

REPLY TO VAN DUN: NON-AGGRESSION AND TITLE TRANSFER

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In a recent issue of *The Journal of Libertarian Studies*, Frank van Dun commented on my views on intellectual property, and on Walter Block's views on blackmail.¹ In this reply, I will concentrate on two aspects of Van Dun's comments: the non-aggression principle & libertarianism, and trademark & contract.

THE NON-AGGRESSION PRINCIPLE AND LIBERTARIANISM

Van Dun criticizes Block and me for using “the so-called Rothbardian non-aggression rule as the foundation or axiom for libertarian jurisprudence.” For although “[n]on-aggression is an important and valid rule of libertarian jurisprudence,” it is “inadequate from a libertarian point of view.” Rather than being the foundation of libertarian theory, Van Dun argues, it is only an implication of the libertarian philosophy of law.²

After such a claim, one might expect Van Dun to provide a critique or denial of the principle of non-aggression followed by an

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¹Frank van Dun, “Against Libertarian Legalism: A Comment on Kinsella and Block,” *Journal of Libertarian Studies* 17, no. 3 (Summer 2003), pp. 63–90; N. Stephan Kinsella, “Against Intellectual Property,” *Journal of Libertarian Studies* 15, no. 2 (Spring 2001), pp. 1–53; and Walter Block, “Toward a Libertarian Theory of Blackmail,” *Journal of Libertarian Studies* 15, no. 2 (Spring 2001), pp. 55–88.

²Van Dun, “Against Libertarian Legalism,” pp. 63, 64.

explanation of the contours of the proper theory of law. However, Van Dun seems to accept the non-aggression rule. He uses the concept of “aggression in the traditional sense of a physically invasive, non-defensive use of force (violence) against another person or his property,”³ just as Rothbardians do. He writes:

I have no problem with the thesis that, in a libertarian legal order, no individual or group—least of all those who are engaged in the administration of justice—should aggress against any person or any person’s property. Aggression, in the libertarian sense of the word, is the physical invasion of another person’s domain without that person’s consent and without lawful justification. As such, aggression is unlawful and should therefore be illegal in a libertarian legal order (because such an order is intended to be as true to law as is humanly possible). Nor do I have a problem with the thesis that violent border crossings are lawful and therefore legally permissible if and only if they are committed in self-defence, to bring a criminal to justice, or to exact restitution or compensation for an unlawfully inflicted harm. They are permissible to the extent that they are themselves compatible with the requirements of justice.⁴

However:

It does not follow from those theses that defensive use of force is justified or lawful only in response to aggressive violent invasions of persons or property. It does not follow that only aggression against another person or his property is unlawful. There may be unlawful acts that are not invasions of a person’s physical domain, yet justify the defensive use of force to prevent, stop, or exact compensation for such acts.⁵

Van Dun goes on to state even more explicitly his view of the relation between aggression and what is properly regarded as “unlawful”:

Block and Kinsella proceed with their arguments on the supposition that such acts are not unlawful because they are not aggressions. Accordingly, they also suppose that the use of force in retaliation against such acts must itself be an aggression, and therefore unlawful. *In their system of*

³Van Dun, “Against Libertarian Legalism,” p. 65 n. 4.

⁴Van Dun, “Against Libertarian Legalism,” p. 65.

⁵Van Dun, “Against Libertarian Legalism,” p. 65.

*thought, the dichotomy of aggression and non-aggression coincides with the logical opposition between unlawful and lawful acts.*⁶

As Van Dun explains in a brief outline at the end of the paper, in his view, libertarian theory tells us what should be *unlawful*, by which term he seems to mean a rights violation, or against natural law.⁷ For Van Dun, “unlawful” means the type of conduct that should be made illegal (against positive law). As he writes, “aggression is unlawful and should *therefore* be illegal in a libertarian legal order.”⁸ Thus, libertarianism is concerned with what is *lawful* and *unlawful*, or with what should be made illegal.

Van Dun states that while physical aggression is one type of unlawfulness, it is not true “that *only* physical invasions of another’s person or property are unlawful.”⁹ Because aggression is only one type of unlawfulness, he writes, other unlawful things may also be made illegal. Such things include trademark infringement, libel, or blackmail.

I hope that I have accurately summarized this aspect of Van Dun’s thought. Now I do not deny that the non-aggression principle might not be an “axiom” in the Randian sense, and that it might be the result of, or dependent on, more basic truths or reasons. But a given theory of law either is or is not compatible with the rule. It seems that Van Dun wants to have it both ways. He is quite correct that, as Block and I see it, “the dichotomy of aggression and non-aggression coincides with the logical opposition between unlawful and lawful acts.”¹⁰ The reason for this is that to declare something “unlawful” means it should be made illegal; that force may be used to oppose the unlawful action. The libertarian believes, I submit, that the only case in which force is justified is if it is in response to an initiated act of force. Otherwise, the outlawing of the conduct is itself an initiation of force.

Van Dun, though, says that the category of unlawful conduct is broader than aggression. This means that conduct other than aggression may be—nay, should be—outlawed. Which means that violence should be wielded against people who have not engaged in aggression.

⁶Van Dun, “Against Libertarian Legalism,” pp. 65–66, emphasis added.

⁷Van Dun, “Against Libertarian Legalism,” pp. 83–89.

⁸Van Dun, “Against Libertarian Legalism,” p. 65, emphasis added.

⁹Van Dun, “Against Libertarian Legalism,” p. 73, emphasis in original.

¹⁰Van Dun, “Against Libertarian Legalism,” p. 66.

However, since it is not in response to aggression, this is initiated force. For this reason, I fail to see how one can admit that aggression should be unlawful, but maintain that things other than aggression are also unlawful. If aggression is unlawful, then nothing else can be, because outlawing non-aggression is itself aggression.

In my view, Van Dun cannot really agree with the non-aggression principle, if he is going to adhere to his “broader” view of unlawfulness. Rather, to follow this line of reasoning, it would be more consistent to state that many, even most, acts of aggression are unlawful, but that some types of aggression are not unlawful—namely, the violent suppression of some types of non-aggressive conduct (e.g., libel). But then it would be plain that this theory does support, at least in some cases, the infliction of violent force against those who have not themselves initiated force. This does not seem very libertarian.

Before I turn to Van Dun’s critique of some of my views on intellectual property, a brief digression. Van Dun states:

A libertarian legal theory must be founded on a sound philosophy of law if it is to have any chance of holding its ground in serious intellectual debate. Block and Kinsella do not provide such a philosophy. They assume instead that it can be found in Rothbard’s writings.¹¹

However, “Rothbard explicitly warned his readers that he himself was merely presupposing the validity of the theory of natural law and would not attempt ‘a full-scale defense of that theory.’”¹²

Now, just as Van Dun cannot set forth his entire legal theory in his article, so I did not in mine, but I did not and do not rely only on Rothbard. To the contrary, I cited my own work and that of Hans-Hermann Hoppe which elsewhere sets forth a defense of the non-aggression principle.¹³ Hoppe’s argumentation or discourse ethics

¹¹Van Dun, “Against Libertarian Legalism,” p. 83.

¹²Van Dun, “Against Libertarian Legalism,” p. 83.

¹³See, e.g., N. Stephan Kinsella, “A Libertarian Theory of Punishment and Rights,” *Loyola of Los Angeles Law Review* 30 (1997); N. Stephan Kinsella, “New Rationalist Directions in Libertarian Rights Theory,” *Journal of Libertarian Studies* 12, no. 2 (Fall 1996), pp. 313–26; N. Stephan Kinsella, “Defending Argumentation Ethics: Reply to Murphy & Callahan,” *Anti-state.com* (September 19, 2002); Hans-Hermann Hoppe, *The Economics and Ethics of Private Property* (Boston: Kluwer Academic Publishers, 1993); and Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston: Kluwer Academic Publishers, 1989).

approach, in particular, is a powerful defense of the standard non-aggression-based libertarian view.

If I am right, Van Dun must reject the non-aggression principle in favor of his view that unlawfulness is not based on or equated with aggression, so that not only aggression may be outlawed. But what I find puzzling is that Van Dun employs discourse ethics, in a way similar to Hoppe, to show that “principles of private property and uncoerced exchange” are also presupposed by participants in discourse.¹⁴ In other words, as Hoppe argues, the non-aggression principle does have a justification in the nature of peaceful discourse; it is not simply an arbitrary “axiom.” Therefore, it is unclear to me why Van Dun refuses to embrace the non-aggression principle and opposes building a foundation on it. It seems that his own “dialogue ethics” theory, like that of Hoppe, shows that the non-aggression rule is, in fact, justified and correct.

TRADEMARK AND CONTRACT

Van Dun seems to agree with the main portion of my article on intellectual property, that patent and copyright laws are unlibertarian. However, he takes issue with my comments with respect to trademark, the relevant portions of which are provided here:

Suppose some Lachmannian changes the name on his failing hamburger chain from LachmannBurgers to RothbardBurgers, which is already the name of another hamburger chain. I, as a consumer, am hungry for a RothbardBurger. I see one of the fake RothbardBurger joints run by the stealthy Lachmannian, and I buy a burger. Under current law, Rothbard, the “owner” of the RothbardBurgers trademark, can prevent the Lachmannian from using the mark RothbardBurgers to sell burgers because it is “confusingly similar” to his own trademark. That is, it is likely to mislead consumers as to the true source of the goods purchased. The law, then, gives a right to the trademark holder against the trademark infringer.

In my view, it is the *consumers* whose rights are violated, not the trademark holder’s. In the foregoing example, I (the consumer) thought I was buying a RothbardBurger, but instead got a crummy LachmannBurger with its weird

¹⁴See Kinsella, “New Rationalist Directions in Libertarian Rights Theory,” p. 333, discussing Van Dun.

kaleidoscopic sauce. I should have a right to sue the Lachmannian for fraud and breach of contract (not to mention intentional infliction of emotional distress and misrepresentation of praxeological truths). However, it is difficult to see how this act of fraud, perpetrated by the Lachmannian on *me*, violates *Rothbard's* rights. The Lachmannian's actions do not physically invade Rothbard's property. He does not even convince others to do this; at most, he may be said to convince third parties to take an action within their rights, namely, to buy a burger from the Lachmannian instead of Rothbard. Thus, it would appear that, under libertarianism, trademark law should give *consumers*, not trademark *users*, the right to sue trademark pirates.¹⁵

Van Dun maintains that “it is . . . difficult to see how trademark piracy could violate the consumer's rights if it was not a violation of the trademark holder's right.”¹⁶ Van Dun mounts an escalating series of criticisms of the alleged implications of my trademark views. Most seem to rest on his conclusion that, under my theory, one cannot say that the consumer has a fraud or breach of contract claim. He reasons:

According to Kinsella, the consumer supposedly is defrauded because the L-Burger chain misrepresented itself to the consumer. The latter therefore should have a right to sue the L-Burger chain for “fraud and breach of contract.” That is a strange conclusion, for it is not at all clear what contract L-Burger breached. The consumer presumably got what he paid for: a burger. If L-Burger acted within its legal rights under the Kinsella Code in using the R-Burger trademark, the consumer should know that a trademark carries no legally relevant information. Kinsella's argument—the consumer thought he bought an R-Burger, but instead got a crummy L-Burger—is simply irrelevant. The consumer's expectations would have been equally frustrated if he had bought at R-Burger when, unbeknownst to him, that chain had hired another chef with the same tastes as his counterpart at L-Burger or had changed its production processes or suppliers. Should any of these things also constitute a violation of the consumer's rights?¹⁷

I acknowledge that my reasoning was somewhat compressed. In a 53-page paper devoted primarily to patent and copyright, I devoted

¹⁵Kinsella, “Against Intellectual Property,” pp. 43–44.

¹⁶Van Dun, “Against Libertarian Legalism,” p. 68.

¹⁷Van Dun, “Against Libertarian Legalism,” p. 68.

only three paragraphs to the issue of whether trademark law can be justified. My view that the consumer has a fraud or breach of contract claim is based on a theory of contract which is contained in an article published after the intellectual property article.¹⁸ I believe Van Dun is incorrect that my non-aggression-principle-compatible legal theory cannot support a fraud or breach of contract claim in the above context.

As explained more fully in the contract theory article cited above, libertarianism maintains that the owner of a scarce resource has the right to use the resource, and to dispose of it. The owner is the first possessor or someone who legitimately acquired the property from the first possessor. Having the right to use property implies one may choose to exclude others from it, permit them to use or borrow it, give or sell title to another, or abandon it. If you own something, you can use it, hoard it, share it, destroy it, sell or give or lend it to another, or abandon it. One's choice whether to sell something or lend it, for example, obviously must be manifested in some way. Clearly, social interaction and property exchanges presuppose the ability of the parties to *communicate* with each other.

It is the owner's consent that distinguishes permitted use from trespass. If my neighbor walks to my front door to borrow a cup of sugar, she has implied permission to use my sidewalk and doorknocker for this purpose. But if I tell her she is not welcome on my property, then she is a trespasser if she steps on it. Clearly, the manifested or communicated consent of the owner is relevant as to whether the use of property is permissible—whether it is a form of trespass or theft.

This is also true for loans and exchanges of title. If I lend my car to someone, the permission must be communicated to him somehow. For example, I can lend my car to my brother. His use is not trespass since I consented to it. If a random stranger takes my car and uses it, it is theft because I did not consent to it.

But since consent is communicated and can be withheld, it need not be all or nothing—a loan need not be a permanent gift. The consent given to others to use one's property can be conditional. For example, it can be limited in time or in other ways. If I lend my car to my brother to go to lunch and he drives off to Canada in it for a month-long vacation, he is now using my car without my consent, and he knows

¹⁸N. Stephan Kinsella, "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability," *Journal of Libertarian Studies* 17, no. 2 (Spring 2003), pp. 11–37.

this. At this point, he is identical to the thief or other trespasser. The question to be asked is always: Did the owner consent to the others' use of the property? If so, it is permissible and rightful, since an owner can allow others to use his property. But if not, it is a type of theft or trespass. And clearly, determining whether consent was granted presupposes the possibility of communication.

Now, when someone sells or buys an item, the sale or purchase can be, and usually is, conditional. For example, if I buy a candy bar for a shilling from a vendor, I transfer title to my shilling to the vendor, and he transfers title to the candy to me. Other customary assumptions are viewed as implied conditions on the title transfers, but they can be made explicit. I might state that the title to my coin transfers *only* if the candy bar has such-and-such property (e.g., it is unopened, or fresh, or not laced with poison). Therefore, the vendor receives my consent to use and take title to the coin *only* if these conditions are met. If the vendor knowingly sells me a five-year-old piece of chocolate, then the condition for transferring title to the coin to him has simply not been met, and he is aware of this. So the vendor would be aware that he does *not* have the right to use or keep the coin—just as, in the example above, my brother knows that he may use my car to go to lunch, but that he has no right to use it to drive to Canada.

Likewise, in the R-Burger/L-Burger example I gave, I assumed a hypothetical situation in which the customer wanted an R-Burger. That is, he wanted a burger having certain characteristics—it is fresh, has meat and bread, and was made by a certain, identifiable company (the R-Burger chain). When he paid for the fake R-Burger, then title to his coin transfers to the vendor only if the conditions are met. They are not met, because the burger was not made by the R-Burger chain, and that was one of the customer's conditions. Therefore, the L-Burger chain is taking and using his coin without his consent. It is for this reason that he should have a claim against them for trespass (which may be couched in fraud, breach of contract, or theft terms).

Van Dun might argue that it is not possible to identify the R-Burger chain if it does not have a trademark right, and that the L-Burger chain can just rename itself "R-Burgers" too, so that when the customer asks for an R-Burger (i.e., conditions the title transfer to the money on it being made and sold by R-Burger), he is actually getting one. He is just getting it from the second R-Burger company, not from the first R-Burger company.

However, this response would be easy to overcome. *It need only be possible for the customer to adequately identify what the condition is.* Language is not infinitely malleable, and communication is (undeniably) possible. If pressed, the customer could specify that the purchase is conditioned on the current store he is in being owned by the same R-Burger company first started at such and such date and address, and so on. There is no reason it would be impossible to identify a given vendor without traditional trademark law, just as it is not impossible to identify fellow humans, despite the fact that we do not usually have trademarks on our names (in fact, humans often have identical names, e.g., John Smith).

Van Dun's implicit assumption here is really that communication and identification of individuals or entities is literally impossible in the absence of trademark rights. This is obviously absurd.

Accordingly, I submit that Van Dun is incorrect. Under libertarian principles, property owners are free to condition the transfer of title to their property. In a typical exchange, there are many implied conditions, and others may be expressly added or changed. These conditions specify when the other party has the right to take and use the property to be transferred, just as when one lends property or invites a guest to one's home, the manifested consent of the owner governs which uses by the invitee are permissible, and which are tantamount to trespass. From here, it is easy to see how selling an item to a customer with a falsely-labeled characteristic can result in title to the monetary payment not passing due to failure of one of the conditions. If title does not pass, then the vendor does not have a right to take, use, or spend the money; it is still the property of the customer.

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