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

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Working draft Sep. 25, 2022

Background

Against Intellectual Property (*AIP*) 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 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]

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[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); it was later published as a monograph by the Mises Institute in 2008 and again by Laissez-Faire Books in 2012. 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, Alabama, 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 21 years, not 20.

[2]Ayn Rand, "Patents and Copyrights," in *Capitalism: The Unknown Ideal* (New York: New American Library, 1967), p. 133.

[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

It made no sense to me, and didn't seem to fit in well with other aspects of libertarian 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. So I dove deep into the literature and tried to find a way to justify IP rights, only to keep hitting dead ends. Every argument I could come up with was as flawed and shaky as Ayn Rand's.

> 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*; and Kinsella, "Obama's Patent Reform: Improvement or Continuing Calamity?", *Mises Academy* (Sep. 23, 2011) (published as episode KOL164 of the *Kinsella on Liberty Podcast*). 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 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. (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 ….'")

[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," *Loyola of Los Angeles Law Review* 30, no. 2 (Jan. 1997): 607-45, both available at www.stephankinsella.com/publications. See also "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 Anthony Wile, "Stephan Kinsella on the Logic of Libertarianism and Why Intellectual Property Doesn't Exist," *The Daily Bell* (March 18, 2012); also "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. See "How I Became A Libertarian," *LewRockwell.com* (Dec. 18, 2002), also published as "Being a Libertarian" in *I Chose Liberty: Autobiographies of Contemporary Libertarians* (compiled by Walter Block; Auburn, Al.: Mises Institute, 2010); "Faculty Spotlight Interview: Stephan Kinsella," *Mises Economics Blog* (Feb. 11, 2011); "What Sparked Your Interest in Liberty?", *FEE.org* (April 21, 2016); and other biographical pieces at www.stephankinsella.com/publications/#biographical.

And in my research I came across libertarian and other criticisms of IP,[6] and also deepened my understanding of the crucial role of *scarcity* to property rights, as emphasized in particular by Hans-Hermann Hoppe.[7] 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.[8] With a relief similar to the one I felt when I 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,[9] 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.[10]

I presented the paper, then entitled "The Legitimacy of Intellectual Property," at the Ludwig von Mises Institute's Austrian Scholars Conference in March 2000. As I recall, 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

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[6]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 Law Review* 12 (1989) and "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects," *Harvard Journal of Law & Public Policy* 13, no. 3 (Summer 1990), both at tomgpalmer.com; Wendy McElroy, "Contra Copyright," *The Voluntaryist* (June 1985), included in *idem*, "Contra Copyright, Again," *Libertarian Papers* vol. 3, art. no. 12 (2011); Wendy J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory," *Stanford Law Review* 41 (1989); and Boudewijn Bouckaert, "What is Property?", *Harvard Journal of Law & Public Policy* 13, no. 3 (Summer 1990).

[7]See Hoppe, *A Theory of Socialism and Capitalism*, chs. 1–2 (Boston/Dordrecht/London: Kluwer, 1989; reprinted Auburn, Al.: Mises Institute, 2010), www.hanshoppe.com/tsc; also Hoppe, "Of Private, Common, and Public Property and the Rationale for Total Privatization," *Libertarian Papers* vol. 3, art. no. 1 (2011), also published as ch. 5 of *The Great Fiction* (2nd Expanded Edition, Auburn, Al.: Mises Institute 2021), available at www.hanshoppe.com/tgf/.

[8]See Kinsella, "The Origins of Libertarian IP Abolitionism," *Mises Economics Blog* (April 1, 2011) and "The Four Historical Phases of IP Abolitionism," *C4SIF Blog* (April 13, 2011). On Benjamin Tucker, see also Wendy McElroy, "Copyright and Patent in Benjamin Tucker's Periodical *Liberty*," in *The Debates of Liberty: An Overview of Individualist Anarchism, 1881-1908* (Wendy McElroy, ed., Lexington Books, 2002), reprinted as "Copyright and Patent in Benjamin Tucker's Periodical," *Mises Daily* (July 28, 2010).

[9]See, e.g., Kinsella, "Letter on Intellectual Property Rights," *IOS Journal* 5, no. 2 (June 1995), pp. 12-13; and "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.

[10]See, e.g., various chapters to be included in *Law in a Libertarian World*, at www.stephankinsella.com/llw/.

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 doddered 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.[11]

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 *AIP* the O.P. Alford III Prize for 2002.[12]

The Internet is the reason for IP emerging from the shadows. The Internet—and digital 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.[13] At the same time, news of shockingly excessive, absurd, and

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[11] 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 *AIP*. "Law and Intellectual Property in a Stateless Society," *Libertarian Papers* 5, Art. no. 1 (2013): 1-44, restates the basic case against IP; a more concise version may be found in "Intellectual Property and Libertarianism," *Mises Daily* (Nov. 17, 2009). See also Kinsella, "The Case Against IP: A Concise Guide," *Mises Daily* (Sep. 4, 2009).

[12] http://mises.org/page/1475/Mises-Institute-Awards#Alford.

[13] 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).

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.[14] No longer were these lawsuits hidden in the dark; Internet users were starting to be made aware of them.[15]

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[14] See, e.g., Kinsella, "The Patent, Copyright, Trademark, and Trade Secret Horror Files," *StephanKinsella.com* (Feb. 3, 2010); "KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished," *Kinsella on Liberty Podcast* (Nov. 24, 2021); and "First Amendment Defense Act of 2021," *C4SIF Blog* (Jan. 17, 2021).

[15] See, e.g., Siva Vaidhyanathan, *Intellectual Property: A Very Short Introduction* (Oxford University Press, 2017):

> 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 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

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,[16] while at the same time the US bullied other countries to keep ratcheting up their own IP laws and enforcement.[17] This culminated in the attempt to enact 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.[18]

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.[19] And more and more libertarians

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> 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*.

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

> 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 pro- grams. Meanwhile, displaying all the temperance of a methadone addict, Congress keeps handing more and more power to copyright owners.

[16] 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); and Timothy B. Lee, "Copyright enforcement and the Internet: we just haven't tried hard enough?", *ars technica* (Feb. 16, 2012).

[17] 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 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.

[18] 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 Kinsella, "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).

[19] See Kinsella, "The Death Throes of Pro-IP Libertarianism," *Mises Daily* (July 28, 2010); "'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., Kinsella "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," *Journal of Ayn Rand Studies* 9, no. 1 (Fall 2007): 139–61. *But see* "Does Cato's New Objectivist CEO John Allison Presage Retrogression on IP?", *C4SIF Blog* (Aug. 27, 2012).

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.[20] In addition, outside of libertarianism proper, a host of 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.[21]

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.[22] I also gave a six-part lecture course on IP for the Mises Academy in 2010 and reprised in 2011,[23] and I have continued to write on the topic.[24]

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

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[20]See, for example, Butler Shaffer, *A Libertarian Critique of Intellectual Property* (Auburn, Al.: Mises Institute, 2013); Jacob Huebert, *Libertarianism Today* (Santa Barbara, CA: Praeger, 2010), ch. 10, "The Fight against Intellectual Property"; Walter Block, *Defending the Undefendable II: Freedom in All Realms* (UK and USA: Terra Libertas Publishing House, 2013; reprint edition Auburn, Al.: Mises Institute, 2018), ch. 30, "The Intellectual-Property Denier"; Jeffrey Tucker, *It's a Jetsons World: Private Miracles & Public Crimes* (Auburn, Al.: Mises Institute, 2011), chs. 37–41, on "Can Ideas Be Owned?"; Adam Kokesh, *Freedom!* (2014), ch. 7, §VI, "Intellectual Property"; Sandefur, "A Critique of Ayn Rand's Theory of Intellectual Property Rights"; Chase Rachels, *A Spontaneous Order: The Capitalist Case For A Stateless Society* (2015), ch. 2, "Property," section "Intellectual Property"; Vin Armani, "The Ownable And The Unownable," in *Self Ownership: The Foundation of Property and Morality* (2017); Tom W. Bell, *Intellectual Privilege: Copyright, Common Law, and the Common Good* (Arlington, Va.: Mercatus Center, 2014); and *Copyright Unbalanced: From Incentive to Excess* (Jerry Brito, ed., Arlington, Va.: Mercatus Center, 2013). See also various resources collected at www.c4sif.org/resources.

[21]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); "Legal Scholars: Thumbs Down on Patent and Copyright," *C4SIF Blog* (Oct. 23, 2012); and "Yet Another Study Finds Patents Do Not Encourage Innovation," *Mises Economics Blog* (July 2, 2009).

[22]See "KOL308 | Stossel: It's My Idea (2015)," *Kinsella on Liberty Podcast* (Dec. 29, 2020) and "KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished," *Kinsella on Liberty Podcast* (Nov. 24, 2021); 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.

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

[24]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.

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.[25]

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.[26] 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 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."[27] Also, I might use "corporeal" or "material" instead of "tangible."[28] 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.[29] I would streamline the initial section providing a positive legal description of the main forms of IP, and

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

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

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

[28]In *AIP* I sometimes used the term "tangible" to indicate scarce resources that can be subject to property rights. 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 *Property, Freedom and Society: Essays in Honor of Hans-Hermann Hoppe* (Jörg Guido Hülsmann & Stephan Kinsella, eds., Auburn, Al.: Mises Institute, 2009).

[29]For more on this, see 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):

> "Property is a word with high emotional overtones and so many meanings that it has defied attempts at accurate all-inclusive definition. The English word *property* derives from the Latin *proprietas*, a noun form of *proprius*, which means one's own. In the United States, the word *property* is frequently used to denote indiscriminately either the *objects* of rights … or the *rights* that persons have with respect to things. Thus, lands, automobiles, and jewels are said to be property; and rights, such as ownership, servitudes, and leases, are likewise said to be property. This latent confusion between rights and their objects has its roots in texts of Roman law and is also encountered in other legal systems of the western world. Accurate analysis should reserve the use of the word property for the designation of rights that persons have with respect to things."

eliminate the Appendix providing examples of obvious IP abuse, since this can be done now in an easily updated online page or post.[30]

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.[31] So I would add some material, as I did to some degree in a later paper.[32] I'll briefly outline below some of the arguments developed after the initial publication of *AIP*.

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.[33] Second, even if violating someone's rights to take 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.[34] 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.[35] As I wrote in a subsequent paper, "Given the available evidence, anyone who accepts utilitarianism should be *opposed* to patent and copyright."[36]

IP Rights as Negative Easements[37]

Additionally, I have come to understand that IP rights can be properly classified as *non-consensual negative easements* (or servitudes),[38] which makes plain exactly how they

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[30]As I did in this later publication 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.).

[31]See, generally, "A Selection of my Best Articles and Speeches on IP," *C4SIF Blog* (Nov. 30, 2015).

[32]"Law and Intellectual Property in a Stateless Society", restates the basic case against IP and incorporates some new arguments developed after *AIP*.

[33]See n. 41 in *AIP*; also Murray N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," in *Economic Controversies* (Auburn, Al.: Mises Institute, 2011). For a recent article debunking David Friedman's scientistic and confused contention that "Von Neumann" proved that utility can be measured cardinally, see Robert P. Murphy, "Why Austrians Stress Ordinal Utility," *Mises Wire* (Feb. 3, 2022).

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

[35]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).

[36]"Law and Intellectual Property in a Stateless Society," p. 11.

[37]See also the section below on "Resources, Properties, Features, and Universals."

[38]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). IP rights can also be classified

infringe justly-acquired property rights.[39] All property rights are enforceable rights in material, scarce—conflictable—resources, the type of 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*.[40] 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 just the *motivation* or reason for the conflict or clash, but the clash 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.[41]

All rights are human rights, and all human rights are property rights,[42] and property rights just are rights to the exclusive control of certain conflictable resources.[43] In the end, every law, every dispute, boils down to some actor being assigned ownership rights in a given contested 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"). Thus, IP rights amount to a taking or infringement of property rights otherwise established in accordance with the principles of original appropriation and

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as incorporeal movables, although this classification has no relevance here. See Kinsella, "Are Ideas Movable or Immovable?", *C4SIF Blog* (April 8, 2013).

[39]Kinsella, "Intellectual Property Rights as Negative Servitudes," *C4SIF Blog* (June 23, 2011).

[40]See also the section below, "Selling Does Not Imply Ownership."

[41]For more on this, see the various discussions of what it means to have a "fight over religion," in "Stephan Kinsella on the Logic of Libertarianism and Why Intellectual Property Doesn't Exist," interview with Anthony Wile, *The Daily Bell* (March 18, 2012); Kinsella, "The Limits of 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).

[42]See Murray N. Rothbard, "'Human Rights' as Property Rights," in *The Ethics of Liberty* (New York: New York University Press, 1998 [1982]).

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

contract.[44] This insight buttresses the argument in *AIP* that "a system of property rights in 'ideal objects' necessarily requires violation of other individual property rights, e.g., to use one's own tangible property as one sees fit."[45]

Lockean Creationism[46]

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[47] 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

[44]Kinsella, "How To Think About Property," *StephanKinsella.com* (April 25, 2021). A third principle, related to contractual transfer, is a transfer of resources made for purposes of *rectification*. This can be viewed as a special case of a contractual title transfer. See Kinsella, "The Limits of Libertarianism?: A Dissenting View" (citing Roderick Long and Robert Nozick); also *idem*, "KOL345 | Kinsella's Libertarian "Constitution" or: State Constitutions vs. the Libertarian Private Law Code (PorcFest 2021)," *Kinsella on Liberty Podcast* (June 26, 2021); and "Nobody Owns Bitcoin," *StephanKinsella.com* (April 21, 2021). See also Gary Chartier, *Anarchy and Legal Order: Law and Politics for a Stateless Society* (Cambridge, 2012), at 64–65, *et seq*., elaborating on the "baseline possessory rules" corresponding to original appropriation and contractual title transfer. Regarding transfers made for purposes of rectification, see Chartier, *Anarchy and Legal Order*, ch. 5, "Rectifying Injury," esp. §II.C.2, and Kinsella, "A Libertarian Theory of Punishment and Rights," *Loy. L.A. L. Rev.* vol. 30 (1997): 607-45, at §IV.B.

[45]*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 Roderick T. Long, "Owning Ideas Means Owning People," *Cato Unbound* (Nov. 19, 2008); 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): 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* 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; and 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)).

[46]See also the discussion of "rearrangement" in the section below on "Resources, Properties, Features, and Universals."

[47]For more on this concept, see Kinsella, "Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and 'Rearranging'," *C4SIF Blog* (Sep. 29, 2010).

resulting product is thus owned according to standard property rights and contract principles.[48]

Property rights in one's body are based in one's direct control over one's body.[49] 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.[50] 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."[51]

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.[52] 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. 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

[48]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," "Libertarian Creationism" section, at pp. 27–30; and "KOL012 | 'The Intellectual Property Quagmire, or, The Perils of Libertarian Creationism,' Austrian Scholars Conference 2008," *Kinsella on Liberty Podcast* (Feb. 6, 2013). And see Chartier, Anarchy and Legal Order, 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). See also Uszkai, "Are Copyrights Compatible with Human Rights?," at 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").

[49]Kinsella, "How We Come To Own Ourselves," *Mises Daily* (Sep. 7, 2006).

[50]See note 44 above.

[51]See references in the next section.

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

on labor must be rejected as overly metaphorical and confused, and, frankly, Marxian.[53]

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 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.[54] 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.[55]

Resources, Properties, Features, and Universals[56]

As noted above (see note 29), 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.[57] But every property right is an ownership right held

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[53]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); "KOL 037 | Locke's Big Mistake: How the Labor Theory of Property Ruined Political Theory," *Kinsella on Liberty Podcast* (March 28, 2013); and "Cordato and Kirzner on Intellectual Property," *C4SIF Blog* (April 21, 2011).

[54]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).

[55]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).

[56]See also the section above on "IP Rights as Negative Easements."

[57]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 "IP and Aggression as Limits on Property Rights: How They Differ," *StephanKinsella.com* (Jan. 22, 2010). However, we need not delve into this nuance here.

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.[58] 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 don't own the way an object is arranged or shaped.[59]

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.[60]

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[58]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* my "Introduction" to J. Neil Schulman, *Origitent: Why Original Content is Property Origitent: Why Original Content is Property* (Steve Heller Publishing, 2018), and "KOL208 | Conversation with Schulman about Logorights and Media-Carried Property," *Kinsella on Liberty Podcast* (March 4, 2016).

[59]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.

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.

[60]Long, "The Libertarian Case Against Intellectual Property Rights" (emphasis added). See also *idem*, "Bye-Bye for IP," *Austro-Athenian Empire Blog* (May 20, 2010), and the section above on "IP Rights as Negative Easements," and Kinsella, "Mr. IP Answer Man Time: On Steel and Swords," *C4SIF Blog* (Feb. 4, 2022); "How To Think About Property"; "Libertarian Answer Man: Mind-Body Dualism, Self-Ownership, and

Selling Does Not Imply Ownership

As noted in the "IP Rights as Negative Easements" section above, it is literally impossible to own or have property rights in information or knowledge. People only manipulate and have conflict over scarce resources, so that IP rights are just disguised reassignments of property rights in existing conflictable or scarce resources. And as noted in the "Resources, Properties, Features, and Universals" section 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."[61] When *A* and *B* exchange two owned objects, such as an apple for an orange, then there are two title transfers. *A* 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*.[62] *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.

Property Rights," *StephanKinsella.com* (Jan. 29, 2022); "KOL337 | Join the Wasabikas Ep. 15.0: You Don't Own Bitcoin—Property Rights, Praxeology and the Foundations of Private Law, with Max Hillebrand"; "KOL219 | Property: What It Is and Isn't: Houston Property Rights Association," Kinsella on Liberty Podcast," *Kinsella on Liberty Podcast* (April 28, 2017); and "Nobody Owns Bitcoin." See also Patrick Smith, "Un-Intellectual Property" (March 4, 2016).

[61]See Kinsella, "KOL395 | Selling Does Not Imply Ownership, and Vice-Versa: A Dissection (PFS 2022)," *Kinsella on Liberty Podcast* (Sep. 17, 2022); *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*, "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability," *Journal of Libertarian Studies* 17, no. 2 (Spring 2003): 11-37.

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

All Property Rights Are Limited

One final argument may be addressed, which is touched on in some of the above sections.[63] 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.[64] Or, as Roderick Long would say, "Owning Ideas Means Owning People."

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.[65] 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 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.[66]

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[63]See, e.g., the discussion in the section "Resources, Properties, Features, and Universals," above.
[64]See the section above on "IP Rights as Negative Easements."
[65] See Kinsella, "The Non-Aggression Principle as a Limit on Action, Not on Property Rights," *StephanKinsella.com* (Jan. 22, 2010) and "IP and Aggression as Limits on Property Rights: How They Differ," *StephanKinsella.com* (Jan. 22, 2010).
[66]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

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

Conclusion

I may someday provide such an updated treatment, tentatively to be entitled *Copy This Book*, building on *AIP* and taking into account more recent arguments, evidence, and examples.[67] In the meantime, readers of *AIP* may find useful the suggestions in this article and others compiled in my C4SIF blogpost "Selected Supplementary Material for *Against Intellectual Property*" (March 1, 2012), which is updated from time to time.

STEPHAN KINSELLA
Houston, May 2022

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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.

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