent book written, which I regard as quite bizarre by my – a colleague at Chicago, Eric Posner, who seems to think that what we have to do is every time we see a contract of employment, we have to assume that there is a deep conspiracy on the part of employers who are trying to put together some kind of monopoly situation so as to pay their workers low wages. And he says what that means is you get all these workers hanging around there, desperate for getting jobs, and these skillful monopolist buyers, that is, monopsonists as they're called, will essentially only hire a few of them. Then you look at the real world. If 4.9 million people quit jobs, it doesn't seem to be a situation where people are being shut out of the markets to raise prices. People are raising wages desperately in order to get these back.

01:27:20

It's a competitive kind of market, so you don't want to sweat that kind of stuff. But there are other sorts of barriers in which you can have various kinds of dangers, and in all of these markets, you're trying to figure out, oh, which will way will work one way or another. So as I mentioned to you before, there's a world of difference between an exclusive right on the one hand and monopoly on the other, and people who essentially work within the more, shall we say, utilitarian tradition, which I surely do, basically will say if you're going to create exclusivity where it promotes competition, then you're in favor of it. Where you create exclusivity where it tends to frustrate competition, it turns out that you're against it.

01:27:58

Well, how do you figure out which is which? You actually have to know something about the subject matter. And so the basic point I think that comes out of all of this is this is a very complicated, rich body of information that you have to be able to assemble and coordinate, if that you start to look at it, the corner solutions of perpetual property rights and no, property rights don't work, you've got to live in the messy middle.

01:28:20

But the good news is, if you understand the theory well enough, you can make mid-level adjustments that are worth making, and you can do so at least if you could overcome the congenital, shall we say, ignorance, which is associated with our courts and our legislature, a problem that exists under every legal regime. Thank you.

01:28:37

[clapping]

01:28:44

GENE EPSTEIN: Thank you to you both. Jane, please open the voting. Then if you voted once, we want you to vote again. And well, let's see. Now, all patent and copyright laws should be abolished. Well, the yes-votes started at 20.37%. Yes-votes started at 20.37% and gained to 29.63%. The yes-vote then picked up 9.26 percentage points. The yes-votes picked up 9.26. That's the number to beat. The no-vote started at 44.44 and went up to 55.56. It picked up 11.1 point. I have to call this very close

race. However, since Richard picked up 11 points and Stephan picked up a little over 9 points, you win by 1.7 points, Richard. Therefore, the Tootsie Roll goes to Richard Epstein.

01:29:46

RICHARD EPSTEIN: Well, I'm going to share it anyhow.

01:29:49

1. Hon. Maureen K. Ohlhausen, "Patent Rights in a Climate of Intellectual Property Rights Skepticism," *Harv. J. L. & Tech.*, 30, no. 1 (Fall 2016 [pdf]): 1–51, pp. 8–9 [↩]

TRANSCRIPT

Should We Release Patents on Vaccines? An Overview of Libertarian Property Rights and the Case Against IP

Stephan Kinsella

May 26, 2021

KOL341| ESEADE Lecture: Should We Release Patents on Vaccines? An Overview of Libertarian Property Rights and the Case Against IP

00:00:01

[Spanish]

00:04:21

JUAN IGNACIO IBAÑEZ: So thank you very much, Iván. I'm just going to proceed in English like the rest of this little talk. So thank you to you and to ESEADE for providing this space. Thank you, Stephan, for participating, and I'm just going to start off with the introduction of our star guest speaker, which is Stephan Kinsella. So Stephan Kinsella is one of the most prominent libertarian thinkers, specializing in the field of intellectual property.

00:04:48

Not only is he a writer and a speaker but also a practicing patent attorney and the director of the Center for the Study of Innovative Freedom. He was founding and executive director of Libertarian Papers, which is one of the journals that has contributed the most to libertarian thought in the past years. He is also the author of a milestone book, *Against Intellectual Property*, published in 2008 by the Ludwig von Mises Institute. And it's no overstatement to say that when it comes to debating intellectual property, his work is a must-read. So I'm going to kick start this meeting by – I'll provide some context first and a trigger question for you, Stephan, and then just give you all the time you need to speak.

00:05:31

Maybe I'll pitch in if I need to ask a question, but I will make a sort of Q&A at the end. So just to lay out the ground here, the title of this talk is Should Vaccine Patents Be Released? And what we're getting at, what it boils down to, is are vaccine patents legitimate? Are they just? Should they exist? You have read a lot on the subject. You're clearly against intellectual property. This is why we want you to explain your position because it seems, for many people, that as Iván said in Spanish, many people who uphold property rights find it intuitive to also uphold intellectual property rights.

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So the question would be as follows. If I create something, I come up with something that didn't exist before, and this is the fruit of my mind and a sign that I came up with, why don't I get to keep it? After all, I own my mind. I own my body, and don't I have a right to keep the fruit of my labor, which I generated, the product which I generated with my mind and my body? So isn't this only just? And aren't vaccine manufacturing or vaccine-developing companies have patent-holding rights? Aren't they just exerting this very same right that I have just described? Why is any of this illegitimate? I'll just give you the floor now. We cannot hear you right now.

00:07:24

STEPHAN KINSELLA: There we go. Sorry. How about now?

00:07:27

JUAN IGNACIO IBAÑEZ: Perfect.

00:07:27

STEPHAN KINSELLA: Thank you, Iván and Juan Ignacio, for the invitation and for allowing me to speak to everyone in English because my Spanish is very poor for which I have little excuse because I live in Houston, Texas, and I probably should learn it. But thank you for the opportunity. I think this came about because there were some Twitter comments in Spanish, which I was replying to. And I just offered to speak about it because sometimes that is the easiest way. I do have a tendency to speak fast sometimes, even though I am from a slow-speaking state—Louisiana—originally. But Juan you were speaking pretty fast, so I assume I can go at a fairly normal speed. If I need to slow down or anyone has questions feel free to let me know.

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The question about vaccines, you cannot just answer it in a vacuum. We have to start from general principles from the beginning and work our way there. And the arguments and the explanation differs if you're talking to – depending upon whether you're speaking to a libertarian audience or a general audience. I believe, and I will try to explain in the summary quickly. I'll try to speak about 30 minutes and then allow any questions.

00:08:51

But I think that the libertarian framework is incompatible with patent and copyrights. And I'll speak mostly about patents here because that is what vaccine patents concern. But if I'm speaking to a general audience, first I have to explain libertarianism, and then I have to explain why intellectual property law is not compatible with libertarian principles. But I'm going to assume here that most of you are mostly libertarian, but I will try to define it in my unique way because I think that the reason we make mistakes and we make the mistake of thinking that patents are legitimate is because we don't have a very clear understanding of our basic libertarian principles.

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So it's important to get those things very clear, and then it will be obvious why patents are unjust and should be abolished. So the ultimate answer is that the patent system is a legislative creation of the state, and it violates property rights, and that is why patent law should be abolished. And that is why patents on vaccines are illegitimate and should be withdrawn by the state if the state can do that because it just removing an unjust monopoly privilege that the state has granted.

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Now, how do I come to this conclusion? So when we talk about libertarianism, we use lots of terms like freedom and liberty. We also talk about the non-aggression principle, or some say the non-aggression axiom, which I think is a misnomer because axiom means an arbitrary starting point in math. But I think the way it's used by Ayn Rand and others is she means axiom to mean a self-evidently true principle or starting point. So we have to identify these axioms or principles, which are at the root of libertarianism. In a sense, libertarianism is not actually about liberty. If you follow the libertarian principles, you achieve a society where one of the consequences is that every human being has liberty. But the principles of libertarianism are really property rights principles.

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Now, why is this? It helps to be a little familiar with the basic economic logic of Mises, the Austrian economist, to understand this. And he has – his theory is called praxeology, which is the logic of human action. It just means we analyze what people do when they act, and we analyze the implications, the logical implications of action. That is what economics is. This is not going to be too technical or complicated. It's very common sense to envision everything that we people do, we human actors, we persons.

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What we do in all of our lives is we act, which means that we live in this world. We have some awareness of what's going on. We have an awareness that we live in the present, that we came from the past. We have a history, and we know we're moving into the future. And we all have some idea of the way the world exists right now in the present. We have some knowledge of the way things are. And we have some idea or estimate about what the future holds. And something about the future that's coming in our mind makes us uneasy in Mises' words. We're dissatisfied. We think that something is going to come that we don't like. So we try to divert the flow of events by interfering in the world to change things.

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In effect, each one of us is like a little god because we try to act to create a different universe in the future that would otherwise exist. This is what successful action is, is when you change things and you achieve some result that you wanted. The achievement of this result is not always the achievement of an ownable good. Sometimes it's just a changed state of affairs. Like if you want to make a child smile, you might say – read the child a story and you get a smile, or you make your wife happy. Or if you want a delicious meal or if you want to see the sunset, you have to take steps to make these things happen.

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But a good example would be hunger. We feel hunger in our stomach, and we realize that this hunger will get worse, and that in the future very soon, we will be very miserable or maybe even dead if we don't get food. So we realize that future is coming, and we want to change it. So we understand some things about the world, and we seek to use scarce resources in the world as extensions of our body to interfere in a cause-and-effect way with the universe. This is a complicated way of just saying that when we act, we use tools to achieve things.

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Now, you notice that there are two critical ingredients of any successful action. Number one, you have to have a body that can do things. You can control that body and control things in the universe. And you have to have the availability of resources in the world, things that you can manipulate and change. These are scarce means or scarce resources. That's the first thing. You have to have the availability of resources that you can use or possess. You also have to have knowledge because we're conscious actors, and we have to have some awareness of the way the world is and the world that's coming.

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And we have to have some awareness of the laws of cause and effect, that is, the scientific laws of the world, so that we know what we can do to achieve our desired result. So if I know that I'm hungry and I'm aware that eating a fish will stop that hunger, I want to catch a fish. And if I'm aware that one way to get a fish is to grab a net and catch the fish in a stream with a net, then I make a net with some available resources, and I use my body and the net to catch a fish and eat it. So you see that that's a successful action, which we call profit in Austrian economics.

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So profit refers to any successful action, and in the monetary sense, it's monetary profit. But profit really is a general, subjective state where you – just to have a successful action as opposed to a loss or a failed action, an action that did not succeed. So any successful action needs the human actor to have the availability of resources at his command and knowledge that guides his action. So those two ingredients are essential to action. Now, if you're alone on a desert island like Robinson Crusoe, there's no such thing as ownership, that is, property rights because a property right is more than just possession or the capacity to control a resource.

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It is the legally recognized right in society that other people respect your ability to control this resource. When we enter into society, we have other people around us, and there is – there are good things and bad things about that. The good thing is that we can live among other humans, and because we are social creatures we want that, and we benefit from that. We benefit from the company of other people, from human society, and we benefit from trade and the division of labor.

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But the danger is that other people might take our resources that we are using, so they become a threat to these resources that we need to use to have successful action. So to avoid conflict over these

resources, we develop societally wide and respected property rights that assign ownership to these resources to one person, so everyone else can respect that, and then they can trade peacefully and they can cooperate.

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Now you notice that that doesn't apply to the knowledge aspect of action. Any number of people can use the same knowledge to guide their action, the same recipes or technology or ideas. For example, if I learn that lighting a fire can help me cook food, then I can light a fire with my own wood or my own fuel source and cook my own food over that fire. And as long as someone doesn't take my wood or infringe my space or take my food, I can eat that food. And someone else who learned the technique from me can also cook their own food with their own fire with their own wood.

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So the information and the knowledge that we use is infinitely usable and, in fact, this is the reason why humanity gets richer and richer with every generation because this ball of scarce resources, the planet Earth that we live on, is finite. And we're not getting more resources all the time, but we're getting more knowledge all the time. So every generation we have more and more knowledge that we can draw upon to do things, so it makes our actions more productive and more efficient. So the spread of knowledge and ideas is good and essential. It just means learning. And property rights assign owners to the scarce resources, the things that otherwise we could have potential conflict and physical fighting over.

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Now, what rules are they? This is what distinguishes libertarianism from other political philosophies. Every – the distinction of libertarianism is not that we believe in private property rights. Everyone believes in property rights because every legal system and every political system has some answer to the question who owns this resource. But the answer is not always the private law natural answer that libertarians give. The libertarians alone give the unique Lockian answer, which is this: For human bodies, which is the most important scarce resource for human beings because you can't exist without having a body, and you can't live without protecting the right to that body, the owner of the body is the person himself.

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So the first – some people call this self-ownership, but it is more precise to call it body ownership because it is your body that is the resource that you want control of. So the first property rule is that each actor owns his own body. The second rule is, with respect to other things in the world that we need to use, these tools that were sitting around unowned in the state of nature that we need to use to exist and survive in the world to achieve successful actions, the owner of that resource is the first person who used it or whoever he sold it to by contract.

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So you only have two rules for these external resources: the first user and the person who got it by contract. These are the only rules. You'll notice that creation is not one of these rules. Creation does – we cannot create things out of nothing. All we do is we find a piece of matter in the world that is unowned. We start using it, and we rearrange it with our effort and our labor and our creativity and our intellect to make it into a more useful configuration. We rearrange it. So I take some fiber from a plant, and I make string out of it, and I take some wood, and I make a frame, and then I craft a net. I haven't created property, or I haven't created an item. I have reformed existing things that I already owned into a more useful thing.

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This does increase the amount of wealth in the world because this is more useful to me now, and I may be able to sell this net to someone for a profit. So creation is a source of wealth, but it is not a source of property rights. And I'll give a simple example. Suppose you're an employee working for an automobile company in factory making automobiles or cars, and the material is supplied the employer, the owner, of the factory, the metal, the rubber, the plastic, and you help make this car. So you did create the car, but you don't own the car because you didn't own the resources that went into it. So you can see that creation is not a sufficient argument for rights.

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Another example is if I steal your block of marble and I carve a statute into it, I've created a statute, but the original owner of the marble owns the statute, not me. So creation is not a source of rights, and to the contrary, if I find a hunk of marble, I didn't create the marble. I just found it. I was the first person, so I'm the owner. So creation is not sufficient. It's not necessary for rights. So if I carve a statute into that marble, the reason I own the statute is not because I created a statute. It's because I own the marble that went into the statute. I already owned it. So we have this confusion about creation being a source of rights. It is not.

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Okay, so the basic libertarian principles are self-ownership or body ownership, and ownership of any resource that could be disputed by identifying who owned it first and who got it by contract. Those are the basics of really all libertarian theory, and everything else is just the law working all this out. So now what is intellectual property law, and how could it be compatible, or is it incompatible with this?

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The best way to understand what IP law is, is to – let's take the case of patents. I come up with a new way to arrange my matter, to come up with an invention, let's say. So let's say that I invent a mousetrap. I take a piece of wood and some steel. I make a spring out of it and a hook. And I put it together, and now my wood and my metal is in a more valuable configuration than when I found it in its raw state in nature, so I've made a mousetrap.

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Now I can catch a mouse with that. It's useful. Someone else – so let's say I start making these mousetraps and I sell them to make a profit, and I'm successful at it, and I make a lot of profit. Well, now what I've done is I've taught the world that it's possible to make a mousetrap. I've taught them something. I've voluntarily revealed information that I came up with that I had secret in my mind and no one knew about, and I could have chosen to keep it secret, but I chose to reveal it to the world as the price of being able to sell it.

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The only way to sell this mousetrap is to give it to people, and once I give it to them, they will learn that it's possible to make a mousetrap. Now this knowledge is public knowledge. It is added to the reservoir of knowledge that the human race has, and for generations going forward, everyone knows they can make a mousetrap. And we can multiply this a billion times by all the things that we do now, things that we've learned from the work of our ancestors—how to make fire, how to fly airplanes, how to make cars, how to grow food, how to make clothing, how to make transistors and computers, all kinds of things like this.

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And this knowledge is not different in kind than any other knowledge that we learn, knowledge of morality, knowledge of philosophy, knowledge of musical works, economic knowledge, history, knowledge of history. This is just knowledge that spreads, and people learn from it, and we have greater and greater base of knowledge as humans to dip into to inform how we act, to guide our own decisions. So if I tell the world how to make a mousetrap by selling a mousetrap, the design of which is public on its face, then other people might start making their own mousetraps. They take their own wood and their own steel, and they make their own mousetrap. And maybe one of them makes a better one than me, or maybe a similar one, and starts selling it, and he becomes my competitor.

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This is what we are used to normally in the free market. This is called free-market competition, something that libertarians usually are in favor of. Competition means – free-market competition arises when you perform a successful action that you make a monetary profit from. And this price signal is an alert to everyone else that this guy has found a way to satisfy consumer needs because they are paying him a profit for these products that allows him to make a profit, and he is being rewarded for his satisfying of consumer needs.

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And so other people learn from this, and they start competing with me by doing something exactly the same or similar. So McDonald's starts making fast hamburgers, fast-food hamburgers, and soon you have Burger King and Wendy's. Mercedes or Ford starts making cars, and now you have hundreds of car makers also making four-wheeled automobiles. This is how competition works, and every time an entrepreneur gets into the business of coming up with a new venture that he hopes will make a profit, he has to try to estimate the future by using prices and economic calculation to estimate his possible profits.

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But he is also aware that the more successful he is, the more likely he is to attract the attention of competitors, and he will soon attract competition, which means that the initial profit he makes, which will be higher at first because he has a semi-monopoly position because he's the only one making this new thing, very soon other people will compete with him. And he will have to lower his prices in the face of competition, and it will be harder and harder for him to keep making the original profit that he made in the face of competition.

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So he has to come up with a business model that will allow him to recoup his original investment and make a profit and keep making a profit by continuing to improve what he's doing and keeping a good reputation up. So competing in the market is a good thing. It benefits the consumers, and it keeps producers innovating and always working to be more efficient. And it doesn't change when the product has an intellectual aspect or a design aspect.

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The only difference is one of degree. So, for example, if I sell pizzas or hamburgers or automobiles, it's not so easy for someone to build an automobile factory. It takes awhile for another competing automobile company to come up. So you have Ford and then General Motors and then Fiat and Mercedes and BMW. But they don't crop up instantly and easily. It takes awhile. But if I'm selling a book, which is a printed page, in this modern age it's easy to copy a book and print a book. And it's easy to sell a book very identical to the book that the first author sold. Or if I sell a mousetrap, it's pretty easy for someone else to copy what I'm doing and sell a mousetrap.

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All this means is that in some fields, like pharmaceuticals or books, it may be easy to compete, which just means that the entrepreneur knows he's going to face competition sooner. So it's not as easy to make a profit or to keep that initial high profit going for as long. But this is not something that the state should be tasked with coming in and slowing down competition so that it's harder for people to compete with me so that it's easier for me to make a profit. This is protectionism, and this is contrary and anathema to libertarianism. So the best way to think about a patent right and also a copyright—but let's stick with patents—is it is something that, in the civil law, which I'm sure Argentina is a civil law country, as is my home state, Louisiana.

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It's the only American state which is mostly civil law. That is, it draws on the Roman law and the Spanish law and the French law. In the civil law, there is a right called a negative servitude. In the common law, this is called a negative easement. Now, the way this works in the law is that when you own a resource, you're the owner of that scarce resource, that object. And this ownership means that you can give people permission to use it, or you can deny them permission.

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This is what ownership means, and this is why you can give them full ownership of it by a contract because you're giving them permission forever. So contract is really subsidiary to the basic property right. Okay, but ownership of this resource gives you the ability to permit people to use it or not use it. Okay, so if I own, let's say, a home, like a house and I live next to a bunch of neighbors, we all might want to live in a neighborhood where no one is permitted to use their home to have a pig farm or to have it for industrial purposes. We want everyone in this neighborhood to use their homes only for residential purposes.

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So we can all sign a contract and agree with each other that only we get to use our homes, but we need the permission of our neighbors to use it for some prohibited purposes like commercial purposes. This is called a negative servitude because I, as the owner of my home, am granting to my neighbor a negative servitude, which means he can't use my house, but he can block or prevent me from using it. He can stop me from using it in a certain way. This is perfectly legitimate under libertarian law and under private law if it is consented to. Just like if a boy kisses a girl, it's legitimate if she consents. But if she says no and if he kisses her anyway, it's assault and battery. So the use of someone's property, which could be their body or their home, is legitimate only if the owner consents.

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And in the case of a negative servitude, if the owner consents to it, it's fine, and it should be enforced. What patent law does is the government grants this negative servitude to the holder of the patent, that is, the person who invented some technique or claims to have invented some technique. They give him this negative servitude, which lets him block me from using my property as I see fit. So if I have a patent on a mousetrap, I can go to government courts, and they can issue an injunction, which is backed by government force, preventing another person from using his factory to make mousetraps. That is a negative servitude, and the problem with it is that it was not consented to by the owner.

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So this is essentially the problem with patent and copyright is that it's the grant by the state of a property right in someone's owned resource. So it is really theft or redistribution of property, and there are lots of negative consequences of this, which we can point to. But this case, as you can see, is not really consequentialist. It's a fundamental principle case based upon the analysis of what libertarian principles really are. But of course, libertarianism is a practical doctrine designed to promote human prosperity and cooperation and peace and happiness.

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And so the more that these principles are diluted or infringed by a corrupt legal system, the more damage it does to us. It basically makes us poorer by impeding and slowing down innovation and restricting property rights. So we are all poorer today because there is less innovation and technical knowledge available to us and less competition among producers, which results in monopolistic prices, higher prices than normal, and slower innovation, which makes us all poorer.

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I mean we very well could be living in a world of immortality now and flying cars if the patent system had not slowed down innovation in a compounding way over the last 100 years. So I believe that, in addition to the other obviously horrible things that states do to us that libertarians recognize as evil, which is the tax system, central banking, which cause inflation and finances war, war itself and the drug war and government education, that is, government-funded school, those big five things, I believe patent and copyright are up there with those things.

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And in fact, you could argue that it's one of the worst of those because it does the most harm to us because it slows down the increase in this pool of knowledge that we humans have at our disposal and slows down prosperity for all of us. And it costs lives. It kills people. It makes us all poorer and restricts property rights and is unjust. That is the basic case against IP and why it should be abolished immediately and why it is one of the most evil things that the state does. So I will stop there with that little précis and open the floor to any questions that any of you have.

00:34:42

JUAN IGNACIO IBAÑEZ: So thank you very much, Stephan. That was an incredible, very clear explanation. And I'm just going to play devil's advocate a little bit just to allow you to explain a little bit more and to help break down your position at least the way I understand it.

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So you said that in order to act we need two things: resources and knowledge. And I pay attention that you made this distinction, and it seems that you made this distinction because later on you are arguing you can acquire property of your resources by becoming the first possessor but not over knowledge.

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STEPHAN KINSELLA: Correct.

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JUAN IGNACIO IBAÑEZ: And but then I could come to you and say, well, knowledge is a resource, and it feels that what you're saying is, yeah, but it's not a scarce resource.

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STEPHAN KINSELLA: Correct.

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JUAN IGNACIO IBAÑEZ: And I also take notice that you define – you didn't use the word scarcity. You went straight to conflict.

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STEPHAN KINSELLA: Correct.

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JUAN IGNACIO IBAÑEZ: And this is interesting because say – back to the case of vaccines, let's go back to 2020. In 2020, there weren't many COVID vaccines, right? So I could say, well, vaccines were scarce. They were a scarce resource, or vaccine designs were a scarce resource but not according to your definition of scarcity.

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STEPHAN KINSELLA: Correct.

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JUAN IGNACIO IBAÑEZ: Because it's conflict what matters.

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STEPHAN KINSELLA: Correct.

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JUAN IGNACIO IBAÑEZ: So the purpose of the law – so your position requires the purpose of the law to be the avoidance of conflict.

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STEPHAN KINSELLA: Correct.

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JUAN IGNACIO IBAÑEZ: But if I said that the – what if I believe – what would you tell me if I believe that the purpose of the law is not just to avoid conflict but also to promote innovation. You said that the difference between designing automobiles and pizza is a matter of degree, so when innovation is so much more important in our goals as a society than avoidance of conflict, what will you tell me to convince me that the law should not protect "intellectual property?"

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STEPHAN KINSELLA: Yes. This is why I said that the argument is different whether I'm addressing a libertarian audience or a general audience because libertarians should understand that the purpose of law is not to promote innovation. In fact, the purpose of law – there are many values we have in

society that we personally have as well. And you could arbitrarily pick any one of these values as what the law should do, but that's not what we libertarians believe in.

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In fact, the non-aggression principle is key to our philosophy because we understand that the only way to violate rights is to use force against other people. This is an implicit recognition that the entire purpose of law is to help us avoid conflict. The reason I use the word conflict – the word scarcity is ambiguous because it sometimes means lack of abundance. And sometimes in economics it has a technical meaning, which means basically rivalrousness, which I use the term which I made up called conflictable because that really gets to the essence of what we mean, but rivalry captures it pretty well. This is, in fact, one trick that statists use is they say things like, well, we believe that liberty is an important value, but unlike you libertarians, it's not the only value.

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So it's just an excuse to regulate the economy because they say, well, it's also a value that poor people don't starve, and it's also a value that children get educated, and it's also a value that religion is supported. And it's – you could come up with an unending list of values, and then you have to have a government committee balance these things. And liberty just becomes one value among many. But when we libertarians say we believe in the non-aggression principle, we are saying that it is unjust to aggress against people.

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But if you add other values, then now you're saying sometimes it is just to commit aggression against people because if it's a value that people don't become addicted to drugs and one way to achieve that is to make drug use illegal, now you're violating people's property rights by committing aggression against them by physically killing them or putting them in prison if they violate the law against drug use. So it's one way or the other. You can't have it both ways. Now, I would say that the only way to have innovation is for human minds to be free.

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This is a practical thing. Humans have to exist and survive and prosper. In fact, we have to have enough time left over at the end of the day to have time to reflect and think and converse with people and to come up with new ideas. When we lived like cavemen and we lived a precarious existence where we're living from sunup to sundown working our fingers off and we're living a hand-to-mouth existence, there's very little time to spend on ruminating and thinking.

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And before we developed advanced language and writing where we could pass these ideas down, this is why the human race stagnated for so long until the modern era. So I think that the invention of the printing press was a big thing, and then the modern era of the industrial revolution were the two big areas where the knowledge exploded because it could be stored and learned and passed around. But

obviously this requires people to be free. That means a free market where they can have enough prosperity to get to that point in the first place.

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So there is no doubt in my mind that respecting the basic property rights, in order to avoid conflict, will have many beneficial consequences, one of which is innovation. So innovation will flow from free people, but for the government to have a policy, first of all, the government has to infringe property rights to enforce these patent rights, and it has to slow down innovation. So if I am making a mousetrap and I have a monopoly on that for 17 years because I have a patent, I have very little incentive to improve that patent, that mousetrap design because I can make my monopoly profits for 17 years.

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And by the same token, people that would have competed with me and come up with improved mousetraps, they largely don't bother investing in mousetrap innovation because they can't sell their new mousetrap for 17 years. So the patent system slows down innovation by reducing the need for people to keep innovating and reducing the ability of competitors to innovate. So I think the premise is just wrong that – and not only that, the government is never good at anything. The government is good at only two things as far as I can see. The government is good at propaganda, that is, deluding us with the idea that it is necessary and that it benefits us, which is a lie and false. And it's good at destroying and destruction. It's good at killing people, starting wars, and putting people in prison and ruining lives.

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But the government is not good at anything else. Even the things the government does that are in themselves not bad things like building roads, the government does a bad job of that, very inefficient, very sloppy, very wasteful, very corrupt. So the idea that the government can come in and fine-tune the economy by giving some people monopoly privileges to increase innovation is absurd. And in fact, all the empirical evidence studied over the last 100 years indicates that the patent system does not increase innovation. It just distorts it and slows it down.

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JUAN IGNACIO IBAÑEZ: Okay, so the premise is wrong. I would like – I was going to ask you if you think your – the statements that you just made about innovation also apply to COVID vaccines. But since I believe so many people are going to ask that later on, I'm not going to ask this question and ask a different one, which is – so you said the premise is wrong. I want to make a question starting with the right premise. So let's adopt a fully libertarian property rights framework.

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And this is my question. So I'm holding in my hand this very contentious mask in Argentina. It's called Atom Protect. This mask was the source of controversy because it was – its use was politicized. And recently there was this debate because the company, who was closely associated to the

government, started complaining that there were copies, illegal copies violating the trademark of this mask. I know I'm shifting away from patents and going to trademark here, but since it's still intellectual property I think it's relevant. And it was funny because people who were asking how this was politicized, people who were asking for patents to be released were asking for trademark to be enforced and the other way around.

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Now, if I adopt a fully non-aggression libertarian framework, I – it seems to me that if I want to buy this mask and not a fake one and somebody just copies the trademark, I'm being deceived, so this is fraud. So it appears at least prima facie that even in a libertarian framework, we should have intellectual property in the form of trademark at least. Is this wrong? Have I missed something in my reasoning?

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STEPHAN KINSELLA: Yes. Let me explain why. So one reason I gave a systematic argument in the beginning is because the arguments from proponents of intellectual property are so diverse that every time you explain why one of them is wrong, it's like playing the game Whack-A-Mole. They just come up with another one. So the really only way to combat them is to start from the beginning and go to a concise set of libertarian principles. And then you can use that to compare these proposed other laws and show why each one of them is wrong.

00:45:20

What happened was trademark evolved under common law, and there is a slightly anti-fraud aspect to the original trademark law, which I'll get to in a second. But patent and copyright arose by legislation only, and they were both protectionist and for censorship purposes, and they could not exist without legislation. They were never called intellectual property. They were called – well, trademark was called trademark, and patent and copyright – or unfair competition. And patent and copyright were just called monopoly privileges or state privileges.

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But when they were – when the free market economists in the 18th century – I'm sorry, in the 1800s started realizing how contrary to the free market the patent and copyright system were, and they started coming up with arguments for why patent and copyright should be scaled back or abolished the interests who were dependent upon these monopoly privilege grants started defending it by calling it intellectual property to make people think that it's like a type of property or a natural right.

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So it is these defenders of patent, copyright, trademark, and trade secret law that lump these different things together under the umbrella term intellectual property and forced us to use that term to object to them. And when I object to patents, then they say, well, what about trademarks? And the arguments I have to use are different because these are four different legal systems that the advocates of IP put under the same umbrella.

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So it's not my fault I have to use a slightly different argument, but we can use the original principles to explain what's wrong. So here's what's wrong with trademark law. The reason fraud is considered to be a type of offense under libertarian law is because it flows out of basic property rights. Again, property rights in the main right, and the reason we can have contract is because the owner of a resource has the right to give it to someone else.

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That's what ownership means. But this implies that you can condition that transfer, like a sale. You can make it conditional upon something that the buyer does. Like I might give you an apple for your orange, and I want the orange to be a real orange. And so that's part of our communication, our understanding about the orange. And if you lie to me and give me a rotten orange, you're taking possession of my apple without my full consent because my consent was conditioned upon you giving me a good orange.

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So fraud can be thought of as a type of theft by trick, so because it's a type of theft, that is, taking someone's property without their consent, you can see that it's a type of trespass or theft. So fraud has to be thought of only as that, a type of taking of someone's resource or using it without their fully informed consent or permission. So we shouldn't use the word fraud to just mean dishonestly or deceptiveness.

00:48:19

Now, in the case you gave where a mask is sold with a trademark on it that is a lie, then the consumer is deceived. He is defrauded, but that is already covered by fraud law. So fraud law and contract law already prohibit the seller doing that, and he could be sued by the consumer for doing that. So why do you need trademark law? What does it add? Trademark law is something else. It adds something on top. What trademark law does is instead of giving the consumer who is defrauded the right to sue the seller, it gives it to the competitor who owns the trademark. But the competitor was not harmed. It was the consumer that was harmed.

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So it's a type of theft of this right to sue from the consumer to the original owner of that mark, which is wrong. And number two, he doesn't have to prove fraud to stop you. He only needs to prove likelihood of consumer confusion. Now, consumer confusion is not the same as fraud, and the likelihood of consumer confusion is not a proof of it anyway. This is why, if someone wants to buy a fake Chanel purse, they are not defrauded because they know that this is a fake purse that costs 100th the price of the original. So the seller of the knockoff purse is not violating the consumer's rights. He is not defrauding him. And the buyer knows that they are getting a fake purse, and they want the fake purse because it's cheaper.

00:49:55

But the trademark holder, Chanel, can still use trademark law to stop that transaction. Why? It's not because of fraud because there is no fraud. It's because the trademark law effectively gives a reputation right to Chanel, which is very similar to what defamation law protects. And as Murray Rothbard explains in *The Ethics of Liberty*, in his chapter "Knowledge: True and False," defamation law or libel law is also not libertarian because it implies that people own their reputations. But your reputation is just what other people think about you, and they have the right to think whatever they want about you because they own their minds and their brains.

00:50:35

They even have the right to think false information about you. They even have the right to rely upon lies about you to form their judgment about you. So to have a reputation right violates other people's rights to their own minds. This is why a focus on what property rights are keeps this straight because if I own my body, no one else has the right to tell me what to think. So you can't own a reputation because it would be owning what I think. So trademark law should also be abolished, although it doesn't do nearly as much harm as patent or copyright.

00:51:10

JUAN IGNACIO IBAÑEZ: Thank you very much for that answer, and I think that – I have many more questions, but it's – I think it's time for other people to also ask. I know, Iván, you were also going to say something, so I'll just let him.

00:51:26

IVÁN CARRINO: I have a question before allowing the rest. So, Stephan, very interesting, very persuasive. The standard argument for patents in the case of the vaccines is that – well, if there were no intellectual property rights, then who would invest? But my question is would it really be that different considering that the patent – it's not the only entry barrier to create a vaccine. It's not that you only need the formula. You need the infrastructure, the capital investment, the reputation, the history of creating good vaccines. So would it really be that different if we didn't have intellectual property rights enforced by government, or what would be your – what's your point of view there?

00:52:30

STEPHAN KINSELLA: Yes, it would be different. It would be better. There would be more innovation. So here's the way to look at this. I'll take the US as an example because I know it the best, and it's the most impactful probably. So in the US, we have an extensive regulatory scheme called the FDA, which requires drug companies to go through this extremely time-consuming and very, very expensive regulatory review process, which of course the FDA should be abolished because it is illegitimate.

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But this is one reason these companies have such huge costs, not to mention all the other costs imposed on them by regulations such as the minimum wage and corporate taxes and tariffs and other regulations. So it's like the government imposes a cost on companies, and then they complain that it's

hard to recoup this cost with their products. And then the government gives them another intervention in the economy called a patent system to make it up to them. So it's just like Mises says: Controls breed controls. If we get rid of the FDA, the costs would be much lower, and taxes, if we could lower taxes, these companies would have way more resources to invest, and they would have fewer resources to recoup in the first place.

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Second of all, as part of the FDA process, these companies – it takes several years, and these companies are forced to divulge or to publish their secrets as part of the process. So after five years or whenever, when the product is finally approved, all their competitors are ready to go because they know what the company is doing because they had to reveal it. The FDA process forced them to. If we didn't have the FDA, you would have a company engaged in research and development, which would cost much less. And they wouldn't have revealed all their information, so when they start selling the product, they would have that lead time for many years before competitors can gear up and start competing. But then they would naturally have competition like they should.

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But their reputation would still help them because, I don't know how it is in Argentina, but in the US, name brand drugs like Tylenol that is for a pain reliever, still sells next to generic acetaminophen on the shelf, which is about half the price or less, and they both still sell. Some people buy the cheaper one. Some people pay twice as much or more for the more expensive one to get the better reputation. There's no reason to think that wouldn't exist with pharmaceuticals. And moreover, the cost of all these drugs is inflated by distortion because of the intervention of the government in the medical industry, that is, the healthcare industry with insurance, government distorting that, and also with the prescription industry where you have to go to a doctor to get a prescription to buy something.

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In a free market, you wouldn't need a prescription, and you wouldn't have the government artificially raising prices of prescription drugs. You probably would have more natural drugs. What happens now is you have companies selling to consumers lots of prescription drugs, when a natural homeopathic drug might work better, because they can't charge very much for that. They can charge a lot for the patented drug because it's patented, and it's expensive because of the FDA process and because the medical system forces people to take it, forces doctors to recommend it so they don't get sued for liability, for tort liability. And the insurance companies will support it because of the socialized insurance system in their country.

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So all these things together distort the entire thing. The tort system, the FDA system, government involvement in healthcare, and the patent system together have ruined and messed up the entire thing. I think without these things we would see a healthy – and one more thing to mention, if you look up the other good book on this topic, which is the book by Boldrin and Levine, which is an empirical or economic look at this called *Against Intellectual Monopoly*, which is free on their website, AgainstMonopoly.org. I think it's chapter seven. They discuss the pharmaceutical industry and all the myths about it.

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There were no patents in Switzerland and Italy for a 50-or-so-year period in the late 1800s and 1900s. And they were among the leaders in the world in pharmaceutical production even though there were no patents on pharmaceuticals there. So it's just false that there would not be pharmaceuticals produced without them being given protection from competition by the state.

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JUAN IGNACIO IBAÑEZ: Can I maybe just give one follow-up?

00:57:22

STEPHAN KINSELLA: Yes.

00:57:23

JUAN IGNACIO IBAÑEZ: I think you answered Iván's question very comprehensively, but I'm just wondering what if I tell you, okay, I buy your entire argument for almost everything but not for all possible innovations. And as it happens, vaccines are kind of an exception. Well, maybe not vaccines themselves because, as Iván said, there are so many other barriers to entry that, in the end, you may find a way to say, look, you don't even need patents to begin with. And there's all these other inefficiencies. What about basic components that can be used in the product? But they are not in itself a product. And they don't have an immediate application, which is in the case of the vaccines is the mRNA technology – mRNA technology.

00:58:10

So maybe – I'm not an expert on this technology, but as I understand, it initially didn't have any immediate application. But it was – this innovation happened anyway, you could argue, because there was the possibility of getting a patent for when in the future they might have – we might – that application may be possible. So for the other kind of basic research, don't you think patents would promote it?

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STEPHAN KINSELLA: Well, so no. And I think you could make the same argument for the necessity for the state to tax people to take that money and to fund research, which they do. So there's no end to this argument. In fact, the patent system is just a disguised form of that. It's equivalent to taxing us and funding the National Endowment for the – I don't know – the various agencies that are funded by government employees, and they give grants for people to do fundamental research. And then people claim that there's benefits to this, and there are benefits to it, but there are costs.

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It's like when people say that NASA has spin-off technologies, like Tang, this great orange drink full of sugar that we all drink, great. We spent billions of dollars to put a man on the moon, and we get Tang from it, and some kind of toilet innovations. But Bastiat cautions us to think about economics as the long-run view and keeping in mind the cost of policies. There is the seen and the unseen. It's the broken window fallacy. Yes, I can take money from someone and build something. I can build a skyscraper or a government building. But that money is now not in the hands of the original owners, and what they would have used the money for disappears, but we don't see it.

01:00:00

So you could point to a couple of cases of increased innovation, but we don't know what innovation was lost. And for all we know about the subjective nature of value, we can assume that overall we're worse off because when you have two parties to an exchange and it's voluntary, they both benefit from that exchange. That's why trade makes everyone wealthier. Both sides are better off, but if one of the sides is coerced, we know he's worse off, and we know that the other guy might be better off.

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But because value is subjective and not interpersonally comparable, we can never know that society is better off on net because I'm harmed, and you're made better off. Like if the government takes a million dollars from Bill Gates and gives it to me, I'm better off, and he's worse off. Is society better off in total? It's impossible to know. So the only way we can know that something makes us better off is if both sides are consensual. So anything that counts as aggression necessarily has to be presumed to make us worse off. I would also point out that no one can argue with a straight face that we would have no innovation or no pharmaceuticals without a patent system.

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What the argument is, is that you would have some innovation but not enough. In other words, it's basically the same old market-failure argument that the free market is suboptimal and that the government needs to step in and interfere and tweak the economy to make things better. Now, the government is bad at doing that, and I think it's impossible, and their interest is not in doing that anyway. If we did have a patent system tailored in a more rational way so that you have a longer term for pharmaceuticals and a shorter term for software and this and that, it might make a little bit more sense.

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But then who's going to be in control of that, some government committee, which will be corrupt and be bribed to do it in the wrong way? And plus there's no scientific or objective standards for any of this. It's all arbitrary. So the only way to improve the patent system is to reduce the scope of patents and the terms. Seventeen years is too long. Sixteen years is better. Two years is better, and zero is the best. Most patent advocates assume that we have a curve, a Gaussian curve. Zero is not enough, and an infinite term is too much.

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Somewhere in the middle we have a peak, and we need to find that peak. And most people that criticize the patent system like some libertarians like Alex Tabarrok, they think we're too far. But they have no empirical evidence to justify that because they don't know where the peak is. No one knows because this is all made up, and economics doesn't work with these empirical numbers anyway. It's all subjective. It's really this. It's a downward-sloping thing. The more patents, the worse off we are, so the fewer patents, the better off we are.

01:02:53

JUAN IGNACIO IBAÑEZ: Great, fantastic. Now, I'm picking a few questions from the public, just one or two. I'm going to combine two, and then we'll have two in total. So first question is from Jamero. He is buying your case at least for the sake of the argument, but only for the future. So he is saying, okay, but now companies, they have already invested in this intellectual – in these vaccines. So shouldn't we – if we buy your argument, shouldn't we release – abolish IP for the future only but not for existing IP since investments have already been done with a view to this?

01:03:40

STEPHAN KINSELLA: Well, I would take that deal because it would be an improvement, and we could finally move forward. But of course that would not be optimal. It depends upon the type of policy you're talking about I believe. If you take some fundamental acts of injustice like, let's say, people in prison now for drug crimes, or if we have slavery like we had in the US in the 1800s, should we abolish gradually, or should we abolish instantly? I think the answer is obvious.

01:04:09

The patent system is totally corrupt and unjust, and no one has a right to use the force of the state to stop competition. If they relied upon that patent right when they came up with their business model, then too bad because they were counting upon the perpetuation of a totally evil and unjust policy. And I think if you build your business model around the perpetuation of a policy that's evil, then I don't have any sympathy whatsoever for you if you lose that right. So no, I would abolish it immediately if I could.

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Maybe some other things I wouldn't, like I don't know if I would end social security right away because you have some old people that depended upon it, and they are helpless now because we've made them helpless. I don't know if I would just have all the soldiers guarding the nuclear bombs walk away tomorrow and let them fall into whoever homesteads them. Unfortunately the state has made such a mess of things that we need some kind of orderly transition for some things, but not for patent and copyright.

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I think immediate abolition would be an instant boon to humankind with no victims whatsoever except for people that are unjustly profiting off of them like the music industry and Hollywood and certain technology industries. However, I would say that as a practical matter, any abolition, which is very

unlikely, would always come with a transition period. And it would keep people like me employed for 20 more years sorting out the transition period. So all you guys are doing is giving tons of work to people like me to soak away productive assets from the economy.

01:05:49

So I'm happy. I have a nice house, so I guess I can keep benefiting from this illegal system just like drug attorneys – defense attorneys make money defending people for drug crimes. Tax attorneys make money helping people navigate an unjust tax system. And oncologists make money trying to stop cancer, and if we were to succeed in getting rid of tax laws or the drug war or curing cancer, these guys would be out of a job, and that's a good thing.

01:06:16

JUAN IGNACIO IBAÑEZ: Fantastic. Fantastic answer. I'm guessing you would have a job for contractual IP or something still. You wouldn't be – with complete abolition, you wouldn't be completely jobless.

01:06:28

STEPHAN KINSELLA: I would transition to Bitcoin law.

01:06:31

JUAN IGNACIO IBAÑEZ: Okay. So then there was another question. I think you have answered this already, but I'm just going to restate it in case you want to add something else. So somebody is asking how you would convince an entrepreneur to invest upfront if there's no protection. And somebody else adds to that. You gave the example of copying a mousetrap, well, that's easy. Copying a vaccine, developing a vaccine is not. Sorry, developing a mousetrap is easy, but developing a vaccine is not. Do you think an entrepreneur would be convinced by your argument, or how would you make him convinced?

01:07:11

STEPHAN KINSELLA: Well, my argument is not to convince the entrepreneur to invest. It's to convince people to agree that IP law should be abolished. It's a policy argument. Again, this is why I gave the example earlier about competition can be easy and fast or slow and difficult. And different ventures face – different entrepreneurial ventures face different types of competition. And you just have to take that into account in the type of venture you go into.

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As I said, if you studied the book by Boldrin and Levine, just read that one chapter seven or – it's either seven or nine on pharmaceuticals. You'll see that Switzerland and Italy had thriving pharmaceutical industries when they had no patent protection for pharmaceuticals. And again, no one will say that no one will invest in innovation. All you can argue is there will be not enough innovation. But then you

get into this argument that the goal of law and the purpose of government is to intervene in the free market to make sure we have the optimal amount of innovation.

01:08:16

But there is no objective standard to determine that, and there's no stopping point because – so let's suppose that there would be X amount of pharmaceuticals invented in a free market. And let's just suppose there would be one-half X invented – I'm sorry, 2X if we add a patent system, which I think is false, but let's say that we have a patent system. And now people have an incentive to develop more drugs because they can invest more money into it because they can sell it at monopoly price for a longer time.

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It's kind of sad that libertarians are arguing for people's ability to sell at a monopoly price, but whatever. So let's say that it does double the amount of innovation. But what if that's not enough? What if we need five times? So the patent system only gives you so much extra incentive, so the only thing we can do is make the patent term longer or maybe increase the penalty from a financial penalty to execution or prison time, or maybe the government has to actually subsidize it, which they do.

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So there's no – so maybe the government should spend $75 trillion a year on subsidizing innovation to get a little bit more innovation to go from 2X to 3X or to 10X. Where is the stopping point? Then we make the human race starve off because we've taxed us of everything. So people say be reasonable. Let's just do a reasonable amount of taxation or a reasonable amount of patent law. But there's no standard there. They just want to have a pragmatic ad hoc approach with no standards whatsoever and let a government – a committee of government bureaucrats, which is what the congress and the legislature is or what the patent office is, or it's what judges are that decide these cases. Let them just decide, but that's just kicking the decision to a bunch of government state actors, which are corrupt and have no objective standards to guide them. The whole thing is a mess and absurd.

01:10:09

01:10:16

IVÁN CARRINO: Thank you very much, Stephen – Stephan, sorry, Stephan. I'm going to take this question from the audience, and it will be the last because we're – otherwise we will take too much of your time, of your generous time, and well, that's not the idea. And thank you for your presence here. **[indiscernible_01:10:38]** says that in these situations the world needs full and global scientific cooperation for global issues and problems and also governmental cooperation. What's your point of view here? What would you answer in this case?

01:11:00

STEPHAN KINSELLA: I don't know if I disagree with that, although I'm an anarchist, so I think governments should be abolished. But to the extent we have governments, I do think cooperation is

better than war, which is why a lot of libertarians hate the United Nations because it's a centralist threat to the world, a one-world government, all that. I don't think it's so much of a threat because the United States is so dominant it will never let the UN take over. So I think in the meantime, having a forum for nations to at least try to resolve disputes amicably is a good thing.

01:11:33

I actually think that the patent system impedes cooperation because it forces people to try to keep their ideas secret until they can patent them and get credit for them. If people knew there wasn't a patent system, then they would know that they could benefit and use whatever information they – is out there. In fact, people misunderstand the patent system's official purpose. People think the purpose of the patent system is to incentivize research and innovation, but it's not.

01:12:07

It's to encourage people to disclose. So before a patent system, people could use what's called trade secrets to keep their information secret as long as they could as a proprietary secret. But quite often you can't do that. The mousetrap example is an example. You can't keep the design secret if you want to sell it. For some things like the way you make a chemical, you can make the chemical secretly, and no one knows how you made it. I'll get them in ten minutes. But – I'm sorry. I lost my train of thought. My wife just walked into the room. Remind me. Where was I?

01:12:47

IVÁN CARRINO: You were in trade secrets.

01:12:48

STEPHAN KINSELLA: Oh trade secrets. So in a world without patents, people keep some things a secret, and the idea of the patent system is to give someone a monopoly for 17 years in exchange for them publishing a patent disclosure that makes it public. Now, when you make this information public, people are supposed to be able to use it, but they can't use it for 17 years. So they finally get to use it in 17 years, but the truth is that for certain types of products, the things you can keep secret you don't usually publish that in a patent.

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You keep that secret anyway. So the only thing the patent system does is it encourages people to publish ideas that they would have had to make public anyway by selling the product. So they're given a monopoly in exchange for doing nothing because they're revealing public – they're revealing information about their invention, but they would have had to do that to sell the product anyway. So we really get no extra disclosure out of the patent system because the things that you can keep secret, you keep secret anyway, and you don't patent it because a trade secret can last forever, whereas a patent expires in 17 years.

01:13:51

IVÁN CARRINO: Well, thank you very much, Dr. Kinsella. It was a pleasure and honor for ESEADE to have you here. Just a few words in Spanish. [Spanish]

01:14:16

JUAN IGNACIO IBAÑEZ: He just said, Stephan, that it's an honor to have you here. Thank you very much for offering to do this, for agreeing to do this in front of this sort of audience, and in Spanish. [Spanish]

01:14:33

STEPHAN KINSELLA: Thank you very much, and I appreciate everyone's interest in this topic, which is not easy, and for allowing me to speak in English. And I welcome – if anyone has any questions for me, feel free to ask on Twitter or Facebook. And I'd be happy to do a follow-up at any time if you'd like, and if you want more research – if you want more information, just go to my website. The focus is on IP, which is C4SIF.org. It's Center for the Study of Innovative Freedom. I have a lot of resources there for people that are interested and some works translated into Spanish on my site too.

01:15:12

IVÁN CARRINO: I'm copying the link of your website here, and I have also shared your book, which is translated in Spanish. [Spanish]

01:15:33

STEPHAN KINSELLA: Gracias.

01:15:34

TRANSCRIPT

Why "Intellectual Property" is not Genuine Property

Stephan Kinsella

Libertarian Papers, C4SIF.org

Adam Smith Forum

Moscow

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(Edited transcript)

Abstract: Intellectual property rights, or IP—primarily patent and copyright—has long been viewed as a legitimate type of property right by libertarians and other defenders of capitalism and free markets. I argue that IP rights are not genuine property rights, and that these laws should be abolished. This issue is relevant to Russia and Adam Smith Forum members because of the pressure by the US on Russia and other countries to adopt western-style patent and copyright law. But the west has attempted to export many other laws and policies to other nations, many of which are not compatible with a free market, such as antitrust (competition), antibribery, tax, narcotics, and central banking laws and practices.

In this talk I provide an overview of the nature of patent and copyright, followed by a discussion of the nature and purpose of law and property rights in a world of scarcity. I argue that property rights apply to scarce resources only, to permit such resources to be used peacefully, productively, and cooperatively as a means of action. However, property rights make no sense are in fact perverse and undermine genuine property rights when the law attempt to apply them to information, ideas, and knowledge. Property rights must be granted in scarce resources and only in scarce resources if we are to have prosperity, freedom, and progress in science.

In fact, state IP rights are not genuine property rights, but are instead neo-mercantilist monopoly grants of privilege that protect favored recipients from competition. This enriches the patentees and copyright holders, and the state, but at the expense of consumers and competitors.

I also provide an overview of the history of opposition to IP law, identifying four key historical phases beginning around 1850.

I conclude the talk by observing that IP reform cannot work; the only solution is complete abolition of patent and copyright.

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Good evening.

This is Stephan Kinsella. I am speaking from Houston. I would like to say good evening, or good morning, in Moscow at the Adam Smith Forum. I would like to thank Andrey Shalnev, the head of the steering committee, for this invitation to speak remotely. I am sorry I cannot be there in person, but I hope that you will find this video presentation and speech of interest.

My name is Stephan Kinsella. I am a patent attorney and a libertarian writer in Houston, Texas, in the United States, and editor of the journal *Libertarian Papers*.

I have been a practicing patent attorney since 1994. I have been writing in opposition to patent and copyright law since about 1995. The topic of my speech today is "Why Intellectual Property is not Genuine Property".

I would like to emphasize that intellectual property has been viewed as a type of property right for over a century now, as part of the western or capitalist free market system.

Now, I did mention that I am a libertarian. And in particular, I am a Rothbardian Austrian economist following libertarian principles, and an anarcho-capitalist. And as a libertarian and an Austrian, I am in favor of property rights and in free markets and in capitalism, if it is rightly understood. I will say I am not in favor of capitalism in the sense of corporatism or the type of cozying up between Western big corporations and the state as we see here in the United States in the West nowadays. That is a corruption of the ideal form of the free market economy or capitalism. But I am in favor of property rights.

So the first question might be: why is someone who is in favor of free markets and property rights, and a patent attorney himself, which is me, *oppose* patent and copyright law, so-called intellectual property law? In this talk, I would like to explain why I believe that intellectual property, primarily patent and copyright law, are not genuine property rights and why these laws actually should be abolished and why the Western style, the American type, of patent and copyright should not be adopted in China, Russia, India, and other countries in the world.

By the way, I have a presentation which I have done which I will have sent to the Forum. I don't know if they will show it along with this speech, but you are free to access it from my website at C4SIF.org (Center for the Study of Innovative Freedom), the site for my research center. Or at my personal site: StephanKinsella.com.

Let me explain quickly one reason why I think this is particularly relevant–this topic of justifying or discussing the legitimacy of intellectual property law–to Russia and the Adam Smith Forum itself. These issues are of particular interest to the Adam Smith Forum because the members of the Adam Smith Forum are also advocates, like Austrians, of free markets and property rights. Also because the Western powers, led by the United States, are continually pushing emerging powers in the former socialist countries, like Russia, to adopt United States or Western style IP law, particularly patent and copyright. They have done this through the WIPO, through the WTO (World Trade Organization), the United Nations, and also through recent and continuing copyright and patent treaties and trade agreements, like the recently signed ACTA (Anti-Counterfeiting Trade Agreement).

So let me make it clear. As a libertarian, as a free market and a property rights advocate, we should not make the mistake of equating the American government's laws and policies with a free market order. And therefore we should not believe that just because the American state, our government, proposes or

pushes a given law or policy and tries to urge other countries to adopt it, does not mean this is actually a capitalist or a free market or a libertarian property right. In fact, it is a mistake to equate the American state with the American economy.

The American economy is at least somewhat free market even though it is a mixed economy, but the state itself, like all states, is inherently socialistic. In fact, you can think of many examples of policies and laws that the West has paternalistically pushed on other countries. We have tried to export our own laws and policies to other countries. We have been somewhat successful in doing this, unfortunately. These policies would include income tax withholding–which actually was adopted during World War II in the United States at the urging of the "free market" economist Milton Friedman, which I believe he admitted later was a mistake–the American version of anti-trust law, or so called competition law, anti-bribery laws… The American state pushed this law called the Foreign Corrupt Practices Act onto the economy in the 1980s, I believe, which prohibited private bribes by American companies to private companies overseas; this is an un-libertarian and illiberal law, but it hurt American businesses compared to their European and other counterparts who were not prohibited from engaging in these customary local bribes. In fact, in some countries you can even deduct that from your taxes as a legitimate business expense. Instead of withdrawing this harmful law, the United States has twisted the arms of other countries into adopting a world-wide treaty on corruption and bribery to get other countries to impose similar restrictions on their citizens.

Also, the American style of central banking, the Federal Reserve, was pushed on Canada in the 1930s and even Russia after the fall of the USSR.

The United States has exported its policy on how we own natural resources, say to Iraq. In the domestic United States, private land owners are the owners of the minerals and oil and gas under their land. In most of the rest of the world and in the federal government's territories in the offshore Continental Shelf (OCS), the federal government–the state–assumes ownership of these natural resources and then grants leases to companies that come in and explore. The state, of course, takes its cut. In the BP oil disaster in the Gulf of Mexico in the last year, the federal government was the actual landlord and BP was just a lessee. But you don't hear that pointed out. You hear BP being blamed. In any case, in the so-called "liberation" of Iraq, of course, the Iraqi government assumes ownership of the minerals, just like the federal government here does on our Offshore Continental Shelf.

And or course US drug laws are exported around the world. We have created a horrible situation in Mexico because of this, which has exacerbated immigration problems. There have been tens of thousands of murders. If Mexico or some other smaller country were to legalize drugs–as they should–then the U.S. would no doubt crack down on them for that.

There is the idea of managed trade. Instead of just having free trade, we have "managed trade" through NAFTA and other trade agreements, which perpetuates the idea of mercantilism.

And we had the Marshall Plan after World War II which exported some of our policies and laws onto Europe.

Finally, we have the American ideal of democracy itself which is not so good of an idea if you would just read some of the writings of Hans Herman Hoppe, such as his book, *Democracy: The God that Failed*.

The point here is you cannot assume that just because the supposedly capitalist United States government is advocating a law—such as patent and copyright–that it is really compatible with capitalism or private property rights or the free market. If we are going to step back and take another look at patent and copyright … And we should because there are obvious abuses and excesses and outrages that we see on a day to day basis; if you just turn on the Internet you will see Android and Apple smartphone and Microsoft suing each other in patent lawsuits; you will hear of hundred billion law suits awarded to patent trolls. You will see people being shut down in their attempts to make new music because of copyright. There seems to be something wrong. We have to ask: Are these rights legitimate? We just need to increase the enforcement mechanisms to make enforcement more efficient, maybe increase penalties, maybe put more people in jail for violating copyright and patent law. Or: Do we need to reevaluate these policies and maybe tone down their strength or maybe even abolish them altogether?

To do that, what we would need to do, especially as liberal economists and as liberals in favor of free markets, individual rights, due process of law–*we need to ask whether patent and copyright are legitimate types of property rights*. To do this, we need to understand *what is the purpose and function of property rights in general*? We need to understand what patent and copyright are, and then what property rights should be.

So let's talk briefly about the nature of patent and copyright. There are many types of so called intellectual property, in addition to patent and copyright. These are just two types. They are the main two types, the most evil two types, the most costly and harmful two types. They are the focus of my talk and I believe should be the main focus of libertarian opposition to these types of laws, but there are other types of intellectual property as well. The other two traditional types would be *trade secret* and *trademark*. Both of those types of laws are more legitimate than patent and copyright, but we don't have time to discuss that today. There are also other, newer types of IP, such as moral rights, and semi-conductor mask work rights which protect the way integrated circuits are laid out. There are also some newer ones like boat hull designs. Also, the entire law of defamation, which includes libel and slander, basically protects what is called reputation rights. That should also be viewed as a type of intellectual property, I believe, and it is also illegitimate.

But today, let me focus on patent and copyright. A patent is a state grant of a monopoly privilege to a patentee, somebody who applies for it, that gives them exclusive rights in an invention. An invention is a useful and new and non-obvious machine or composition of matter or process or method, for example, a mousetrap, having a useful new design, or a computer, or the functional aspects of software. Think of it on the flowchart level, a method, how you do something, where software performs a set of steps or pharmaceuticals which are compositions of matter. All these things are types of practical devices or processes. When you apply for this, the government grants you a monopoly privilege. You are the only one who can perform this invention, and make or use or sell it, for about 17 years, roughly 17 years.

But it has to be applied for. You don't get a patent unless you apply for it. It is important to recognize that independent invention is not a defense. What that means is you can be sued for infringing someone's patent even if you didn't copy it from them, even if you didn't learn about it from them, even if you independently invented the idea yourself. What this patent right does is: it gives the patentee the right to go to court to extract money damages, sometimes called "royalties," from an infringer or they can even get the court to issue an injunction forcing the competitor not to make or use a given product or process. Basically, it protects a patentee from competition by making it more difficult for others to easily copy its product. The example I gave earlier is the smartphone wars where Apple and Microsoft are suing a lot of Android manufacturers, like Samsung. And now Samsung is

countersuing Apple for infringing its patents with the iPhone. They are getting various injunctions in Australia and Europe and other countries to try to stop each other from even introducing their own competing product.

Copyright is another state granted monopoly which is granted to someone. It covers their original expressions or creative works like novels or paintings or movies or music or even software code. I mentioned patent covers the functional aspects of software like the block diagram, flow chart level, whereas copyright would cover the written code because that is like writing a novel or poem. It has an expressive element.

Copyright lasts nowadays much longer. It used to last only about 14 years which, coincidentally was two times the term of a seven-year apprentice. The idea was that the artisan could be protected for the term of two of his apprentices, to train them in making his new idea. Then he would face competition. But before then he was protected. That 14 year period has been extended gradually over the last 200 years to the point now where it is 70 years after the life of the author. If you write a novel today, then it will last until your death and then 70 years later. Usually they last more than 100 years. We have an extremely long copyright term.

And unlike patent, copyright is automatic. That is, you get it just by writing down your idea on a sheet of paper. The second you do that you have a copyright on that, at least in the United States system, and I believe it is similar in most other systems in the world because of treaties that we have all agreed to that require us to have similar basic provisions that are similar in our patent and copyright laws.

Contrary to popular assumption, you cannot "copyright" something. Copyright is not a verb. It is a noun. In other words, you can't take an affirmative step to get a copyright. You don't have to apply for it. You **do not have to put a copyright notice on your work to have a copyright**. You don't have to register the copyright to have a copyright. Most people do not realize this.

So it is unlike patent in that way. When people say, well, if you are against copyright why did you copyright your article? Well, I didn't copyright my article or my book. The government gave me a copyright and there is nothing I can do about it. The patent system is an "opt in" system. You only get a patent if you file for a patent application. A copyright is not opt in. It would be better if it was opt in where you had to affirmatively file the registration application to get a copyright. *But it is not even opt out*. In other words, you can't even sign something that gets rid of your copyright. The government will not let you get rid of your copyright. So I am going to have a copyright in my novel for the remainder of my life no matter what I do, even if I write on the front of it, "I hereby get rid of my copyright". That simply is not effective. It may serve as permission for others to use it without me suing them, but the fact is I still own a copyright.

What copyright does is, like patent, it allows someone to be free of certain types of competition. It lets you censor other people or charge them a fee to make songs or movies based upon your novel or sequels of your novel or a painting based upon your novel and so on. This is what these laws do. They are grants of monopoly privilege by the state that allow you to petition the state courts to use force against people who are doing things with their property that you do not like.

Let's step back and talk about the purpose of property and rights and laws and even government.

As an anarchist, I think government is inherently illegitimate, but even in a private free society with no state you would have laws, but only certain legitimate justified laws. If we have a state, then the question is which types of laws promulgated and enforced by the state are legitimate? Let's step back and think about what in the world is it that gives rise to the need for laws and property rights?

There is something some of you may have heard about. It is called the Land of Cockaigne. This is a mythical land of milk and honey or infinite abundance or plenty, theorized by the Middle Age poets. It was just an idea of a land where you could have anything you wanted at any time with no effort. There was no scarcity, no shortages. Life is perfect and idyllic and there is infinite abundance and the ability to satisfy any desire at any time.

Obviously, we don't live in the land of milk and honey, or the Land of Cockaigne. In our world, in the real world that we all live in, there is scarcity. What this means is you can't just have what you want by wishing for it. It also means that if you obtain one of these scarce resources in the world–a banana, a stick, an apple, a tract of land, a log, a bucket of water–then other people cannot use that item at the same time as you. That would give rise to conflict. My use of a scarce resource *excludes* your use.

This is where we get into the Austrian or Misesean, Ludwig von Mises's conception of Austrian economics. His view of looking at the basic concept of economics is what he calls *praxeology*.

That is the science and the logic, the study of human action and the implications of human action. He looks at human action in a fundamental way. What does it mean for humans to act in this world of scarcity?

It means that we have some dissatisfaction or we expect some dissatisfied state that will come to occur in the future if we don't do something to change it, if we don't interfere with the state of things. In other words, every human action is an attempt to achieve an end, to achieve greater satisfaction, but the action is the employing or the use of these scarce means to achieve that end. So we have to select a means that will causally achieve our end. This is exactly why we have to use these scarce means. This is why knowledge is important, or science, which is the systematic acquisition and categorization of knowledge. *We need to have both property and knowledge to have successful human action.* You need property because you have to employ these means. If you are not going to be fighting over the means with some other contestant, some other person, who wants the means, the property rules say who gets to use that means so that the means can be used by one person, the owner, productively to achieve their ends.

We also need knowledge to tell us what ends are possible, what things we should strive for, what might make us more satisfied and also to tell us what types of means will achieve our ends. This is knowledge of causal laws. This is why we need to have causal or scientific knowledge. It informs our actions. We need property rights so we can use these means that our knowledge has told us we need to use.

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The basic view of the libertarian and the free market advocate is that we have to have both science and property. They are like the twin pillars of human prosperity and civilized, peaceful, cooperative life. We need property to let resources be used peacefully and productively. We have to assign owners to things. This is the essence of the free market order. We, of course need science and the right to learn from each other and to discover new things and to add to our base of knowledge so that we can act

efficiently and choose the right means as part of our action. This is actually the libertarian vision of the free society. It is one where property rights permit men to use resources productively and cooperatively without conflict and where science informs us how to use it.

Let's think about how we acquire knowledge as part of human life because this acquisition of knowledge is crucial. We start out, more or less, with a *tabula rasa*, with a blank slate. There are many ways that human beings acquire knowledge, the knowledge that informs our human actions, that guides our human actions, the knowledge that tells us about causality and causal laws, the knowledge that we use to choose what actions to perform, what means to employ to achieve our given ends. From just experience in living, from observation of others, just from being immersed in a culture and learning from what has been developed, what has gone before. There is, of course, education and teaching informally by parents or even formally by formal education and instruction and by apprenticeships and even by employment. We learn from our jobs and also, of course, in a systematic way by the scientific method and empirical testing.

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The free market is also a source of knowledge. Entrepreneurs are always incentivized and motivated to try to learn better ways to use resources to lower their costs and to have better products and to attract customers to make a profit. When they do this, the consumers learn from this and benefit from it and their competitors learn, too. The competitors then try to emulate and copy and compete and sometimes improve. Then the original innovator has to improve even more. Everyone is better off. There is an unceasing striving for an ever increasing innovation, in improvement, in the desire to get profit, but in the face of always lowered profit because of competition, the threat of competition. A free society, a free market, a private property based order, has competition and it has learning and it has emulation. These are *good things*, not bad things.

Let's now return to patent and copyright. The basic problem with patent and copyright, as state granted monopoly privileges, is they are explicitly designed to protect people and companies from competition. As I mentioned, the holder of the patent or copyright can use state force against potential competitors. It is basically a completely confused notion which is an outgrowth of the mercantilist idea–which were anti-competitive–of the last several hundred years.

It is also based upon the confused idea that it is sometimes wrong to learn or to actually use information in deciding how you want to use your own property, that is your own scarce resources that you have property rights in, that it is wrong to copy or emulate or to compete in some context.

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What it does is it uses the language of property rights in trying to say there are property rights by virtue of these laws in information, in patterns, and in designs. But remember: the entire function of property, the purpose of property, is to address the problem of natural scarcity in the real world that we live in, not the world of Cockaigne. Ideas and knowledge and recipes and designs are just knowledge that we have. Unlike scarce resources, they are not scarce. They can be used over and over and over again, infinitely, and they can be used at the same time by an infinite number of people without diminishing the other people's ability to do the same.

For example, if my neighbor and I both want to make a chocolate cake, then we cannot use the same mixing bowl and wooden spoon and eggs and flour and ingredients. These are scarce resources and we each need to own our own separate ingredients and capital facilities to make the cake in.

But we can both use the exact same recipe at the same time, even if one of us learned it from observing the other. There is no conflict in the use of knowledge. Patent and copyright try to impose scarcity on things that are non-scarce. It tries to make them more scarce.

This is perverse, because the free market is doing the opposite when it comes to actual scarce goods. Things that are in short supply, or not in sufficiently abundant supply, like food and energy and houses and shelter and clothing, are in natural short supply or scarce supply, but the free market strives to make them *more* abundant *in the face of* scarcity. We are trying to

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overcome this unfortunate fact of scarcity. But we don't have this problem with knowledge. In fact, we have a growing base of knowledge in society and civilization which we can draw on. In fact, it is good that we have this. It is good that we have a growing base of knowledge.

So the fundamental problem with IP is that because you really cannot have property rights in non-scarce things, they are always actually enforced *against scarce things*. IP is just a disguised way of *undercutting real property rights*. Remember, these real property rights were put in place as the civilized mechanism to permit productive, peaceful and fair and just and efficient use of these scarce resources. When IP rights are introduced, it *undercuts* these rights.

What do I mean by that? An IP right really gives a third party who holds the IP the right to control other people's scarce resources. For example, in the recent case, the American singer Beyonce' has been sued by a Belgian dancer because Beyonce' used dance moves in a music video that are similar to the ones that were shown in an earlier video by the Belgian dancer and the Belgian dancer's group. If the Belgian dancer prevails, then she will either get a court order telling Beyonce' that you cannot use your body in this way, or that will take some of the money from Beyonce's bank account, which she owns, and give it to the Belgians.

Similarly, Apple, just the other day, got a patent on using a gesture to unlock the iPhone or smartphones. If this patent is upheld and if they are successful in suing someone, they can prevent other makers from making their own smartphones with that gesture. Basically, it gives Apple a *veto* over how other people use their own property. A veto right is a type of property

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right. It is called a *negative servitude* in the civil law. What this means is that the government, by the law, has given some third party a property right in someone else's property. That is a redistribution of property rights.

This is actually the reason that libertarians usually use to object to many laws like the minimum wage or drug laws or taxation or conscription or censorship or pornography laws. There we have the government stepping in and telling you that you cannot use your own body or property in certain ways.

We object by saying what business is it of yours how I use my property? You have no right to veto a use of my own property. You have no right to penalize me, either monetarily or with a jail sentence, for doing something with my property that is not harming anyone else. Yet, this is exactly what patent and copyright do.

Patent and copyright also undermine science, the very endeavor of science, in a lot of ways because it restricts the flow of information. It restricts how people can use information. It distorts the structure of research and development by making companies find it more profitable to engage research and development dollars in patentable areas as opposed to unpatentable areas. Fundamental physic equations cannot be patented because they are too abstract. So you have more research, than otherwise would be, flowing into practical gizmos and devices.

Patent law also discourages innovation and research in areas that are heavily patented because the newcomer to the market, for example, is afraid that if he makes a new product in this area, like smartphones,

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he will be unable to even sell his smartphone because he will be sued by the dominant patent holding companies. So he doesn't even go into that line of business, so, of course, he doesn't invest in research and development in it.

Copyright also leads to distortions of the whole publishing industry: closed business models, difficult to find books and papers online. They are locked up by these publishing houses that rely upon the copyright model.

None of this should be surprising because the origin of patent and copyright actually lies with mercantilism, going back to the Statue of Anne in 1710 which was one of the early major copyright statues and the Statute of Monopolies in 1624, both in England, which was one of the early patent laws. At the height of mercantilism, in the 1500s, in England, almost every good you could imagine was covered by a monopoly that the monarch had granted to different guilds or companies in exchange for favors and maybe helping to collect taxes, such as monopolies on playing cards, leather, iron, soap, coal, books, and wine.

These companies did not invent these things. They were just granted the privilege to be the only one who could sell these things. They even enlisted the state to perform warrantless searches and seizures of their competitors to make sure that they were not violating these monopolies. In other words, along with these state monopolies during the height of mercantilism, came a lot of intrusive searches and seizures and the collaboration between the state and the industries that had the monopolies. It harmed the consumers and it harmed the competitors. France even tortured

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and executed people. They "broke on the wheel" people who had pirated fabric designs that the state had granted monopolies in. The wool exporters had the monopoly on wool exporting in England. They would collect the taxes for the king in exchange for this monopoly.

We clearly see this as not compatible with the free market and with competition and with private property rights and with capitalism; but this is exactly the situation we have now. We have mercantilism under another name: intellectual property. We have the movie industry and the music industry in the United States for example, the RIAA and the MPAA, demanding warrantless searches to stop DVD and CD counterfeiting or "piracy," as they call it. We have private companies helping the Immigration and Custom Enforcement agency in the U.S., the ICE, seize domain names accused of cybersquatting. We have ISPs collaborating with the Obama administration and with content providers to do the same things. So we have a lot of the same things happening now as a result of copyright and patent.

We also have an unholy alliance between patent holders and copyright monopoly holders and the state. Microsoft, to take an example, is a profitable, successful company which has provided valuable services and products to people, but its profits are undoubtedly much, much higher than they would have been in a free market without copyright because of their ability to use copyright to stop competition or pirating or counterfeiting of their operating system which has allowed them to charge monopoly prices for this. So Microsoft, over the last few decades, has

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accumulated hundreds of billions of dollars of profits that they wouldn't have otherwise had. Then they are able to use these profits to, number one, pay politicians in Congress in the form of bribes —"campaign contributions"–or even in the form of collected taxes. The government benefits from this by legal bribes and by taxes. They grant a monopoly to Microsoft. Microsoft makes higher than normal profits. Some of that is returned back to the state in the form of bribes and taxes. The state and its monopoly grantees benefit. The consumers don't, the competitors don't, and the free market suffers.

Also, Microsoft uses these profits to acquire patents which is another form of monopoly. So it uses its copyright profits to accumulate a huge patent war chest. Then they use that patent war chest to make even more monopolistic profits by suing competitors like Android smartphone makers, like Samsun. They are already extracting several dollars from every sale of a competing Android handset because of their patent threats.

This system just feeds back on these entrenched, oligopolistic industries. The state laws actually create oligopolies because it makes it harder for smaller companies to compete. Then the state perversely comes in and introduces anti-trust law, claiming it needs to be our savior to make sure there is competition in the market, to prevent monopolies or oligopolies from forming in the free market–even though the very reason that these oligopolies form, the very reason that we have a lack of competition on the market, is because of monopolies the state gave to these companies in the first place in the form of patent law, and other state regulations. So we still have mercantilism. It is just institutionalized

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and democratized now and it is not called mercantilism anymore.

Let's make it clear. There are some people who oppose IP from the left, or from an anti-property point of view. They are mistakenly accepting the same mistaken package deal or notion that the pro IP people do. Both IP advocates and leftist opponents of property accept the idea that intellectual

property is a legitimate type of property. Now this is their mistake. They are both wrong. The people that are in favor of patents on capitalist grounds are wrong to think that we should have IP because it is a type of property right. It is not a type of property right. The people who are opposed to IP because they are opposed to property rights are wrong to oppose property rights.

The correct point of view, the libertarian point of view, the free market and Austrian point of view, is to favor property rights, but to recognize that state granted monopolies, like patent and copyright, are not property rights. IP rights undercut property rights.

Let me mention quickly where the libertarian landscape is when it comes to this issue. There has always been opposition to these monopolies of course. In fact, this is one thing that led to the Statute of Monopolies of 1624 in England because of these abuses that I pointed out earlier. The Crown was granting so many patent monopolies to the guilds and to merchants and to supplicants and to court cronies that it just got obviously out of hand. So Parliament banned most of these patents with the Statue of Monopolies; but they made an exception for patents of novel inventions. This is why we still have patents today on inventions because Parliament only banned 95% of monopolies and left one small type in place. Unfortunately, that has grown into the patent system we have now.

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In the modern era, after most of the industrialized world has finally adopted sort of an American style patent and copyright system, since the early 1800s let's say, we can identify four historical phases or movements to abolish patent and copyright.

The first one we can identify is roughly the second half of the 1800s, from 1850 to 1873. At that point in time, some countries still had not adopted patent systems, like Switzerland. There was opposition to this by the free trade people, people that were in favor of free markets and free trade saw these policies and laws as monopolies and they opposed them. What happened was in 1873 there was a depression caused by the Panic of 1873, a large global depression. This caused an increase in nationalism and a reduced opposition to tariffs and protectionism: free trade became less popular because of the emergency of the depression. This made the opposition to patents evaporate because it was part of the free trade movement. In other words, a government-caused recession caused free trade to go out of favor for a while which caused opposition to patents to evaporate. So the final holdout nations, like the Netherlands–which had previously abolished patents, because of people seeing what a disaster it was–caved in, and Switzerland never had a patent system and they went ahead and adopted patent systems. The whole world joined on the bandwagon. So the first movement was against, but a depression ended it.

Then in the late 1800s, after this, there was vigorous debate among the individualist anarchists like Lysander Spooner and Benjamin Tucker. Lysander Spooner was in favor of intellectual property, but Benjamin Tucker rejected IP, based on similar arguments I have given now. He

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had a very clear vision on this. But this was a small group of individualist anarchists, so that opposition didn't go very far.

In the meantime, during this debate by the free market economists, the defenders of these patent and copyright laws, such as in France in the late 1700s, right before the turn of the century, started using the language of property rights to describe these monopoly privileges because they knew that the concept of monopoly was not popular with economists and even with the public. They started calling them property as basically a propaganda ploy, even though, of course, they are not property.

In the third stage of opposition, roughly from the 1930s to 1995 (the dawn of the Internet), there was an increasing amount of skepticism about IP by libertarians and proto-libertarians and free market economists. Arnold Plant, an economist in 1934, and Fritz Machlup, an Austrian economist in the 1950s, had serious reservations about the empirical claims made for IP: that it stimulates innovation and creativity. There was a great deal of skepticism of the empirical case for IP by these and other free market economists.

Then in the latter half of the twentieth century, more of the explicit libertarian thinkers like Hayek in 1948, Murray Rothbard in the 60s, Leonard Read, the founder of the Foundation for Economic Education in the United States, and others like Wendy McElroy, Sam Konkin, and Tom Palmer in the 80s started seriously questioning the compatibility of patent and copyright with libertarian

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property rights. They made great arguments. A lot of their arguments are the type I have repeated today, but they did not have a certain urgency because this was the pre-Internet age.

Around 1995, when the Internet arrived on the scene, a lot of the patent and especially copyright abuses became much more exacerbated and more common. It started getting really out of hand and everyone is more aware of this now because we can see news stories on the Internet on a daily basis almost of one crazy patent or copyright outrage.

In the last fifteen years there has been an increasing recognition among modern libertarians, especially principled libertarians, more radical types, Austrian types, and the anarchist types, who are almost completely against intellectual property. You can see a lot of this on the resources page of my website, C4SIF.org/resources. In fact, I would venture to say that most libertarians of this type now are anti-IP. The ones that are pro IP tend to be minarchist, or worse, classical liberals and usually utilitarians who are not very principled. The funny thing is the utilitarians have yet to prove their case. They have yet to show that evidence does back up the empirical case made for IP.

I am getting close to my conclusion. In getting close to that, let me say that we should not say that the patent or copyright system is broken or in need of reform. It is not broken. It is not in need of reform. It is need of abolition. It is not really broken. It is doing exactly what it is designed to do. It is giving competitive advantages to government-favored applicants and holders. So the problem is not software patents. Getting

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rid of software patents won't solve the problem. The problem is not big corporations. The problem is not junk patents. Nor are patent trolls the problem. The problem is not that the copyright term is too long. It is too long, but even it it were 30 years, it would be too long, it would be a problem.

We have to recognize, as libertarians, as principled advocates of freedom, of science, of human knowledge, of information, of competition on the free market, of justice and private property rights, that patent and copyright are completely, 100%, antithetical to the purpose of property rights. It undercuts property rights. It impedes science and it impedes learning and free expression. Science and knowledge and property are designed to overcome the problem of scarcity and to permit human prosperity. So to favor something that undercuts these is to oppose human prosperity and human freedom and human learning and ideas. I would say don't mend it, end it.

Thank you very much. I hope you have enjoyed this. Feel free to email me with any questions. As I said, you can download the slides for this from my website, www.stephankinsella.com. Thank you and good afternoon.

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Do Business **WITHOUT** Intellectual Property

by Stephan Kinsella

Liberty.me

DO BUSINESS WITHOUT INTELLECTUAL PROPERTY

GUIDE 1.0

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INTRODUCTION

One of the most egregious government interventions in the digital age flies under the label *intellectual property* (IP). This type of intervention has been around since the advent of modern capitalism and the Industrial Revolution. Originally recognized as exceptional, state-granted monopoly privileges, even by their earliest proponents, IP rights are now referred to as a type of "property right"; IP is thought of as a natural and essential part of a capitalist, free market order.

We are told that IP is a type of property right. We are told that it is necessary for innovation. Without patent and copyright, we would live in a world of stagnation. There would be no innovation, no artistic works. Who would bother, if the state did not properly incentivize us? But the astounding truth is that *IP is completely incompatible with a free market*

***system*. It is not necessary for innovation at all. Far from it: it actually gives rise to monopolies that dampen creativity and stultify free market competition. It distorts the market, innovation, and creative culture. And it leads individuals and businesses to adopt coping strategies that are often to their long-run detriment.**

An IP-free world would be one of competition, innovation, and prosperity, contrary to the claims of IP's defenders.

An IP-free world would be one of competition, innovation, and prosperity.

But in today's world, patent and copyright exist whether we like it or not. Individuals and businesses need to be aware of the reality of IP and take it into account in their business strategies. An open-eyed approach as to the true nature of IP is essential to understanding what IP policy should be in a free society. Understanding what IP is, how it arose, and its role in today's economy can help entrepreneurs develop the proper strategies to thrive and prosper in a mixed economy. The purpose of this guide is to expose the true nature of IP and to provide guidance to entrepreneurs and individuals about the pitfalls of over-reliance on modern IP.

WHAT IS IP?

Intellectual property refers to laws that protect the products of the intellect, as opposed to laws dealing with ownership of commonplace physical or material goods. IP is a broad term that includes several types of legal rights: **copyright** (which gives authors a right in original works such as novels or paintings); **patent** (which gives inventors rights in practical inventions like a mousetrap); **trademark** (which gives companies rights in names used to identify products such as Coca-Cola); and **trade secret**. Trademark is said to have its basis in protecting consumers from deception and fraud by unscrupulous vendors who falsely use others' names and reputations. (My ***Against Intellectual Property***[1] has further detail on the types of IP; see also "**Types of Intellectual Property.**"[2])

WHY DO BUSINESSES NEED TO CARE ABOUT IP?

I have been a **registered US patent lawyer**[3] for 20 years. I've helped clients **obtain hundreds of patents**,[4] and have been called on many times to help defend them from patent and other IP threats. I've also been a very strong advocate of free markets, private enterprise, and private property rights for my entire professional life. People are often confused about my personal situation: "You're anti-IP but you're an IP lawyer? What gives?" So I've been asked many times, "How can you be an IP lawyer if you think IP is illegitimate?" This type of question highlights a dilemma that libertarians and entrepreneurs living in the real world must face. We recognize that some policies are harmful and unjust, but they exist and have to be dealt with. Their existence cannot be ignored but their essential nature should not be either.

Some policies are harmful and unjust, but they exist and have to be dealt with.

Given the existing IP system, there is a need for companies to adopt IP strategies.

Here's one approach I take when responding to such queries. I view IP as similar to, say, taxes. High taxes and IP are both harmful to prosperity and freedom. But given the existence of these laws and systems, there is a need for companies to be aware of and deal with these laws. Given high taxes, there is a need for CPAs, tax software, and tax attorneys who defend people being threatened with prison for tax evasion.

Likewise, given the existing IP system, there is a need for companies to adopt IP strategies, which sometimes include using IP attorneys and specialists. There is a need to be aware of the contours of the system, to navigate it, even to use it. Given the existence of the

[1] http://www.stephankinsella.com/publications/#IP
[2] http://c4sif.org/2011/03/types-of-intellectual-property/
[3] https://oedci.uspto.gov/OEDCI/details.do?regisNum=37657
[4] http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&u=%2Fnetahtml%2Fsearch-adv.htm&r=0&f=S&l=50&d=PALL&RS=%28%28LREP%2Fstephan+OR+LREP%2Fstephen%29+AND+LREP%2Fkinsella%29&Refine=Refine+Search&Refine=Refine+Search&Query=+%28lrep%2Fstephan+or+lrep%2Fstephen%29+and+%28lrep%2Fkinsella+or+lrep%2Fkznsella%29

patent system, high-tech companies often need to spend resources obtaining patents, if only to be able to defend themselves from patent threats by competitors or patent trolls. Granted, if there were no patent law, then the need to waste funds on such acquisitions and on lawsuits and distorting business strategies would evaporate. Also, if taxes were lower, tax lawyers would have to find a new profession. If we cure cancer, oncologists might be out of a job, too, but I suspect a decent oncologist really hopes that his job is someday rendered unnecessary.

I view my own profession as something like IP oncologists. The cancer of IP exists, and unfortunately, IP attorneys are necessary so long as it does. I wish more IP attorneys would at least oppose IP like most oncologists oppose cancer. But until our thinking about the nature of property rights is changed, we can expect IP professionals, along with the general public, to support some kind of patent and copyright regime.

Individuals living in today's world, faced with the IP system, cannot ignore this prevalent system and mode of thinking—this way of doing business. They must take it into account. There are two fundamental approaches one can take to such matters: *political-normative*, i.e., What kind of legal system should you favor?; and *practical-ethical*: given the existing IP system, how should you react to it? How should you use it? What actions, in personal or business life, are right or wrong, or are practical and profitable, destructive and wasteful?

Let's take these issues in turn.

SHOULD WE ABOLISH IP?

It is clear that patent and copyright should be abolished immediately and completely.

As to the policy issues—what the law should be—it is clear that patent and copyright should be abolished immediately and completely (and so should other forms of IP, such as trademark, trade secret, and defamation law, but let's leave those to the side for now). There are a number of reasons for this conclusion. First, most advocates of IP admit that IP rights are temporary monopoly privileges, that such laws are deviations from the free market. But they argue that the harm done by these statutes is somehow outweighed by innovation gains. That is, they argue that, without IP, we would have less artistic creation and less innovation, that with these laws we have far more innovation and creativity than we would otherwise (in a purely free market), and that the value of this extra innovation is far greater than the costs of these laws. (For example, see "**There's No Such Thing as a Free Patent.**"[5])

[5] http://www.mises.org/story/1763

However, these claims are completely unfounded, and in fact are counterintuitive and implausible; IP proponents do not provide serious arguments or evidence for their pro-IP position. Most of the proponents are special-interest lobbyists—the pharmaceutical industry, Hollywood, or the music industry—who don't really care whether IP is a good idea in a free market; they are simply out for their own interests. They then lobby Congress, who in turn enacts laws that benefit these special interests. Then the guy on the street repeats, fairly mindlessly, the propaganda he's heard filtered down from the special interests, lobbyists, and legislators in groundless pro-IP slogans.

For example, the typical person has an assumption that IP is part of a free market and private property system, that it incentivizes artists and inventors, that it protects the small guy innovating in his basement. This is contrary to reality, but the average person does not always have time to examine these common arguments and assumptions, and so the propagandists succeed. Again, we see this in the very term *intellectual property*, a misleading label that serves the purposes of the IP lobby.

Patent and copyright heavily distort the creative and innovative fields and lower the total amount of innovation in society.

The empirical evidence we do have suggests strongly that patent and copyright heavily distort the creative and innovative fields and lower the total amount of innovation in society. IP imposes huge costs on society and the economy: probably hundreds of billions of dollars a year, if not more. (See, for example: "**Legal Scholars: Thumbs Down on Patent and Copyright**,"[6] "**The Overwhelming Empirical Case *Against* Patent and Copyright,**"[7] and "**Costs of the Patent System Revisited.**"[8])

But the main reason I oppose IP—especially and primarily patent and copyright—is that not only does it impose unnecessary costs on society, slow down progress, impede freedom, and distort culture, research, and development: but it is a *blatant infringement* of property rights.

IP VERSUS PROPERTY RIGHTS

Over the years, I and others have given a variety of arguments to explain why IP is not compatible with a free market. One explanation I have given runs like this. Imagine you live in a neighborhood of 100 people, where everyone owns his own home and the tract of land it sits on. The neighbors might enter into a restrictive covenant that prohibits certain uses of one's home.

For example, everyone might agree to use their property for residential use only and not to paint their house bright orange. If you want to paint your house orange, you can't do it unless you get

[6] http://c4sif.org/2012/10/legal-scholars-thumbs-down-on-patent-and-copyright/
[7] http://c4sif.org/2012/10/the-overwhelming-empirical-case-against-patent-and-copyright/
[8] http://archive.mises.org/14065/costs-of-the-patent-system-revisited/

the neighbors' permission. In effect, everyone has agreed to grant their neighbors a limited, partial property right in their own home: a veto right. The neighbors can prevent you from using your property in certain ways. This practice is common and popular because it can provide benefits to all the members of the covenant.

That is why people enter into these arrangements voluntarily. And that is really why they make sense, why they are compatible with private property rights: because they are entered into by the homeowners *voluntarily*. In fact, such agreements are *exercises* of private property rights—the owners agree to transfer some of their property rights to others in exchange for similar transfers, in the hopes that the overall value of their homes, in the neighborhood, will increase. These property arrangements can be classified as "negative easements" or "negative servitudes." They are "negative" since a person's neighbors cannot use his property, but can prohibit certain uses of his property. The owner of property that is subject to such an easement or servitude is said to have a "burdened" estate. He owns the main use of the property, but it is subject to the veto of others, a veto right that he contractually agreed to.

Copyright and patent holders retain a negative servitude over others' property.

The owners of the burdened estates—you and me—never agreed to this.

And this brings me to my primary objection to patent and copyright. These rights are types of negative servitudes. A copyright holder can use state force to stop you from printing a given pattern of words on your own paper with your own ink and printer. A patent holder can prevent you from using your own materials to shape them into certain arrangements. In effect, copyright and patent holders retain a negative servitude over others' property. But the owners of the burdened estates—you and me—never agreed to this. We didn't contractually grant this servitude to patent and copyright holders. The state simply grants it to them by fiat. (See "**Intellectual Property Rights as Negative Servitudes.**"[9])

So in effect, through the use of IP statutes, the state makes patentees and copyright holders co-owners of everyone else's property, but without the property owners' consent. This results in an erosion of property rights, a seizure of property, a redistribution of wealth. It is a limitation on competition, learning, and emulation. This is exactly the type of policy that free market advocates oppose when implemented under more explicitly socialist governments. Yet when special interests that benefit from these wealth transfers label them "property rights," many people lose sight of the essentially interventionist, anticompetitive nature of these policies.

[9] http://archive.mises.org/17398/intellectual-property-rights-as-negative-servitudes/

HISTORY OF PATENT AND COPYRIGHT LAW

Modern patent and copyright regimes became prominent in Western countries about 200 years ago. Patent law emerged from older mercantilist, protectionist practices where the crown would grant monopolies to court favorites (as authorized in the **Statute of Monopolies of 1624**[10]).Copyright law finds its origins in the censorship of prohibited books and ideas (such as the **Statute of Anne of 1710**[11]). (See also Karl Fogel, "**The Surprising History of Copyright and The Promise of a Post-Copyright World**."[12])

Patent and copyright are state-granted monopoly privileges, not natural property rights.

Free market economists were suspicious of or even hostile to these laws and practices, so defenders of patent and copyright started referring to them as "intellectual property" to appeal to the pro-property sentiments of legislators and the populace. (See "**Intellectual Properganda.**"[13]) But in truth, patent and copyright are state-granted monopoly privileges, not natural property rights.

A large number of software producers in effect opt out of the copyright system through the use of open licenses.

Individuals and companies use these laws to varying degrees, depending on their industry and interests. Software and video game vendors, Hollywood, and the music industry rely widely on copyright and related laws in an attempt to stop "piracy," though a large number of software producers in effect opt out of the copyright system through the use of open licenses, and an increasing number of independent musicians and artists are opting out of copyright protection through the use of Creative Commons licenses. (See "**Let's Make Copyright Opt-OUT.**"[14])

An increasing number of independent musicians and artists are opting out of copyright protection.

Pharmaceutical and high-tech companies rely more heavily on patent law. Pharmaceutical companies claim that they need the patent monopoly to help make up for the costs imposed on them during the expensive and lengthy FDA drug-approval process. But think about that: the state imposes heavy costs on pharmaceutical companies, then tries to partially make up for it by granting an anticompetitive, monopoly privilege right to these companies. High-tech companies stockpile thousands of patents, mainly to use as

[10] http://en.wikipedia.org/wiki/Statute_of_Monopolies
[11] http://en.wikipedia.org/wiki/Statute_of_Anne
[12] http://questioncopyright.org/promise
[13] http://c4sif.org/2010/12/intellectual-properganda/
[14] http://c4sif.org/2011/04/lets-make-copyright-opt-out/

defensive weapons against patent lawsuits filed against them by their competitors. (Patent lawyers and IP litigators profit handsomely from all this activity, siphoning tens, hundreds of millions of dollars a year from the productive economy.) As an example, consider the **ongoing "smartphone" wars**[15] between Apple and Samsung and others, which are being waged in dozens of countries and costing tens of millions of dollars or more.

The effect of this is to entrench the monopoly positions of the larger players who can afford to acquire thousands of patents and pay millions of dollars to lawyers in litigation costs, and to pay each other royalties after the inevitable settlements, then pass most of this cost on to the consumer in the form of higher prices. Smaller companies cannot afford to defend against such lawsuits and have no large patent arsenal to draw on defensively, so the effect of this is to erect barriers against entry, leaving large markets under the control of a small number of large, patent-wielding companies.

This is a monopoly- or oligopoly-type situation. The dominant firms have less incentive to innovate, since they face less competition and can collect monopoly profits from earlier innovation because it has been patented. (See, e.g., "**The Microsoft-Apple Gesture Oligopoly.**"[16])

To obtain a patent, the inventor has to disclose the details of his invention; that is the so-called patent bargain. The public can learn about the invention, and eventually use it, after the 17-or-so year term expires, in exchange for the inventor being granted a temporary monopoly. (See, e.g., "**The Purpose of Patent Law.**"[17]) Some companies, however, find it in their interest to keep a portion of their innovations and other confidential information (like client lists) secret rather than publicize it by filing for a patent application. This is what trade secret law covers.

Most companies with trade names, brand names, and so on rely to some extent on trademark as well.

INTELLECTUAL PROPERTY IS CONTRARY TO FREE MARKETS AND HUMAN FREEDOM

The common view of IP is misguided, not necessarily dishonest. But when proponents of IP say that they are for it because it enhances innovation and welfare, while all the studies point the other way, one has to assume that they are dishonest. They remind me of the liberal advocates of failed welfare policies who continue to advocate for them even after it becomes clear that they cause hu-

The common view of IP is misguided, not necessarily dishonest.

[15] http://c4sif.org/?s=apple+samsung+smartphone+wars
[16] http://c4sif.org/2011/10/the-microsoft-apple-gesture-oligopoly/
[17] http://c4sif.org/2010/12/the-purpose-of-patent-law/

man misery and devastation. These are the types of people rightfully skewered by Thomas Sowell in his great book ***The Vision of the Anointed: Self-Congratulation as a Basis for Social Policy.***[18]

And then we see attempts to apply, enforce, and expand patent and copyright, which do not merely retard innovation or impose some dollar costs on society, but which are truly fascistic and scary, such as the attempt to reduce Internet freedom with SOPA and PIPA in the name of stopping copyright piracy, imprisoning people for years for uploading or downloading a few movies, extraditing foreign students and nationals to face US jail time for having websites with links to piracy sites, invading the homes of people in foreign countries (Kim Dotcom of Megaupload in New Zealand) in the name of protecting intellectual property. The Internet is a key development and tool for the defense of freedom. Anything that imperils freedom of commerce or communication on the Internet should be taken very seriously. (See, e.g., "**SOPA is the Symptom, Copyright is the Disease: The SOPA Wakeup Call to Abolish Copyright.**"[19])

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The state has an interest in restricting digital, technological, and Internet freedom, and uses various excuses to do this this: terrorism, child pornography, tax evasion, prostitution, drugs and Silk Road, digital money (bitcoin), online gambling, money laundering, and copyright "piracy." And then we have the US government, at the behest of very powerful American special interests (big pharmaceuticals, Hollywood, the music industry) twisting the arms of developing countries to adopt draconian US-style patent and copyright laws, all in the name of "capitalism" and "private property rights." Recently, these industries have pressured the United States to try imposing increased IP standards on other countries through the use of the Trans-Pacific Partnership, or TPP, and other measures. (See "**Longer copyright terms, stiffer copyright penalties coming, thanks to TPP and ACTA…**"[20])

We have to recognize laws and policies that limit competition and restrict freedom for what they are.

Most free market advocates and libertarians oppose laws against narcotics, high taxes, and so on, but when the state labels its monopoly patent and copyright privileges as property, it befuddles and confuses the opposition.

The bottom line is that we have to recognize laws and policies that limit competition and restrict freedom for what they are, no matter what the label given by legislators and lobbyists. We have to recognize, expose, and oppose policies that restrict property rights and freedom.

[18] http://www.amazon.com/Vision-Anointed-Self-Congratulation-Social-Policy-ebook/dp/B002TZ3D1M/
[19] http://www.libertarianstandard.com/2012/01/24/sopa-is-the-symptom-copyright-is-the-disease-the-sopa-wakeup-call-to-abolish-copyright/
[20] http://c4sif.org/2013/10/longer-copyright-terms-stiffer-copyright-penalties-coming-thanks-to-tpp-and-acta/

WHY DOES IP PERSIST?

Many intellectuals—legal experts/lawyers in particular— defend what they perceive to be in their personal self-interest. I imagine a large percentage of federal government employees think the state is necessary; and a large number of government school teachers believe in the legitimacy and necessity of public education. Likewise, those in the big pharma want patents, and Hollywood wants copyright to stop piracy. Patent lawyers make their living on this system and so likewise have an interest in promoting it.

But I think the main reason people without such strong interests continue to support IP is a lack of principled thinking. Most people think they are being pragmatic and practical when they eschew principled thinking about rights and property and justice, instead favoring "what works." So they think in empirical, utilitarian terms and reject principle, which they regard as impractical or extremist. They are used to the current system; they assume that the IP we have had for 200 years is part of our private property system; they assume that it must have played some role in the prosperity we've had. They confuse correlation for causation. Even if they recognize that the system is broken, they only advocate reform, never a radical rethinking of the whole system. Radical change frightens people.

Radical change frightens people.

However, the tides are changing and many free market economists seem to have long been skeptical of IP. A growing number of legal scholars do as well, though only a handful of them seem to want to go so far as to abolish the whole system. Among free market proponents such as libertarians, my impression is that since the advent of the Internet in the mid-90s, when copyright and patent enforcement started becoming more visible and virulent, there has been increasing skepticism of IP's legitimacy. Among free-culture types, the free software movement, Austrian libertarians, anarchist libertarians, and left-libertarians there is a large and growing opposition to IP. (See "**The Death Throes of Pro-IP Libertarianism**;"[21] "**The Four Historical Phases of IP Abolitionism**;"[22] and "**The Origins of Libertarian IP Abolitionism.**"[23])

There is a large and growing opposition to IP.

[21] http://mises.org/daily/4601/
[22] http://c4sif.org/2011/04/the-four-historical-phases-of-ip-abolitionism/
[23] http://c4sif.org/2011/04/the-origins-of-libertarian-ip-abolitionism/

IP, INNOVATION, AND FREEDOM

I am often asked for examples of how innovation and creativity could or would develop absent patent and copyright law. It is hard to predict the future. It is hard to predict what regimes, practices, products, and services will emerge after freedom or in a future, more advanced technological world. And yet even today, we have widespread piracy—copying in contravention of copyright law—and violation of patent law as well (and this trend should speed up after 3D printing starts to mature). So let's consider some examples or possible ways creators could profit either in an IP-free world or in a world—like today's—in which piracy is rampant.

Copyright is said to be necessary to help struggling authors.

First, I have collected a large number of **examples**[24] of how IP law has harmed innovation or those it was intended to help. I recount them regularly on the blog, but there are too many to keep up with. But for a few examples, copyright is said to be necessary to help struggling authors. Yet copyright grew out of a guild-censorship system in Europe, which resulted in the Statute of Anne in 1710. Before this, the Stationer's Company had a state-protected monopoly over which books could be published and circulated using the printing press. Without official approval, authors could not be sure their works would be published.

The Statute of Anne pretended to give authors the right to decide, but the publishing industry quickly co-opted these author-based copyrights, resulting in the system still prevalent today, in which an author is forced to sign his rights away to some publishing house in order to get published. Then the publisher can refuse to reprint the work when sales fall, yet copyright prohibits others from reviving the work for over a century. So many works disappear (so-called orphan works) or are lost or too obscure. I discuss this in my post "**How long copyright terms make art disappear.**"[25]

More mindless Hollywood sequels are made than would be the case absent copyright; novels and films have—quite literally—been banned by judicial order because of copyright.

In the case of patent, we have the phenomenon of patent trolling, where patentees who sell no products basically extort money from small companies and individuals, who buckle under because they know they cannot afford a multi-million-dollar patent lawsuit. We have high-tech startup companies who receive patent infringement lawsuits just days before an IPO, designed to delay or ruin the IPO. We have the independent seller of "Eat more Kale" t-shirts being **bullied by**

[24] http://www.c4sif.org/resources
[25] http://c4sif.org/2013/07/how-long-copyright-terms-make-art-disappear/

Chick-Fil-A[26] because it allegedly infringes their "Eat mor chikin" slogan. Documentary producers are unable to get their films cleared because of outrageous copyright claims.

Copyright holders use the Digital Millennium Copyright Act procedure to get criticisms taken off YouTube since there is little penalty or sanction for abuse of this process. It exerts a chilling effect on freedom of expression and it distorts the culture. More mindless Hollywood sequels are made than would be the case absent copyright; novels and films have—quite literally—been banned by judicial order because of copyright, such as a sequel to *Catcher in the Rye*. (See "**Book Banning Courtesy of Copyright Law.**"[27])

WHAT SHOULD YOU DO?

First, Do No Harm

Let's consider the proper stance toward IP law.

Before turning to some practical ways to navigate the modern business world, including patent and copyright law, let's consider the proper stance toward IP law. Each person, in his private capacity, recognizing the immorality of IP and its incompatibility with justice, free markets, capitalism, and private property rights, *should never advocate or support IP law*. Your business should not lobby for it, and you should not vote for it. You could condemn it and speak against it, oppose it whenever possible.

IP law is like the drug war. Even if you recognize that narcotics should not be criminalized—that the state has no right to lock people up for using or selling drugs—you might choose to respect the law to avoid the risk of jail. Your stance would be: the law is immoral and should be repealed, even if you warily abide by such laws out of prudential concerns.

Likewise, whatever your practical coping strategy for dealing with IP law (discussed below), you should always make it clear that you oppose patent and copyright law, that you do not condone or endorse it, that you recognize it as unjust and completely incompatible with individual rights and freedom. The moral, principled, and practical businessman must denounce IP law while finding ways to cope with it, so long as it exists

[26] http://c4sif.org/2012/07/a-defiant-dude-eat-more-kale-t-shirt-designer-fighting-back-against-chick-fil-as-trademark-bullying-2/
[27] http://www.lewrockwell.com/blog/lewrw/archives/28808.html

But While IP Exists …

Opposing IP is all well and good. But for now it permeates our legal system. Even the most morally punctilious of businessmen have to recognize that patent and copyright law exist and must be taken into account. These legal systems infect, distort, and corrupt the modern business environment, no doubt. But they exist and are enforced.

What does one do, in the face of such legal and business practices, if one is aware of the deficiencies of IP law?

It is obvious that law cannot be ignored. This is a recipe for disaster. In a free society based on private law, you could start a business that streams popular songs; in today's world this may get you shut down, arrested, and invaded by FBI agents.

So one response is to just play the game like everyone else does. Assume that the law is what it is, forget about legitimacy, and focus on profit only. Use copyright and patent to your advantage where necessary, regardless of its legitimacy or morality. Do what other companies do.

Individual human beings, in their capacity as entrepreneurs and businessmen, should strive for both morality and profit.

But is this the wisest approach? If we know that there is something wrong with the very basis of IP law, maybe there is something wrong with going along lock-step with the standard way of dealing with IP. One should not be a Pollyanna martyr and act as if IP law does not exist; but perhaps there is a different position one can take—one that is more profitable both in monetary and moral terms. My contention is that individual human beings, in their capacity as entrepreneurs and businessmen, should strive for both morality and profit. By understanding the corrupting nature of IP, we can avoid some of its pitfalls, and earn both moral and monetary profit.

To IP or Not to IP

The standard advice given to businessmen is to simply take the existing legal system for granted, and to work within it. If the system permits you to obtain patent and copyright, apply for or obtain them. If it permits you to sue your competitors, sue. If the system permits you to lobby legislators through campaign contributions, influence their votes, and give you preference over competitors, do it.

But the success of the Internet and open models of innovation and development in the digital age should give one pause before adopting the business models and approaches mired in the fallacious reasoning of bureaucrats and special interest groups.

The entrepreneur who sees the benefits of freedom and openness and the harm wrought by patent and copyright law should ask himself several questions:

- **Do I really want my business model to depend on patent or copyright?**
- **Do I really want to turn my customers into enemies if they actually use and profit from the information I provide to them?**
- **Do I want to spend tens or hundreds of thousands or millions of dollars, on legal fees to secure and enforce IP rights?**
- **Do I really believe in free markets and fair competition?**
- **Do I want to prosper, flourish, and profit on my own merits, or rely on the state to protect me from competition?**
- **Do I want to be free to innovate and change business strategy and direction as I see fit, or be mired in some IP-maximization strategy?**

Below, we'll examine some case studies, examples, and practical strategies and considerations entrepreneurs can contemplate when faced with an IP-laced business environment.

Steps You Can Take Now

For the sake of liberty, freedom, free markets, and prosperity, IP should be abolished completely and immediately. And everyone should oppose patent and copyright law when they have the chance.

There are many ways to reduce the damage of IP to your own work and business right now.

However, given the entrenched interests and the state's control of the legal system, immediate and radical progress is unlikely. Political action is not the only response that can be taken against corrupt and antiquated systems. Individuals and entrepreneurs can first educate themselves to become aware of the nature of the system we face. They can seek to educate themselves and others and to push for political change. But in their private capacities, they can use their knowledge of the true nature of the laws and institutions that exist to inform their actions. They can begin to confront the IP paradigm with action that is both principled and self-aware, and that also benefits the actor and complements forces of social change. The law tends to follow on the footprints of social change, but there are many ways to reduce the damage of IP to your own work and business right now.

The initial step is one of orientation. Be aware of the nature of the system and what can be done within the system or to navigate around the system. Sometimes the existing legal rules need to be abided by and even employed and manipulated, but sometimes this can lead to a trap.

For example, if you buy into the logic behind the patent system, you file for patents for your employees' innovations. Then, perhaps, you start relying on your dominant position or royalties for a given patent-protected product line instead of being flexible and moving to a different strategy that is not yet patented. This can cause ossification and open the door for newcomers to overwhelm you. Or you might rely overmuch on copyright and sit on your rights, refuse to permit openness, refuse to permit your customers to share your MP3 or video files, refuse to permit your fans to take photographs or make homemade recordings at a concert. Refuse even to make a legally available version of a 15-year-old movie, for a reasonable fee, on convenient stream or other platforms like Netflix or AppleTV or iTunes. This leads would-be customers to simply resort to piracy, or avoid your content altogether and resent you.

So, before adopting the standard strategy of relying on IP laws like patent, copyright, and trademark, to try to suppress competition and treat your customers like enemies and thieves, consider whether a more open, nimble, flexible strategy is preferable. Consumers and fans like openness. They think it's "**awesome**,"[28] in the words of Mike Masnick. It's a good strategy to make your customers and employees love you.

Consider whether a more open, nimble, flexible strategy is preferable. Consumers and fans like openness.

EXAMPLES OF IP CONTRARIANISM

Companies often rely overmuch on IP. Consider how the movie industry's reliance on copyright and refusal to make content available to users in an easy way and at a reasonable price leads to resentment and widespread piracy. Some tech companies obtain patents on their key products and thus are locked into that product category since it is protected. They are protected, for a while, from competition, and their incentive to innovate is reduced. And they need to recoup the tens of thousands of dollars spent on patent lawyers' fees. In the past, it was routine for some famous musician to file a copyright suit against competitors or even fans. Now, copyright holders are often thinking twice. As the quasi-libertarian sci-fi author Cory Doctorow **has observed**,[29] "for pretty much every writer—the big problem isn't piracy, it's obscurity."

For pretty much every writer—the big problem isn't piracy, it's obscurity.

Doctorow himself releases his novels for free via a Creative Commons license. You can download it for free or pay for a paper copy or other version.

We are familiar with Google's "Don't be evil" corporate motto. Many thought this meant Google would not be a patent aggressor. Yet it was sucked into the patent morass when it acquired Motorola Mobility and its pending lawsuits, which it did not drop.

A better example would be Twitter, which found a way to prevent itself from using patents in an aggressive manner. As noted in "**Twitter Heroically Promises Not to Use Patents Offensively,**"[30] Twitter adopted a patent policy where they assigned rights to employees, tying their own hands against using patents offensively, in order to fulfill the promise to engage in true innovation and fair competition and not rely on any state-granted monopoly privilege right.

[28] http://www.techdirt.com/blog/?tag=awesome+stuff
[29] http://craphound.com/littlebrother/about/#freedownload
[30] http://c4sif.org/2012/04/twitter-heroically-promises-not-to-use-patents-offensively/

PUBLISHING AND COPYRIGHT

The standard approach for authors is to rely on copyrights in their published works and be ready to threaten suit against others for copying or unauthorized use. Of course, we all know that today any novel, movie, or song can be easily copied without permission via torrenting, The Pirate Bay, or related technology or sites.

The question is often asked: how can an author make money without copyright? Here are a few responses. First, as noted, the reality of modern piracy means that even with copyright, an author's work can and will be copied very soon after being made public. This is a reality, even given current copyright law. Second, we have to realize most nonfiction authors—authors of law review articles or academic or scholarly works—never make a dime off of them anyway. Academics publish scholarly articles to get their ideas out there or to cement their reputations, or in pursuit of tenure. Sometimes they or their employers have to pay a publishing fee, in fact; and often, the published book or article is kept behind a paywall or priced at a prohibitive level so that few people have access to the author's work.

And even novelists have a hard time making a profit given the traditional publisher model. A few lucky ones make it big, but most authors eke out a meager living at best. This is in part a relic of the publisher-guild system that is partly perpetuated even today by copyright.

Even novelists have a hard time making a profit given the traditional publisher model. A few lucky ones make it big, but most authors eke out a meager living at best.

As noted above, the fundamental danger faced by authors is obscurity. Authors want their work to be widespread and widely available. Once you have notoriety you can parlay this into other opportunities. So it's in the author's interest to release published works with as little restriction as possible. Since it's not even possible at present for an author **to opt out of**[31] copyright protection (it's automatic and basically inalienable), the best one can do is employ some kind of license, such as Creative Commons, to release one's work to the public. I recommend a **CC-BY**[32] (attribution only) or **CC0**[33] license.

As an example of how a novelist might profit in a copyright free world, consider the examples provided in my post "**Conversation with an author about copyright and publishing in a free society**."[34] An author such as J. K. Rowling, of Harry Potter fame, writes a first novel out of passion.

[31] http://c4sif.org/2011/04/lets-make-copyright-opt-out/
[32] http://creativecommons.org/licenses/by/4.0/deed.en_US
[33] http://creativecommons.org/choose/zero/
[34] http://c4sif.org/2012/01/conversation-with-an-author-about-copyright-and-publishing-in-a-free-society/

She self-publishes on Amazon's service or some other, or even has a normal publisher. Her popular book is soon knocked off and millions of kids are reading her book. Some paid for it, others didn't. No matter; she has a new, built-in audience of millions. She announces she has book number two ready to go, and will release it after 1 million people pre-purchase it for $10 each. That's $10 million. And so it goes, through all of the sequels. Soon Ms. Rowling is worth $50 million without relying on copyright.

Once you have notoriety you can parlay this into other opportunities.

And then people start making movies based on the novels (and don't think there wouldn't be blockbuster movies absent copyright; see Rick Falkvinge, "**Debunking The Argument That No Blockbusters Would Be Made Without The Copyright Monopoly**").[35] Maybe there are three versions of the first Harry Potter novel being considered. One of the studios approaches Rowling and asks her to consult on their version, for a share of the profits. Her involvement will improve the movie's quality and her endorsement will bring in more fans, who would rather see her authorized version than that of others. So she rakes in a few more million dollars that way. All fine. All without copyright.

Other examples of how creators have or can profit without patent and copyright are given elsewhere, e.g.:

- "**Innovations that Thrive without IP**"[36]
- "**Examples of Ways Content Creators Can Profit Without Intellectual Property**"[37]
- "**The Creator-Endorsed Mark as an Alternative to Copyright**"[38]

Innovators and entrepreneurs do not need to rely on IP to profit and succeed.

The basic point is that innovators and entrepreneurs do not need to rely on IP to profit and succeed. They need to continually innovate, rely on their reputation, and please their fans and customers. That is ultimately the entrepreneurial function.

With the foregoing examples and lessons in mind, consider:

[35] http://c4sif.org/2012/01/a-scene-from-return-of-the-king-the-third-part-of-lord-of-the-rings-debunking-the-argument-that-no-blockbusters-would-be-made-without--the-copyright-monopoly/
[36] http://www.stephankinsella.com/2010/08/innovations-that-thrive-without-ip/
[37] http://www.stephankinsella.com/2010/07/examples-of-ways-content-creators-can-profit-without-intellectual-property/
[38] http://archive.mises.org/13286/the-creator-endorsed-mark-as-an-alternative-to-copyright/

Music without Intellectual Property

- **Free distribution. Musicians make their money from other sources. Let people copy your hits. Let YouTube flourish. People will want to buy tickets to hear your concerts.**

- **Artists have learned that covers are actually great. It's a great compliment. It never harms the original artist.**

- **If someone steals your stuff, try cheering for a change. Welcome emulation and competition!**

Inventing without Intellectual Property

- **Patents tie your hands. If you get a patent on a key product, you might think twice before being willing to adapt. Patents are stultifying.**

Patents tie your hands.

- **Defensive patents are sometimes necessary, but beware the lure of using them as profit center; consider adopting a policy like Twitter has, of using patents only defensively.**

Dying without Intellectual Property

One of the most critical issues of our day is that, as noted above, copyright cannot be opted out of and it lasts for a long time (life of author plus 70 years). This gives rise to the orphan works problem and the literal disappearance of copyright-protected works. Copyright kills creative works. It causes them to literally disappear. (See "**How long copyright terms make art disappear.**"[39])

Copyright kills creative works. It causes them to literally disappear.

If you have works subject to copyright, you want them to outlive you. You don't want legal uncertainty or squabbling among descendants to doom your work to obscurity. Release them. Release them now, while you live, using CC0 or CC-BY, or put something in your will to accomplish a similar result; one emerging possibility authors can consider is the **Free**

[39] http://c4sif.org/2013/07/how-long-copyright-terms-make-art-disappear/

Culture Trust,[40] a group that you can dedicate your copyright to upon death, to ensure it stays alive and is not buried by orphan works or other problems.

Patents

In today's world, businessmen and tech companies cannot ignore the problem of patents. It is unfortunately necessary to acquire patents as an adjunct to innovation, if only for defensive purposes or bargaining chips. Yet one does not have to reserve the right to use patents aggressively; this can safely be given away, as Twitter has done, reserving the right to use patents defensively. This is all a good free market company should want: the right to compete on a fair, free market—not the right to shut down competitors with the help of the state.

One does not have to reserve the right to use patents aggressively.

An emerging mechanism that might prove to be useful, so long as the patent system exists, is the use of ad hoc or more systemic patent defense pools or leagues (see my post "**The Patent Defense League and Defensive Patent Pooling**"[41]). Any high-tech company today that is pressured to expend hundreds of thousands of dollars on patent acquisition should consider such alternative mechanisms to cope with the modern quasi-mercantilist system.

[40] http://questioncopyright.org/free_culture_thing
[41] http://c4sif.org/2011/08/the-patent-defense-league-and-defensive-patent-pooling/

Stephan Kinsella

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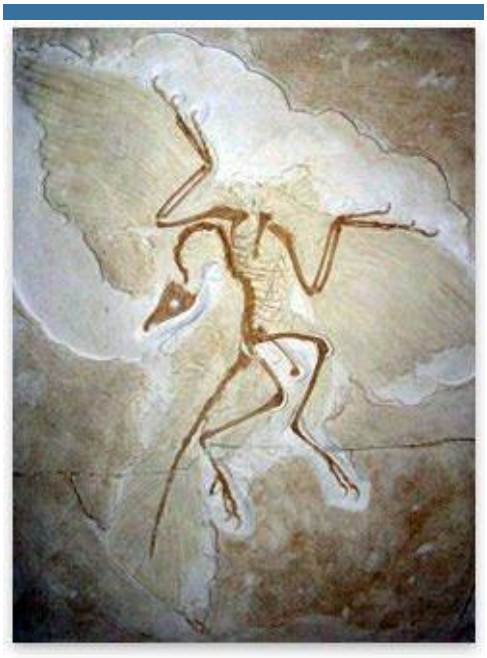
The Death Throes of Pro-IP Libertarianism



TAGS Legal SystemMonopoly and CompetitionPhilosophy and MethodologyPrivate Property

07/28/2010 Stephan Kinsella

Like a submarine patent, the intellectual-property issue has lurked beneath the surface of libertarianism for decades. IP was for a long time largely assumed by most libertarians to be legitimate, a type of property right. This is because of the influence of Ayn Rand, one of the most influential of all modern libertarians, who was strongly pro-IP. One reason Rand was so much in favor of IP was probably due to her reverence for the American system, which enshrined patent and copyright in the Constitution, which she saw as almost perfect (Judge Narragansett in *Atlas Shrugged* only had to tweak a few things to make it ideal).

But though weakly pro-IP, most libertarians never gave the issue much thought, assuming that it was an arcane and technical type of property right whose details were best left to experts. The arguments for IP looked similar in structure to those for regular property: there were principled, natural-rights-type arguments based on justice and the merit of production and "creating value"; and there were utilitarian arguments that said it makes sense for the market to provide incentives to innovate and create, just as it does to produce goods for a profit. But most libertarians didn't look at it too closely; indeed most had, and still have, a hard time distinguishing between copyright, patent, and trademark — they use them erroneously and interchangeably quite often.

Those that did look more closely at the issue felt uneasy about it — Mises and Hayek had a few things to say about it, but not completely conclusively, and not in depth (see "Mises on Intellectual Property"; Jeff Tucker, "Misesian vs. Marxian vs. IP Views of Innovation"; Jeff Tucker, "Hayek on Patents and Copyrights"). Even Rothbard, obviously another very influential libertarian, only dealt with patent and copyright in a few short passages — criticizing patents but defending a tentative notion of private copyright (see *Against Intellectual Property*, the "Contract vs. Reserved Rights" section).

But all along there were dissenters — such as Benjamin Tucker, way back in 1888, as explained by Wendy McElroy in "Copyright and Patent in Benjamin Tucker's Periodical *Liberty*." In the last couple of decades, scholarly criticism of IP by libertarians has begun to mount: by Wendy McElroyDownload PDF, Boudewijn BouckaertDownload PDF, TomDownload PDF PalmerDownload PDF, Roderick Long, and others (see the section "Anti-IP Resources" in "The Case Against IP: A Concise Guide"; and *Against Intellectual Property*, "The Spectrum" section).

My own *Against Intellectual Property*, first published in 2000, had a definite (and unanticipated) effect among libertarians, primarily, I think, because of its timing (five years after the Internet), and the fact that, although it built on the work of previous scholars, it was more systematic and comprehensive, and more explicitly integrated with Austrian-libertarian insights and principles (plus my status as a practicing patent attorney made some people take notice). In the last three to five years, it seems that the libertarian tide has turned against IP — dramatically and decisively (we might mark the inflection point in 2004, when Jeff Tucker asked me to to do a post on the Mises Blog collecting the various growing resources on IP, shortly after his own conversion to the Light Side of the Force). Thus, today, most libertarians, especially the young, are very aware of the IP issue and are adamantly opposed to it; they see it as clearly unlibertarian (see Jeff Tucker, "The Great IP Breakthrough"; "Have You Changed Your Mind About Intellectual Property?").

As noted here,

> While Objectivists, libertarians and conservatives strongly agree on the principle of physical property rights, the picture is much more divided when it comes to "intellectual property," a catch-all phrase for several different items, including patents, copyright and trademarks. In a landmark essay by Stephan Kinsella, *Against Intellectual Property*, argues that "intellectual property" is not only meaningless and harmful, it is in direct violation of the general principle of private property, and primarily constitutes a state-sanctioned creation of artificial scarcity, leading ultimately to poverty, not job creation and wealth.
>
> The wider libertarian movement accepted the argument, put it into action (see this achievement) and moved on. Objectivists, on the other hand, maintained that what Ayn Rand spoke and practiced on the subject remains the unalterable truth.

But even some Objectivists are now switching sides.[1]

Some of the Austrian or libertarian critics of IP who have emerged in recent years include Jeff Tucker (see various chapters in the "Technology" section of his recent *Bourbon for Breakfast*), Julio Cole Download PDF, Jacob Huebert (who has a great chapter on IP in his recent book *Libertarianism Today*), Manuel Lora and Daniel Coleman, and Timothy Sandefur. Left-libertarians who have been quick to condemn IP as unlibertarian include Kevin Carson, author of "Intellectual Property — A Libertarian Critique"; Sheldon Richman; and Gary Chartier, author of the forthcoming *The Conscience of an Anarchist*; not to mention Roderick Long. (That said, some of the leftists who oppose IP have, not surprisingly, some confusing ideas that weaken their case; see "Eben Moglen and Leftist Opposition to Intellectual Property," "Thick and Thin Libertarians on IP and Open Source," and "An Open Letter to Leftist Opponents of Intellectual Property: On IP and the Support of the State.")

There are also a growing number of IP critics who are artists, philosophers, techies, or journalists, most of them at least libertarian leaning, including artist Nina Paley, philosopher David Koepsell, tech blogger Mike Masnick, and reporter Joe Mullin. Standing in a league all its own, there is the monumentally important 2008 book *Against Intellectual Monopoly*, by Michele Boldrin and David Levine (see Jeff Tucker, "A Book that Changes Everything").

"The direction of the future, of progress, is towards more abundance and prosperity and wealth. It is obscene to undermine the glorious operation of the market in producing wealth and abundance by imposing artificial scarcity on human knowledge and learning."
Why the sea change in the prominence of IP as an issue among libertarians, and their decisive rejection of it, in contrast to the apathetic pro-IP stance of the past? It appears that IP could be taken for granted only so long as no one looked at it very closely. But as soon as libertarians turned their attention to IP, they realized the case for it was full of holes.

But why did they turn their attention to it? Why did it emerge from the depths after decades of relative obscurity? A primary reason is that the damage done by patent and copyright law has been magnified and exacerbated by the advent of digital information and the Internet — copyright, for example, is being invoked more than ever because of the ease of duplicating and transmitting digital files. And the flood of news and information delivered over the Internet alerts millions to the consequences of IP law. We see horror stories every day (see "The Patent, Copyright, Trademark, and Trade Secret Horror Files").

The younger generation of libertarians is larger, more radical, more Austrian, more sophisticated, and more informed than ever before — largely due to the resources and efforts of the Mises Institute (just see the typical arguments made in the comments threads such as these). Combine this with the mounting — and Austrolibertarian — case against IP and its more conspicuous damages and daily outrages, it's no wonder

that the IP issue, out of nowhere it seems, in the last three or so years has been "settled": libertarians are now, almost universally, against IP. Their arguments are sophisticated, they are technically savvy, they love the Internet, and they love the Mises Institute and its complementary open-information policy (see Doug French, "The Intellectual Revolution Is in Process"; Jeff Tucker, "A Theory of Open" and "up with iTunes U"; Gary North, "A Free Week-Long Economics Seminar"). The young libertarians and Austrians "get it." For them the IP issue (and, increasingly, the anarchy issue) is a no-brainer.

The speed of this recent IP awakening appears to have caught the old-guard libertarian defenders of IP — mostly Randians and older libertarians from a generation or two ago — slumbering, clinging to the tattered remnants of arguments for IP. As they have gradually realized that a revolution has taken place around them, a few have tried to mount a rear-guard defense; but it has been tepid and half-hearted for the most part. You can see it in the quality of their arguments. Most of these are smart libertarians, who usually make much better arguments than they do when talking about IP. Why are their arguments so weak? It is because they are just wrong. There is no defense of IP (see "There are No Good Arguments for Intellectual Property").

IP law is unlibertarian and unjustified. I realized this myself after trying, and failing, for years to figure out a way to justify IP and square it with libertarian principles. IP is a type of systematic redistribution of property rights, contrary to Lockean homesteading rules, that can only be implemented by the state and its legislation. So the IP libertarians have nothing left but the tired old arguments of the type you might hear dashed off in law school or in a mainstream economics class.

They trot out tired bromides, make unsubstantiated claims, refuse to engage critics honestly. We own things we create, they say, even though ownership is meant to solve conflicts over scarce things (see "What Libertarianism Is"), not just any thing you can conceptualize and put a name to. Or they'll repeat the Randian notion that you own "value" that you create, as if value is a substance you create, as opposed to the way we demonstrably regard and use an object due to its configuration (see "Rand on IP, Owning 'Values,' and 'Rearrangement Rights'," discussing Hoppe's criticism of property rights in value).

They accuse "pirates" of "stealing"; when you point out that copying is not theft because the originator still has his copy, then they switch to some other argument, such as claims that the value of the original copy is diminished; when you point out that there are no property rights in value, but only in the physical integrity of property, they switch to arguments about incentives, even though they usually condemn utilitarian arguments. If you explain that every creator's work also built on the thought of others, they come up with a convenient public domain or "fair use" exception. When you point out obviously outrageous injustices of the current IP system, they say they are not in favor of the current IP system … yet they oppose the call to abolish it! And when you ask them what type of IP system they *do* favor, they have no answer, punting it to judges or Randian legislators to figure out, on the grounds that they are not patent lawyers or specialists!

"There are no property rights in value, but only in the physical integrity of property."
They say that you need patents to stimulate invention and copyright to stimulate artistic creativity — they are often hyperbolic and say there would be *no* innovation in an IP-free world. If you point out that there would obviously be *some* innovation absent IP law, they then say there would not be *enough* innovation. If you ask them how much is enough, they have no answer — though some apparently think even the monopoly IP grant doesn't ensure enough innovation, and propose using tax dollars to provide innovation awards to state-recognized geniuses — even some libertarians favor this! (See "Libertarian Favors $80 Billion Annual Tax-Funded 'Medical Innovation Prize Fund'"; "$30 Billion Taxfunded Innovation Contracts: The 'Progressive-Libertarian' Solution"; "Re: Patents and Utilitarian Thinking Redux: Stiglitz on using Prizes to Stimulate Innovation.")

What does a libertarian say to *that* argument? Is that supposed to be serious? It reminds me of my conservative friends in Houston who are — surprise, surprise — in favor of NASA, and repeat the propaganda about the value of "spinoff technology." After all, think of all the spinoff technology the space program has produced. Never mind the cost of the unseen — have some Tang, boys! Ain't that Tang good? You woudn't want to be deprived of Tang, now, would ya?

When they say that we need IP to stimulate innovation, they presume that the value of the extra innovation thereby stimulated is greater than the cost of the IP system (see "There's No Such Thing as a Free Patent"). If you ask them how they know this, they have no answer. They've never wondered and don't care. Ask

them what the cost of the IP system is, or what the value of the marginal innovation is, or how they even know it's a "net gain" — they have no idea (my estimate is over $30 billion net loss annually in America from patents alone — see "Reducing the Cost of IP Law").

And if you point out the methodological and moral problems with utilitarian reasoning (see *Against Intellectual Property*, "Utilitarian Defenses of IP"), why, you're a nutty Austrian or extremist! If you point out that despite their claim that the IP system generates wealth, almost all studies conclude otherwise (see "Yet Another Study Finds Patents Do Not Encourage Innovation"), they change the subject. Or maybe they toss out the sloppy comment that, well, America has done pretty well since its founding, which — eh, eh, EH? — was the same time we adopted patent law! Never mind that you could make the same argument about war, imperialism, democracy, antitrust law, taxation, and so on.

They demand to know how artists and innovators are supposed to be paid absent IP. If you point out that it's the job of the entrepreneur to figure out how to make profit in the market given the costs of exclusion and externalities, they are not satisfied: they switch from individualist free marketeers to central planners demanding to know exactly what a market freed of the IP restrictions they favor would look like. Never mind that one reason we don't know for sure what market institutions and practices would arise is because the statist IP they support has preempted and crowded these solutions out. And if you point out some possible solutions, they sneer and call it charity or "not enough."

For just a sampling of some of the recent, futile libertarian attempts to defend IP and to stem the migration to the anti-IP side, see: "The L. Neil Smith — FreeTalkLive Copyright Dispute" and Jeff Tucker, "L. Neil Smith on IP"; "IP: The Objectivists Strike Back!"; "Shughart's Defense of IP"; "Richard Epstein on 'The Structural Unity of Real and Intellectual Property'"; "Yeager and Other Letters Re *Liberty* article 'Libertarianism and Intellectual Property'"; "Objectivists: 'All Property is Intellectual Property'"; "Objectivist Law Prof. Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors."

When the holes in their weak arguments are exposed, they escalate and call us IP socialists or communists — even though the idea that people who mentally "labor" "deserve" a "reward" for their labor is itself Marxian (see "Locke, Smith, Marx and the Labor Theory of Value"; "Objectivists: 'All Property is Intellectual Property'"). Their escalating rhetoric is driven by a desperation arising from the growing awareness that they have lost. It resembles a bit the way the state keeps increasing IP protection — copyright terms always lengthening, the West twisting the arms of emerging economies to "strengthen" IP protection and the coming ACTA (see "Stop the ACTA [Anti-Counterfeiting Trade Agreement]") — in the face of a growing, unstoppable wave of piracy and torrenting. We are seeing the thrashings of a dying institution and a dying idea.

The mistake made by IP libertarians stems in part from the imprecise, overly metaphorical Lockean notion that the reason you own things you homestead is that you "own" the labor you "mixed" with these things — rather than the more straightforward argument that by first appropriating an unowned resource you establish a better claim than latecomers — no fiction of "labor ownership" is needed (see "Intellectual Property and Libertarianism"). This mistake permeates the modern — mostly Randian — thinking about IP. This way of thinking about homesteading, and the American Founders' choice to put copyright and patent in the "protolibertarian" American Constitution (even though it was just a centralizing document used in a *coup d'etat* as a legitimacy cover for the state; see "Rockwell on Hoppe on the Constitution as Expansion of Government Power"), and Rand's and others' adoption of these ideas, has created a road block to clear thinking about IP.

"'Making' or 'creating' simply refers to the process of transforming something you *already own* by *rearranging* it."
They say that you own things you find (appropriate or homestead) and things you buy from others — and "*also*" anything you create. They miss the fact that finding and contractual acquisition exhaust the ways of legitimately acquiring ownership of external objects. "Making" or "creating" simply refers to the process of transforming something you *already own* by *rearranging* it so that it is more valuable to you, or to a customer, say (even Rand saw this — see "Rand on IP, Owning 'Values,' and 'Rearrangement Rights'"). Creation is *not an independent source of ownership*; it is a way of *making your property more valuable*. (See "A Theory of Contracts: Binding Promises, Title Transfer, and Inalienability"Download PDF; *Against Intellectual Property*, "Creation vs. Scarcity" section; "Objectivist Law Prof. Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors"; "Libertarian Creationism." "Trademark and Fraud")

By assuming the "ownership" of labor, even though the ability to control one's actions and labor is simply a by-product or consequence of ownership of one's body (all rights are property rights, as Rothbard has shown), and not an independent property right; by assuming that creation is an independent source of property rights, even though it is not; by assuming values are created, ownable things, rather than the changed utility of property the owner himself rearranged — these libertarians have equated nonscarce ideas and patterns with physical, scarce resources. After all, by your effort or labor, you create a plow, a house, or a song, right?

By treating these dissimilar things — nonscarce, infinitely reproducible patterns of information and physical, scarce objects — similarly, the IP advocates try to treat them with the same rules. They take property rules designed precisely to allocate ownership of scarce physical objects in the face of possible conflict and try to apply them to information patterns. In so doing, they end up imposing artificial scarcity on that which was previously nonscarce and infinitely reproducible.

Thus, what the pro-IP libertarians have missed is that it is *good* that ideas, information, patterns, and recipes are nonscarce and infinitely reproducible. Technological and other progress is possible because we can learn and build on previous knowledge. The market itself crucially relies on *emulation* — entrepreneurs emulate the successful action of others, thereby competing and serving consumers, and always bidding down prices and even profits. (As Jeff Tucker has noted, the role of emulation and learning in the market is ripe for further research and inquiry by Austrians. See "Hayek, IP, and Knowledge"; Jeff Tucker, "Without Rejecting IP, Progress is Impossible.")

The market also enables the production of products that are scarce goods — with ever-increasing efficiency — and, crucially, makes *scarce goods more abundant*. The market is always trying to *overcome and reduce the scarcity* that is inherent in physical resources. The human actors on the market use infinitely reproducible, nonscarce knowledge and information to guide their use of scarce resources in ever-more efficient ways, so as to reduce the real scarcity that does exist in the physical world of useful goods. (See "Intellectual Property and the Structure of Human Action.")

And what does IP do? In the name of capitalism and the free market, *it imposes artificial scarcity on things that are already infinitely reproducible*. In the name of the market — the same market that is working to *increase* the abundance of scarce goods, to *decrease* scarcity — IP libertarians argue that we should impose restrictions on nonscarce information — to make it scarce so that it fits into the round-hole property-rights framework they have erroneously decided to apply to the square peg of information. They are going the wrong direction. The direction of the future, of progress, is towards more abundance and prosperity and wealth. We work with the real world of scarcity, using our ever-expanding base of knowledge to prosper in the face of scarcity; we make more things in the face of entropy and physical limitations!

It is obscene to undermine the glorious operation of the market in producing wealth and abundance by imposing artificial scarcity on human knowledge and learning (see "IP and Artificial Scarcity"). Learning, emulation, and information are good. It is good that information can be reproduced, retained, spread, and taught and learned and communicated so easily. Granted, we cannot say that it is *bad* that the world of physical resources is one of scarcity — this is the way reality is, after all — but it is certainly a challenge, and it makes life a struggle. It is suicidal and foolish to try to hamper one of our most important tools — learning, emulation, knowledge — by imposing scarcity on it. Intellectual property is theft. Intellectual property is statism. Intellectual property is death. Give us *intellectual freedom* instead!

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1. As noted, the IP criticisms in my publications of course built on the work of earlier libertarians; but the point is that in recent years libertarians have widely accepted the anti-IP argument.