

“Introduction” by Stephan Kinsella

“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. (See Pat McNees, “What is the difference between a preface, a foreword, and an introduction?” <https://bit.ly/2JCcbCM>.) 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 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 fucking with you—she's dead." [<https://bit.ly/2HM4qoe>] 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 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. 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 and censorship.

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.

Real Pirates

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. According to Wikipedia, "Maritime History of England," 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.” [See my post “The Real IP Pirates,” c4sif.org/resources.]

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 1624

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 1624 (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. (See at Karl Fogel, “The Promise of a Post-Copyright World,” at c4sif.org/resources.)

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 Constitution authorizes Congress “to promote the progress of science and the useful arts by securing for a limited time to authors and investors 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. 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 (see my posts “Legal Scholars: Thumbs Down on Patent and Copyright” and “The Overwhelming Empirical Case Against Patent and Copyright,” both available at c4sif.org/aip).

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.” 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. 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. (See “KOL 037 | Locke’s Big Mistake: How the Labor Theory of Property Ruined Political Theory,” at stephankinsella.com.)

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 1624 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. Among libertarians, and especially some anarchists, the chief thinkers 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.

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. (See my posts “The Origins of Libertarian IP Abolitionism,” “The Four Historical Phases of IP Abolitionism,” and “Classical Liberals and Anarchists on Intellectual Property,” at c4sif.org/aip.)

With the dawning digital age and the Internet 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—we all, as good libertarians, want there to be 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 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. (See 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,” “SOPA is the Symptom, Copyright is the Disease: The SOPA Wakeup Call to Abolish Copyright,” and others at c4sif.org/aip.)

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.” 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
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