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The rebuttal of pro-IP arguments

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Political Dialogues

Abstract:
In this paper I will argue that intellectual property rights are unjustifiable. I shall demonstrate not only that they would violate tangible property rights but also that last-resort utilitarian arguments in favour of them are inconclusive at best. The paper will assume the form of a sort of imaginary debate where the arguments by IP advocates (mostly utilitarian ones) will be anticipated and replied. Furthermore, the paper shall include a word of concession saying that ,if anything, there are better reasons (however feeble) to protect works of arts than inventions.

1. Introduction

First of all, utilitarianism aside, it is easy to notice that the rights in intellectual property cannot be reconciled with the property rights in tangible goods (that is the right to exclusively control one's own body [self-ownership] and the right to one's external property).[1] For instance, Paul McCartney holds the copyright to his songs, which means that any public performance of his songs without his consent may be legally prosecuted. This in turn is tantamount to McCartney saying :"Try to perform in public one of these songs and I will simply sue you". What it further implies is our key point: I am not allowed to produce a definite series of phonemes having a definite pitch, that is to say I cannot exercise my vocal apparatus as I please. Therefore, to defend the apparent intellectual property rights is to violate the right to exclusively control one's body. The person whose output is protected under copyright at least partly co-owns my body. Incidentally, there may be a highly intuitive remark by IP advocates that needs critical investigation.

Let's imagine the following situation. Mark buys a brand-new printer on Monday and on Sunday a long-awaited book on philosophy by Ralph is released. Obviously, in the world in which IP holds, from Sunday onwards Mark is restricted as to his free use of his own printer, that is he cannot freely print that very book of Ralph's. But Ralph might retort: "I do not infringe on the use of your private property because without me having written the book, you wouldn't have ever dreamt of printing it. So, the very need of yours to print it comes with its release.

1 On the impossibility of the said reconciliation see: S. Kinsella, *Against Intellectual Property* Ludwig von Mises Institute, Auburn 2008, p. 14–15.

Without my book, you wouldn't need to print it!". Mark could reply then as follows: "Your last statement is definitely right but so what? It doesn't change the fact that from Sunday I do have a new need and due to your copyright I cannot satisfy my need using my own printer and ink, that is solely at my expense". Mark's intuition precisely corresponds with the workings of free market. Whenever there is a disruptive innovation by a company A, there appears the need on the part of consumers to buy it and more crucially, on the part of producers to improve upon it. Then again, it is a purely logical statement. It is trivially true that there cannot be any need to improve an innovation before it is launched into the market.

Obviously, one cannot readily conclude that the right in tangible property prevail when it is merely at odds with intellectual property rights. There is a need for some justifying principle. Hans-Hermann Hoppe believes that principle is *scarcity*[2]. The very purpose of having laws as such is to avoid conflict. Conflict arises only over scarce resources. Ideas in general come easy and cheap, that is once somebody comes up with ideas, they can be replicated *ad infinitum* and the inventor obviously does not lose them once they are replicated. In other words, ideas (once they are out there) cannot be scarce. Cars, furniture and other tangible goods are scarce because they have to be laboriously produced from scratch each and every time. They cannot be copied within a blink. Consequently, since conflicts may arise only over scarce means and the only scarce means are tangible, law (which is by nature aimed at avoiding conflicts) should apply to tangible goods exclusively.

After recollecting Hoppean justification, I would like to add one more twist, which is a kind of metaphysical justification. There is one (among others) widely shared metaphysics according to which there cannot be a mental property without an underlying physical property[3]. On the other hand, there can be a world in which there is a physical property without any mental property. Translating the rule from philosophical heights to our practical issue, being a subject of the present paper, we can safely say that *intellectual property* exists insofar as there exists some *physical medium*. Unfortunately, the converse does not hold true. Poetry (as an abstract entity) can exist as long as it is written down in books, carved in stone etc. On the other hand, there might be stones not being a medium for any poetry whatsoever. It may be stated that the above consideration demonstrates that physical entities are somehow more important than abstract ones being always supervenient on the former.

2. Scarcity vs Creation as a Criterion for Property Rights (a dispute within natural rights)

Before we leave the realm of natural rights, it is worthwhile to consider one key point of disagreement, that is whether it is s*carcity* or c*reation* that justifies property rights. The latter view was famously defended by Ayn Rand.[4] According to Rand, the *differentia specificae* of humans is that they are value-creators, and their output should be at the very

2 H.-H. Hoppe, *A Theory of Socialism and* Capitalism, Kluwer Academic Publishers, Boston 1989, p. 235.

3 J. Kim, *Philosophy of Mind*, Westview Press, 1998, p. 148–152.

4 A. Rand, *Capitalism:The unknown ideal,* New American Library, New York 1967.

core of private property rights. Let us try to tackle the above assertion, making ample use of Kinsella's pain-staking analysis of Rand's statement.[5] First, let us examine whether *creation* can be a necessary or a sufficient condition for appropriating things. Let us imagine a situation where there is John (marble collector) and Mary (a sculptor). The other day Mary notices that John is in the possession of a handsome but amorphous heap of marble and she decides to steal[6] it and put it to proper use. Then, with the innate dexterity so typical of her, Mary transform the heap of marble into a wonderful sculpture. Is she right in claiming that the sculpture is rightfully hers? I believe all the intuitions are against her. It is true that there was no sculpture before Mary carved the heap of marble into one; yet, the point is that she did not rightfully acquire the heap of marble in the first place. John can then justifiably claim compensation for the lost raw material. It sufficiently shows that *creation* cannot be a sufficient condition for appropriating things. Moreover, it does not account for the more fundamental problem: how to determine the rightful owner of the marble? After all, first came the marble, then came the sculpture.

What about a necessary condition? Is *creation* indispensable for appropriating things or not at all? Here, I believe the confusion arises when we adhere to Lockean theory of appropriation.[7] Rand's claim that people have property rights in ideal objects does not collide with Lockean theory of property only because Locke's theory of appropriation uses words so vaguely and stretches the notion of "owning". Simply stated, the theory goes as follows: a person owns his or her labour and his or her labour brings some fruits (broadly understood); therefore, a person also owns these fruits. Projecting this generic concatenation of relations onto *creation* scenario, we would end up with the following: one owns his or her mind (not a controversial premise at all yet), and the mind in turn owns its labour (the controversy starts) and the fruits of the said labour are ideas; therefore, one can claim property rights in ideal object. So, one can easily observe that Lockean blurred terminology can serve as justification to many things merely because it stretches the notion of "owning". One undeniably owns one's body unless we claim that we are our bodies. We can also understand the statement that we own our minds when we conceive of ourselves as entities being essentially some combination of body and mind. In the latter case, "having" may be identified with the relation "being a part of". By the same token, a car *has* wheels means that the wheels are a part of the car. Yet, by no stretch of imagination we can make sense of the utterance that "we own our labour". Labour is some effort, some kind of action and actions are not ownable at all. In short, Rand's claim that *creation* is at least a necessary condition for appropriating things (what would be a sufficient one then according to her?) *is* compatible with Lockean theory of appropriation but unfortunately the latter is so vague that it is almost empty, and thus it can justify too much. Finally, Kinsella provides us with the remedy: "By focusing on first occupancy, rather than on labour, as the key to homesteading,

5 S. Kinsella, *Against Intellectual Property*, Ludwig von Mises Institute, Auburn 2008, p. 30–42.

6 It is unfortunate to call it "stealing" just now because that is exactly what we want to examine here, that is whether private property rights are violated or not. However question-begging it may sound, the natural use of language can serve as an excuse.

7 On labour theory of property see: J. Locke, *Second Treatise of Government,* Hackett Publishing, 1980.

there is no need to place creation as the fount of property rights, as Objectivists and others do. Instead, property rights must be recognized in first-comers (or their contractual transferees) in order to avoid the omnipresent problem of conflict over scarce resources (...) Further, there is no need to maintain the strange view that one "owns" one's labour in order to own things one first occupies"[8]

Furthermore, the second argument raised by Kinsella against *creation* as a source of property rights lies in its arbitrariness.[9] The valid question is that since creation gives rise to property rights in created ideal objects, why are there still arbitrary distinctions related to what *kinds* of ideas can be patented. Why, for example, aren't scientific discoveries patented? After all, the respective scientists made a lot of mental effort and exercised their minds strenuously to produce these ideas. Obviously, *creation* proponents might retort that we should protect all the ideas but the absurdity of such a claim becomes apparent when we imagine what kind of havoc it would wreak: the violation of property rights in tangible objects and virtually paralyzing any potential inventors. If any general physical theory were ever to be patented, it would imply asking for the discoverer's permission every single time one wants to make use of the workings of the physical world, which is insane in the extreme. So, as we can see, *scarcity* does much better than *creation* as a source of property rights. *Creation* criterion implies arbitrariness and one can deal with arbitrariness only at the cost of such extreme and absurd solutions as protecting *all the ideas*.

8 S. Kinsella, *Against Intellectual Property*... p. 38.

9 S. Kinsella, *Against Intellectual Property*... p. 26–27.

3. Utilitarian Arguments

Now, before we introduce our imaginary protagonists into the dispute, that is the adherent of natural-rights libertarianism (hereinafter referred to as AL) and the adherent of utilitarianism (hereinafter referred to as AU), let us shed some more light on the difference between natural-rights libertarianism and utilitarianism. What must be borne in mind is that these two do not necessarily align, which means that the rules of conduct proclaimed by libertarians are not the same as the optimific rules adhered to by utilitarians[10].

Natural-rights libertarians and utilitarians differ with respect to the justified use of force. For natural-rights libertarians, the use of force is not valid unless somebody's bodily integrity or the integrity of their external private property is endangered. Utilitarians would welcome the use of force when it would result in the greater general happiness than there would otherwise have been, hadn't the force been used. These two standpoints make entirely different predictions. For instance, natural-rights libertarians would not approve of taking some money from the rich and distribute it among the poor, while utilitarians would happily do so claiming that the marginal dollar is less worthy for a businessman (he has many dollars so the marginal one must be of little value, they believe) than for a beggar (of course in terms of highly mysterious utils[11]). Let us now take a closer look at some utilitarian attempts to defend IP.

10 Optimific rules are the ones abiding by which would yield the greatest possible happiness. On the in-depth analysis of it, see: D. Parfit, *On What Matters* vol.II, Oxford University Press, 2011, p. 193–212.

11 On utils, see: D. Friedman, *Hidden Order,* HarperBusiness, 1998.

AU might claim that without patents or copyright, there would be a small incentive to create anything new. The implicit assumption here is that authors and inventors create things merely with a view to obtaining copyright and patents respectively, that is a sort of monopoly. How can we judge this argument? First, it seems to be a mere speculation. There is nothing aprioristic in it and to give this argument some substance and make it empirical one would have to conduct a control test. The test would control for IP rights/no IP rights. It would take having two countries where IP holds in one country and does not in the other, *ceteris paribus*[12]. Obviously, citizens in the country A and B should have similar mental dispositions, should be subject to the similar political regime and should have a roughly similar economic situation. Only under such conditions can we conclusively say what impact IP rights have on the number of broadly understood innovations. Of course, there might be some historical empirical arguments. Incidentally, I will resort to them later on but in the strict sense, there cannot be any conclusive empirical test of this problem. Obviously, contemplating on counterfactuals would not be conclusive either.

So, in other words, there is no definitively robust position that might be taken as far the afore-mentioned problem is concerned. If aprioristic reasoning and empiria cannot guarantee any definitive answer, let us examine some other replies. What utilitarians are also left with is speculating. Yet, AL can play into utilitarian hands and happily enter the maze of speculations. It is at least equally valid to claim that in the world without patents or copyright, what we would witness would be the *continuous improvement*– especially in the realm of technology, which is subject to patents. Let us imagine a possible scenario. Some producer A produces phones with highly innovative solutions. When an entrepreneurial businessman B, having a large capital at his disposal, notices the demand for the said phones, what would he be inclined to do? Would he merely copy the entire design and functionalities of the phones and improve them- however slightly? I believe it is at least equally valid to say that such a businessmen would be rather prone to some minor innovations just to get some *competitive edge*. If such reactions were recurrent, the society would be gradually building up a formidable technological edifice. The whole process would be a sort of self-propelled mechanism. One minor innovation would provoke another minor innovation until this incremental process would lead up to a huge technological leap. Now let us consider a possible reply by AU with a dash of economics in it. I believe that on this ground AU is unsuccessful either. Even if not sweepingly refuted, the following utilitarian claim is at best controversial and rather feeble, economically speaking.

Of course it can be now argued by AU that in the world without IP a given invention can be simply copied and sold at a slightly lower price (nowadays it is reputedly the Chinese who do so). Therefore, there would be no motivation to create anything innovative as it will be inevitably copied and viciously capitalized on by other producers. Before, we dip into more economic speech, it is worth noting that if it were

12 The speculative character of this argument might be confirmed by the fact that the alternative test can be a thought experiment involving comparing a real world, where IP holds with the possible world in which IP does not hold, everything else equal. Since, the latter is a mere counterfactual, we still speculate rather than test things empirically.

true, no branch of industry would be launched ever lest others might enter it too. Empirically speaking, people enter certain lines of production even when they are painfully aware of the possibility that others will follow. Still, the above utilitarian counter-argument can be also answered in the following way. First of all, what is the incentive of the original producer A after his invention has been copied and sold at a competitive price? He or she should lower the price too. How to obtain it? If we assume the labour price is constant, the only way to achieve it is to make production more efficient. The means to that end may be some technological breakthroughs which would perceptibly minimize the cost of production in the long run [13]This is exactly the way that laissez-faire capitalism works. The interest of the consumer and the producer coincide: they both strive for low prices and high quality (producers– to stay competitive; consumers– to increase the purchasing power of their money). In the meantime, technology develops willy-nilly because in the long run it is the only way to outplay one's competitors. It seems quite clear that the lack of IP would make a society wealthier as a whole although an IP holder in the actual world might lose as the monopolistic price is always higher than the price under competition.[14]

4. Historical Arguments

Now, what can also count against utilitarian defense of IP rights are some historical facts. Let me quote extensively authorities on the subject: "After all, for most of history, there were no copyrights, but people still created great literature, art, and music. Suppose Shakespeare had lived in a world where copyright existed. As one writer put it, "his legal bills would have been staggering. Shakespeare made a unique contribution to Western civilization by putting words together in a way that no human being had before or since, but he was not a pure original. He took many stories, characters, and ideas from other works by other people—which he wouldn't have been able to do if the creators of those previous works had possessed and enforced copyrights".[15] That is exactly the point 16.Any bold AU should consider the costly IP system encompassing patent lawyers. Second historical argument comes from the realm of music. As noted by exquisite libertarian experts M. Baldrin and D.K.Levine in their monumental work on intellectual monopoly: "In the realm of serious music, many of the great composers' works were never protected by copyright. England began protecting musical compositions with copyright in 1777, yet relatively few composers lived or worked in England after that time, despite England's relative prosperity overall. Beethoven, for one, lived in Germany, which offered no copyright protection, yet he made enough money to survive and felt sufficiently motivated to create some of the greatest musical

13 Obviously granted monopoly due to a patent, the producer is not forced to lower the price at all but the whole IP machinery (see lawyers) is costly and the society as a whole is on the losing side and utilitarians must take heed of that fact if they want to play fair.

14 On monopolistic, duopolistic price etc. see: D. Friedman, *Hidden Order…*

15 T. G. Palmer *Intellectual Property: A Non-Posnerian Law and Economics Approach*, Hamline Law Review 12, 1989, p. 302.

16 It is never enough to stress that such arguments are at best inconclusive simply because *ceteris paribus* condition is not met. When one compares pre-IP historical times to contemporary times, almost everything else is different, so one can never say which factors are contributing factors and which ones can be neglected. Yet, such arguments may have some heuristic value.

works ever. Like Shakespeare, pre-IP composers were able to draw on previous composers' works and alter and adapt them freely. Today, that requires permission from copyright holders that may or may not be granted".[17] The above remarks only corroborate our intuition: the world without patents or copyright would give rise to an incremental process of improvement. The whole history of art seems to be a recurrent inspiration of a given author B by a preceding author A. Then in turn, the author C draws on B's corpus and alters it and adjusts it. Current ideas are normally the variations on previous ideas. So, it seems that historical arguments, if anything, rather confirm the intuition that it is the world without patents that would be a wealthier world. Yet, it should be stated again that it is far from conclusive as pre-IP times are much different from modern times, in which, for example, copying possibilities are far greater than they used to be.

5. Conclusions

As demonstrated, IP cannot by any means be reconciled with natural-rights libertarianism for any IP rights automatically infringe on private property rights of other people. One or the other has to give here. On utilitarian grounds, IP is far from being defended and it is best controversial and inconclusive as the speculative and historical-economic arguments might have shown. There is just one thing left to say. Far from being an argument at all, IP rights somehow reflect the dream of any monopolist. Just as the only baker in a village dreams about staying a monopolist for as long as possible, the IP holder relishes in having his or her state-granted privilege. Unfortunately, that privilege of a monopolist (since it was granted) prevents other– often equally or more industrious– people from entering the market.

17 Michele Boldrin and David K. Levine, *Against Intellectual Monopoly,* New York: Cambridge University Press, 2008, p. 187–189.

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