Intellectual Property and Libertarianism

by Stephan Kinsella

Intellectual property is a contradiction in terms.

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

Intellectual property (IP), which has garnered greater attention in recent years, was never my strongest interest, even though I have specialized in this field in my legal practice for more than 16 years. But I've ended up writing a great deal on it from a libertarian perspective anyway.

One reason for this is that there are not many libertarian patent attorneys. Commentary by those familiar with IP law is usually devoid of libertarian principle. Most IP experts are, unsurprisingly, proponents of the status quo, just as government school teachers tend to favor government schooling and astronauts cheer NASA. And libertarian discussions of IP often confuse the details of the law under debate. In fact, it's common for libertarians to conflate trademark, copyright, and patent (Murray Rothbard talked about a copyright on a mousetrap, which is an invention and therefore the subject of patents).

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

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

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

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

But IP is widely seen as basically legitimate. Sure, there have always been criticisms of existing IP laws and policies. You can point to hundreds of obviously ridiculous patents, and hundreds of obviously outrageous abuses. There are absurd patents on ways of swinging on a swing and faster-than-light communications and one-click purchasing; there are $100-million and billion-dollar patent lawsuit awards; there are millions of dollars in copyright liability imposed on consumers for downloading a few songs. Books are even banned — quite literally — in the name of copyright. The terms of patents (about 17 years), and especially copyrights (which expire 70 years after the author's death, or 95 years in the case of works made for hire), are ridiculously long — and Congress keeps extending them at the behest of Mickey Mouse (a.k.a. the Disney company). Copyright is now received automatically, whether you want it or not, and is hard to get rid of. The patent office is an inefficient government bureaucracy; and the laws that govern it are arbitrary, ambiguous, and vague (generating more work for me — thanks).

Copyright is now received automatically, whether you want it or not. The patent office is an inefficient bureaucracy governed by laws that are arbitrary, ambiguous, and vague.

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

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

The Libertarian Framework

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

What about individual rights, justice, and freedom from aggression? Well, in my view, these are all derivative; they are defined in terms of property rights. As Rothbard explained, all rights *are* property rights. And justice is just giving someone his due, which depends on what his (property) rights are.

The nonaggression principle itself is also dependent on property rights. If you hit me, it is aggression *because* I have a property right in my body. If I take from you the apple you possess, this is trespass, aggression, only *because* you own the apple; if it is my apple, it is not trespass. In other words, to identify an act of aggression is implicitly to assign a corresponding property right to the victim. (This is, incidentally, one reason why it is better to refer to the nonaggression *principle* instead of the nonaggression *axiom* — because property rights are more basic than freedom from aggression.)

But mere "belief in property rights" does not explain what is unique about the libertarian philosophy. This is because a property right is the exclusive right to control a scarce resource; property rights just specify who owns, who has the right to control, scarce resources. Yet no political system is agnostic on the question of who owns resources. To the contrary: any given system of property rights assigns a particular owner to every scarce resource. None of the various forms of socialism, for example, denies property rights; each socialist system will specify an owner for every scarce resource. If the state nationalizes an industry, it is asserting ownership of these means of production. If the state taxes you, it is implicitly asserting ownership of the funds taken. If my land is transferred to a private developer by eminent domain, the developer is now the owner. If the law allows a recipient of racial discrimination to sue his employer for a sum of money, he is the owner of the money.

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

There are many calls to "reform" the current Intellectual Property system. But just like the tax code, IP laws should be abolished, not reformed.

Thus, protection of and respect for property rights is not unique to libertarianism. What *is* distinctive about libertarianism is its particular property assignment rules — its view as to who is the owner of each contestable resource, and how to determine this. So the question is: what are the libertarian property assignment rules that distinguish our philosophy from others?

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

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

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

The libertarian view is that each person completely owns his own body — at least initially, until something changes this, such as if he commits some crime by which he forfeits or loses some of his rights. Now some say that the idea of self-ownership makes no sense. You *are* yourself; how can you *own* yourself? But this is just silly wordplay. To own means to have the right to control. If A wants to have sex with B's body, whose decision is it? Who has the right to control B's body, A or B? If it is A, then A owns B's body; A has the right to control it, as a master to a slave. But if it is B who has the right to decide, then B owns his own body; he is a self-owner.

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

So the libertarian property assignment rule for bodies is: each person owns his own body. Implicit in the idea of self-ownership is the belief that each person has a better claim to the body that he or she directly controls and inhabits than do others. I have a better claim to the right to control my body than you do, because it is *my* body; I have a unique link and connection to my body that others do not, and that is prior to the claim of any other person. Anyone other than the original occupant of a body is a latecomer with respect to the original occupant. Your claim to my body is inferior in part because I had it first. The person claiming your body can hardly object to the significance of what Hoppe calls the "prior-later" distinction, since he adopts this very rule with respect to his own body; he has to presuppose ownership of his own body in order to claim ownership of yours.

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

This slavery is implicit in state actions and laws such as taxation, conscription, and drug prohibitions. The libertarian says that each person is the full owner of his body: he has the right to control his body, to decide whether or not he ingests narcotics, works for less than minimum wage, pays taxes, joins an army, and so on. But those who believe in such laws believe that the state is at least a partial owner of the body of those subject to such laws. They don't like to say they believe in slavery, but they do. The modern liberal wants tax evaders put in jail (enslaved). The modern conservative wants marijuana users enslaved.

In addition to human bodies, scarce resources include external objects. Unlike human bodies, however, external things were initially unowned. The libertarian view with respect to such external resources is very simple: the owner of a given scarce resource is the person who first homesteaded it — or someone who can trace his title contractually back to the homesteader. This person has a better claim than anyone else who wants the object. Everyone else is a latecomer with respect to the first possessor. Note that we are here speaking of scarce resources — material objects — not infinitely reproducible things such as ideas, patterns, and information.

This latecomer rule is actually implied in the very idea of owning property. If the earlier possessor of property did not have a better claim than some second person who wants to take the property from him, then why does the second person have a better claim than a third person who comes later still (or than the first owner who tries to take it back)? To deny the crucial significance of the prior-later distinction is to deny property rights altogether. Every nonlibertarian view is thus incoherent, because it presupposes the prior-later distinction when it assigns ownership to a given person (because it says that person has a better claim than latecoming claimants); while it acts contrary to this principle whenever it takes property from the original homesteader and assigns it to some latecomer.

But what is relevant for our purposes here is the libertarian position, not the incoherence of competing views. In sum, the libertarian position on property rights in external objects is that, in any dispute or contest over any particular scarce resource, the original homesteader — the person who

"I couldn't get Parliament to outlaw Lady Godiva, but they agreed to *regulate* her!"

appropriated the resource from its unowned status, by embordering or transforming it (or his contractual transferee) — has a better claim than latecomers, those who did not appropriate the scarce resource.

Libertarianism on IP

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

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

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

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

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

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

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

The utilitarian perspective itself is bad enough, because all sorts of terrible policies could be justified this way: why not take half of Bill Gates' fortune and give it to the poor?

Utilitarianism justifies terrible policies. Why not give half of Bill Gates' fortune to the poor? The total gains to the recipients would be greater than Gates' reduced utility.

Wouldn't the total welfare gains to the thousands of recipients be greater than Gates' reduced utility? After all, he would still be a billionaire afterwards. And if a man is extremely desperate for sex, couldn't his gain be greater than the loss suffered by his rape victim if, say, she's a prostitute?

But even if we ignore the ethical and other problems with the utilitarian or wealth-maximization approach, it is bizarre to think that utilitarian libertarians are in favor of IP when they have not demonstrated that IP *does* increase overall wealth. They merely assume that it does and then base their policy views on this assumption. It is beyond dispute that the IP system imposes significant costs, in monetary terms alone, not to mention its costs in terms of liberty. The usual argument, that the incentive provided by IP law stimulates additional innovation and creativity, has not even been proven. It is entirely possible (even likely, in my view) that the IP system not only imposes many billions of dollars of costs on society but actually reduces or impedes innovation, adding damage to damage.

But even if we assume that the IP system does stimulate some additional, valuable innovation, no one has established that the value of the purported gains is greater than the costs. If you ask advocates of IP how they know there is a net gain, you get silence (this is especially true of patent attorneys). They cannot point to any study to support their utilitarian contention; they usually just point to Article 1, Section 8 of the Constitution, as if the backroom dealings of politicians two centuries ago were some sort of evidence. In fact, as far as I've been able to tell, virtually every study that attempts to tally the costs and benefits of copyright or patent law concludes either that these schemes cost more than they are worth, or that they actually reduce innovation, or that the research is inconclusive. There are no studies showing a net gain. There are only repetitions of state propaganda.

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

Libertarian Creationism

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

The mistake is the notion that creation is an independent source of ownership, independent from homesteading and contracting. Yet it is easy to see that it is not, that "creation" is neither necessary nor sufficient as a source of ownership. If you carve a statue using your own hunk of marble, you own the resulting creation because you already owned the marble. You owned it before, and you own it now. And if you homestead an unowned resource, such as a field, by using it and thereby establishing publicly visible borders, you own it because this first use and embordering gives you a better claim than latecomers. So creation is not necessary.

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

This is not to deny the importance of knowledge, or creation and innovation. Action, in addition to employing scarce

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owned means, may also be informed by technical knowledge of causal laws or other practical information. To be sure, creation is an important means of increasing wealth. As Hoppe has observed:

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

While production or creation may be a means of gaining "wealth," it is not an independent source of ownership or rights. Production is not the creation of new matter; it is the transformation of things from one form to another — the transformation of things someone already owns, either the producer or someone else. Using your labor and creativity to transform your property into more valuable finished products gives you greater wealth, but not additional property rights. (If you transform someone else's property, he owns the resulting transformed thing, even if it is now more valuable.) So the idea that you own anything you "create" is a confused one that does not justify IP.

Many libertarians also argue as if some form of copyright or possibly patent could be created by contractual tricks — for example, by a seller selling a patterned medium (book, CD, etc.) or useful machine to a buyer on the condition that it not be copied. For example, Brown sells an innovative mousetrap to Green, on the condition that Green not reproduce it. For IP to work, however, it has to bind not only seller and buyer, but all third parties. The contract between buyer and seller cannot do this — it binds only the buyer and seller. In the example given above, even if Green agrees not to copy Brown's mousetrap, Black has no agreement with Brown. Brown has no contractual right to prevent Black from using Black's own property in accordance with whatever knowledge or information Black has.

Now if Green were to sell Brown's watch to Black without Brown's permission, most libertarians would say that Brown still owns the watch and could take it from Black. Why doesn't

a similar logic apply in the case of the mousetrap design? The difference is that the watch is a scarce resource that has an owner, while the mousetrap design is merely information, which is not an ownable type of thing. The watch is a scarce resource still owned by Brown. Black needs Brown's consent to use it. But in the mousetrap case Black merely learns how to make a mousetrap. He uses this information to make a mousetrap, by means of his own body and property. He doesn't need Brown's permission, simply because he is not using Brown's property. The IP advocate thus has to say that Brown owns the information about how his mousetrap is configured. This move is question-begging, however, since it asserts what is to be shown: that there are intellectual property rights. If Black does not return Green's watch, Green is without his watch, precisely because the watch is a scarce good. But Black's knowing how to make a mousetrap does not take away Green's own mousetrap-making knowledge, highlighting the non-scarce nature of information or patterns. In short, Brown may retake his property from Black but has no right to prevent Black from using information to guide his actions. Thus, the contract approach fails as well.

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

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