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## Defamation as a Type of Intellectual Property

Stephan Kinsella\*

### PERSONAL NOTE

I first encountered the thought of Hans Hoppe in the pages of a 1988 *Liberty* magazine article where he put forth a provocative new defense of libertarian rights: his “argumentation ethics.” I was fascinated by this and by his subsequent books.<sup>1</sup>

A few years later, as a young lawyer, I also began to publish articles on various aspects of libertarian theory, first, on my own “estoppel” based theory of rights, which was heavily inspired by Hans’s own work, and

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<sup>1</sup> See Kinsella, “How I Became a Libertarian” and “On the Logic of Libertarianism and Why Intellectual Property Doesn’t Exist,” both in *LFFS*, and *idem*, “Argumentation Ethics and Liberty: A Concise Guide,” *Mises Daily* (May 27, 2011).

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\*Thanks to Jule Herbert and Jared @RadicalLiberty (Twitter) for helping me find the original, 1973 edition of Rothbard’s *For a New Liberty*, so that I could verify that his arguments about defamation law in later editions of the book were also present in the very first edition (before Block wrote on it also in 1976).

Most of my own publications cited in this book may be found at [www.stephankinsella.com](http://www.stephankinsella.com) or [www.c4sif.org/aip](http://www.c4sif.org/aip). I hereby grant a CC0, no rights reserved, license in this chapter.

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then a lengthy review essay on his second English language book, *The Economics and Ethics of Private Property*.<sup>2</sup> After timidly sending these sparse writings to him, he wrote back warmly, and I was determined to meet him. I attended the John Randolph Club meeting in Crystal City, Virginia, in October 1994, to meet Hans, as well as other Mises Institute luminaries who were attending, including Murray Rothbard.<sup>3</sup>

The first thing I remember about meeting Hans is how affable and approachable he was. In response to my deferential “Dr. Hoppe,” he immediately said, “call me Hans.” We became fast friends. When Rothbard died just a couple months later Hans became editor of the *Journal of Libertarian Studies*. After publishing many of my articles, he eventually asked me to serve as book review editor, and he continued to encourage and nurture my publishing and intellectual development. And so our friendship and relationship has continued, to these past thirty years, including deep involvement with his Property and Freedom Society, inaugurated in 2006. When the *JLS* was in disrepair, he supported my creation of *Libertarian Papers* in 2009, which I published for ten years until the *JLS* was ready for a re-launch. Hans’s work and friendship have profoundly affected my life. It has helped make me who I am, my work what it is, and it has infinitely enriched me. It has also been gratifying to see his work illuminate and inspire so many others—those interested in truth, in liberty, and sound economics. We are all his grateful and humble students.

In honor of his 75<sup>th</sup> year, I’d like to say: Happy birthday and cheers to Hans, the king of liberty, my dear friend, and a treasure to the world.

## INTRODUCTION

“Intellectual property” (IP) law includes a variety of legal rights, including patent (which protects rights to inventions), copyright (original, creative artistic works), trademark (brand and product names),

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<sup>2</sup> Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute, 2006; [www.hanshoppe.com/epp](http://www.hanshoppe.com/epp)); my review is “The Undeniable Morality of Capitalism,” in *LFFS*.

<sup>3</sup> See references in note 1, above, and Kinsella, “Meeting Rothbard and Hoppe: John Randolph Club, 1994,” *StephanKinsella.com* (Oct. 16, 2023).

trade secret (proprietary, secret knowledge), and others. I argue in this paper that IP is an artificial and loaded category of law that was created to defend patent and copyright when these laws were (rightly) under attack in the 19<sup>th</sup> century, and that if trademark is to be included in this category, defamation law should be also. The arguments in favor of trademark and defamation law are similar, and the criticisms of them are also similar. Those who appreciate why defamation law is unjust should also understand why trademark law is also unjust. By seeing the common connections between accepted types of IP and defamation, it becomes clearer that every type of IP, and defamation law, are all unjust laws.<sup>4</sup>

### THE EMERGENCE OF “INTELLECTUAL PROPERTY” AS A LEGAL CATEGORY

In today’s world we are used to the concept of IP law or IP rights, often referred to just as IP. IP includes the “paradigmatic quartet” of patent, copyright, trademark and trade secret.<sup>5</sup> The first two are creatures of statute and the latter two, while now also protected and supplemented by various statutes, initially arose on the common law. There are also newer forms of IP, mostly based in statute, such as moral rights, database rights, semiconductor maskwork protection, boat hull designs, “gathered information” or other informational rights, some privacy rights, aspects of the right to publicity, and others.<sup>6</sup> And who knows

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<sup>4</sup> To be clear, it is not defamation *itself* that is a type of IP. Rather, the reputation rights protected by defamation law should be classified as IP rights.

<sup>5</sup> See Bryan Cwik, “Property Rights in Non-rival Goods,” *J. Pol. Phil.* 24, no. 4 (2016): 470–486, 471, describing these four rights as the “paradigmatic quartet” of IP law. See also Justin Hughes, “The Philosophy of Intellectual Property,” *Georgetown L. J.* 77, no. 2 (Dec. 1988; <https://perma.cc/U4XX-5DZV>): 287–366, p. 292. See also Kinsella, “Types of Intellectual Property,” *CASIF Blog* (March 4, 2011), and *AIP*.

<sup>6</sup> See also Pamela Samuelson, “Privacy as Intellectual Property,” *Stan. L. Rev.* 52, no. 5 (May 2000; <https://lawcat.berkeley.edu/record/1116878/files/fulltext.pdf>): 1125–75, pp. 1147–48; Charles R. Beitz, “The moral rights of creators of literary and artistic works,” *J. Pol. Phil.* 13 (2005): 330–58 (on “moral rights” of creators of artistic and literary works); and the discussion of *O’Bannon v. NCAA* in Taylor Branch, “The shame of college sports,” *The Atlantic* 398 (2011): 80–110 (on the possibility of property rights in one’s image and public likeness).

what other IP rights are coming down the pike. The IP maximalists keep advocating for ever more IP rights, from the EU's "right to be forgotten" to fashion designs to website linking and newspaper headline rights.

But until fairly recently the initial quartet of rights were not unified under any umbrella category. "Intellectual property" was not a term. How did it come about?

In the 1800s the Industrial Revolution was underway both in Europe and the United States. Accompanying this was the new US system of state-granted patent and copyright, itself based on earlier English and continental practices. Patent law emerged from the practice of the crown granting monopolies to court cronies in exchange for favors. The English parliament limited this power with the Statute of Monopolies of 1623 but retained the government's right to grant patents for inventions. Copyright resulted from the attempt by the state to maintain its control over published ideas after the printing press threatened its previous guild-like control, culminating in the Statute of Anne of 1710.<sup>7</sup> When the US gained independence the authors of the Constitution—some of the country's most prominent *writers* and *inventors*, of course—included a clause that authorized Congress to enact patent and copyright law, to protect ... *writers* and *inventors*. Congress enacted patent and copyright statutes the following year, in 1790. Europe started to do the same. Patent and copyright law started to become institutionalized and bureaucratized.

Patent and copyright were not opposed at first, although Jefferson tried (and failed) to put a hard limit on their terms during the drafting of the Constitution.<sup>8</sup> The Constitution provided for patent and copyright, and these state-granted interventions were seen as somehow bound up with the success of the New World and industrialization. Creative and new ideas are good; inventions and innovation are good; books and knowledge are good; it's right and proper that people be rewarded for the "fruits of their labor." So arose the myth of IP: the idea

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<sup>7</sup> This history is discussed in Kinsella, ed., *The Anti-IP Reader: Free Market Critiques of Intellectual Property* (Houston, Texas: Papinian Press, 2023), Part I. See also Kinsella, "Rothbard on Mercantilism and State 'Patents of Monopoly,'" *C4SIF Blog* (Aug. 29, 2011).

<sup>8</sup> See Kinsella, "Thomas Jefferson's Proposal to Limit the Length of Patent and Copyright in the Bill of Rights," *C4SIF Blog* (Dec. 1, 2011).

that state support of ideas can make the world a better place. Without state intervention as a salve for the problem of market failures caused by “holdouts” and “free-riders,” there would be an *underproduction* of creative and innovative works.<sup>9</sup>

But soon opposition arose. The free market economists of the mid-19<sup>th</sup> century rightly began to see IP rights as contrary to the free market, as artificial monopoly privileges, and primarily as interfering with free trade, sparking a huge debate in the 19<sup>th</sup> century about IP law. In response to these criticisms, patent laws started being dismantled in various ways. During the second quarter of the 19<sup>th</sup> century, many statesmen started calling for abolition or more limited patent rights. Patent law was widely opposed in Germany and Prussia; Chancellor Bismarck in 1868 stated opposition to patents; Switzerland’s legislature rejected patent law

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<sup>9</sup> The idea is that normally it’s hard to compete with someone who has a new venture. Thus, they can make enough “monopoly” profits in the early years when exploiting the new idea, to “recoup their” costs of investment, developing the new business model, and so on. But unfortunately, so the reasoning goes, for goods and services where the major part of the value is the pattern or design, such as with a book or invention, then it’s “too easy” for others to compete so you can never “recoup your costs” and thus you won’t bother innovating. So we have an “underproduction” of innovation and creative works, due to free rider and holdout effects, which the state can fix by granting temporarily monopoly privilege grants so that monopoly prices can be charged to enable costs to be recouped. This type of language and reasoning is rife in defenses of pharmaceutical patents. This is how these people think. Cato’s Tim Lee, who otherwise seems skeptical of IP, says that “if properly calibrated” patent and copyright can “promote the progress of science and the useful arts.” See Kinsella, “*Reason’s* Tim Lee on Two Decades of Attempts to Enforce Copyright,” *CASIF Blog* (Feb. 15, 2012). See also comments about Tom Palmer’s apparently revised views on patents mentioned in note 25, below.

As for the more general issue, see “Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985), arguing for state interventions when they solve pervasive market failures such as free rider and holdout problems. Unsurprisingly, Epstein also supports IP law. See Kinsella, “Richard Epstein’s *Takings* Political Theory versus Epstein’s Intellectual Property Views,” *StephanKinsella.com* (Nov. 4, 2011); *idem*, “KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished,” *Kinsella on Liberty Podcast* (Nov. 24, 2021); *idem*, “Richard Epstein on ‘The Structural Unity of Real and Intellectual Property,’” *Mises Economics Blog* (Oct. 4, 2006); Richard A. Epstein, *The Structural Unity of Real and Intellectual Property* (The Progress and Freedom Foundation, 2006; <https://perma.cc/B8JP-4MWQ>); *idem*, “The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary,” *Stanford L. Rev.* 62, no. 2 (2010; <https://perma.cc/79X2-9CS8>): 455–523. See also Kinsella, “*Against Intellectual Property* After Twenty Years,” in *LFFS*, Part IV.I, “The Structural Unity of Real and Intellectual Property,” esp. n.75 and accompanying text, *et pass.*

proposals numerous times from 1849 to 1863, and in the Netherlands the patent law was repealed in 1869.<sup>10</sup> The tide was with us.

In response to this threat to their state-granted monopoly privileges, those special interests now dependent on IP—publishers, firms amassing patents to quash competition, and so on<sup>11</sup>—claimed that IP rights are not monopoly privileges, and that they are actually simply property rights, and *natural* property rights at that. So when the response was, “how can a natural property right expire in 14 or 28 years?” the answer was, well, they are *special* types of property—*intellectual* property, the type of property rights that apply to the products of the intellect. And they often rooted their argument in Lockean ideas about labor, that one ought to own the “fruits” of his labor: just as you own a farm because you mixed your owned labor with it and produced or created it a valuable resource, so you also own a useful idea like an invention or a novel that you create with your mental effort.<sup>12</sup>

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<sup>10</sup> See Fritz Machlup, *An Economic Review of the Patent System* (U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, 85th Cong., 2d Session, 1958, Study No. 15), Part II.C; also included in Kinsella, ed., *The Anti-IP Reader*. See also Roger E. Meiners & Robert J. Staaf, “Patents, Copyrights, and Trademarks: Property Or Monopoly,” *Harv. J. L. & Pub. Pol’y* 13, no. 3 (Summer 1990): 911–48, pp. 911–12:

In the Nineteenth Century, the patent debate was characterized in terms of free trade versus protectionism, with “protectionists” favoring monopoly grants to inventors, and the “free traders” against grants. The free traders lost, but not without some battles. A bill to weaken patents passed the House of Lords in England in 1872. Holland abolished patents in 1869, but reinstated them in 1910. Switzerland, which held out against patents longer than any other European country, adopted patents in 1882. Although several portions of Germany did not adopt patents and Chancellor Bismarck announced his opposition to patents in 1868, uniform patents were adopted for the entire Reich in 1877.

For more on this history, see also Robert Andrew Macfie, ed., *Recent Discussions on the Abolition of Patents for Inventions in the United Kingdom, France, Germany, and the Netherlands: Evidence, Speeches, and Papers in Its Favour: With Suggestions as to International Arrangements Regarding Inventions and Copyright* (London: Longmans, Green, Reader and Dyer, 1869); Kinsella, “Nineteenth Century Criticism of the Patent System,” *C4SIF Blog* (June 6, 2023); *idem*, “Against Intellectual Property After Twenty Years,” n.79 and accompanying text.

<sup>11</sup> Today the primary special interests pushing for international IP rights enforcement are the American industries of film and music (copyright) and the pharmaceutical industry and some high tech industries (patent).

<sup>12</sup> Thus arose a type of “creationism”—the confused notion, mired in some of Locke’s own stumbles, that property rights come from labor, or effort, or creation (this confused Lockean “labor theory of property” led to the Marxian labor theory of value and also underlies many arguments for IP). See Kinsella, “Law and Intellectual Property in a Stateless Society,” Part III.B, and *idem*, “Against Intellectual Property After Twenty Years,” Part IV.C,

In other words, referring to patent and copyright as “property rights” was pure propaganda to obscure the nature of patent and copyright as artificial state-granted monopoly privileges. This was observed by Fritz Machlup and Edith Penrose in a seminal study in 1950:

There are many writers who habitually call all sorts of rights by the name of property. This may be a harmless waste of words, or it may have a purpose. It happens that *those who started using the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, “property,” for a word that had an unpleasant ring, “privilege.”*<sup>13</sup>

As part of this process of establishing the new concept of IP, which was to include the newest, statute-based and most harmful types of IP—patent and copyright<sup>14</sup>—to give them intellectual cover, older,

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both in *LFFS*; also *idem*, “KOL037 | Locke’s Big Mistake: How the Labor Theory of Property Ruined Political Theory,” *Kinsella on Liberty Podcast* (March 28, 2013). As one IP advocate puts it:

The first usage of “IP” in the extant US legal record is in an 1845 court opinion by Circuit Justice Levi Woodbury, who wrote that “we protect intellectual property, the labors of the mind, . . . as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.”

Adam Mossoff, “Intellectual Property,” in Matt Zwolinski & Benjamin Ferguson, eds., *Routledge Companion to Libertarianism* (London and New York: Routledge, 2022), p. 472 (quoting *Davoll v. Brown*, 7 F. Cas. 197, 199 [C.C.D. Mass. 1845]).

<sup>13</sup> Fritz Machlup & Edith Penrose, “The Patent Controversy in the Nineteenth Century,” *J. Econ. History* 10, no. 1 (May 1950): 1–29, p. 16 (footnotes omitted; emphasis added). See also Machlup, in his important Congressional study *An Economic Review of the Patent System*, p. 26, quoted in Kinsella, “*Against Intellectual Property After Twenty Years*,” text at n.79:

While some economists before 1873 were anxious to deny that patents conferred “monopolies”—and, indeed, had talked of “property in inventions” chiefly in order to avoid using the unpopular word “monopoly”—most of this squeamishness has disappeared. But most writers want to make it understood that these are not “odious” monopolies but rather “social monopolies”, “general welfare monopolies”, or “socially earned” monopolies. Most writers also point out with great emphasis that the monopoly grant is limited and conditional.

See also Kinsella, “Intellectual Properganda,” *Mises Economics Blog* (Dec. 6, 2010); *idem*, “*Against Intellectual Property After Twenty Years*” (ch. 15), Part IV.I.

Some modern libertarian defenders of IP now argue that IP rights are natural property rights and that the US Founders, Thomas Jefferson, John Locke, etc., also viewed IP rights this way. As I explain elsewhere, this latter view is untenable, although it would be irrelevant even if true. See Kinsella, “*Against Intellectual Property After Twenty Years*,” Part IV.J.

<sup>14</sup> See Kinsella, “Patent vs. Copyright: Which is Worse?,” *C4SIF Blog* (Nov. 5, 2011); *idem*, “Where does IP Rank Among the Worst State Laws?,” *C4SIF Blog* (Jan. 20, 2012).

more established rights, namely trademark and trade secret, needed to be swept into this new artificial category to give it a sense of intellectual coherence and legitimacy. In this way, the more artificial and legislation-based upstarts, patent and copyright, could be protected by the presumed legitimacy surrounding older forms which had some connection to more evolved and organic common law.

Initially there was squabbling among the jurists about what was to be included in this new category of IP. Everyone now agrees that IP includes the *quarto* mentioned above, although the European continental analog of IP, “industrial property,” does not include copyright, as “copyright was for art and not trade.”<sup>15</sup> And some have argued that IP should not include trademark since trademark has to do with marks that identify the source of goods and services rather than “creations of the mind” such as inventions (patent law), original works (copyright), and useful, proprietary, secret knowledge (trade secret).<sup>16</sup> Others argue

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<sup>15</sup> See Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (Cambridge University Press, 1999), ch. 8; Wikipedia entry on Industrial Property, [https://en.wikipedia.org/wiki/Industrial\\_property](https://en.wikipedia.org/wiki/Industrial_property).

<sup>16</sup> See Sherman & Bently, *The Making of Modern Intellectual Property Law*, ch. 8, relating arguments for why trademark should not be considered a type of IP, and the quotation therefrom in note 29, below. See also Rochelle Dreyfuss & Justine Pila, “Intellectual Property Law: An Anatomical Overview,” in Rochelle Dreyfuss & Justine Pila, eds., *The Oxford Handbook of Intellectual Property Law* (Oxford University Press, 2018), § 2, pp. 4–5 & 6, explaining some reasons for not including trademark in the IP classification and also that that trademarks protect the *goodwill* attached to the mark holder’s goods and services. For another criticism of the term IP and this classification scheme and noting arguments against including trademark as a type of IP, see David Llewelyn & Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 9<sup>th</sup> ed. (Sweet & Maxwell/Thomson Reuters, 2019), § 1–001 (“*There is no single generic term that satisfactorily covers them all. ... ‘Intellectual property’ is the expression used in this book for the whole field, even though it has to be accepted that it is less than a universal definition.*”). Others have also criticized the coherence of the label or category “intellectual property.” See Wendy J. Gordon, “Intellectual Property,” in *Oxford Handbook of Legal Studies* (Peter Cane & Mark Tushnet ed., 2003; <https://perma.cc/59GP-HRD8>), §1.1.2.

On opposition to counting trademark as a form of IP, see also note 51, below. Also, in a book critical of IP, primarily copyright and, to some extent patent, the author declines to deal with trademark rights since they are not “rights that primarily grant exclusive exploitation of creative works, but rather as rights which make sure a product or an organisation is clearly identifiable. This said, it should be possible to categorise trademark rights under competition law rather than under intellectual rights.” Andreas Von Gunten, *Intellectual Property is Common Property: Arguments for the Abolition of Private Intellectual Property Rights* (Zurich: buch & netz, 2015), p. 3.



that “traditional” IP includes patent, copyright, trademark, but that trade secret and others are “non-traditional.”<sup>17</sup>

In any case, the advocates of patent and copyright won their propaganda battle. The “Long Depression” starting in 1873 turned public opinion against free trade (which was at that time the main argument against IP), leading the anti-patent movement to collapse and modern patent systems to eventually become dominant world-wide, and the term intellectual property to become solidified.<sup>18</sup> And now we have a world where basically every country is a member of various major copyright and patent treaties.<sup>19</sup> The IP advocates won. If today you oppose IP, which is itself socialistic since it is an institutionalized form of aggression against private property rights,<sup>20</sup> you are perversely called a communist or socialist.<sup>21</sup> *Father, forgive them, for they know not what they do.*

## THE CASE AGAINST TRADEMARK LAW

Let me now turn briefly to the libertarian case against IP and especially against trademark, before turning to defamation.

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<sup>17</sup> See Jeffrey D. Dunn & Paul F. Seiler, “Trade Secrets and Non-Traditional Categories of Intellectual Property as Collateral,” UNCITRAL, Second International Colloquium on Secured Transactions: Security Interests in Intellectual Property Rights, Vienna, Austria (Jan. 18–19, 2007; <https://perma.cc/93AA-WALM>), p. 1.

<sup>18</sup> See note 10, above; also various posts on IP imperialism at <https://c4sif.org/tag/ip-imperialism>. See also Kinsella, “*Against Intellectual Property After Twenty Years*,” Part IV.I, and text at note 19, in particular.

<sup>19</sup> See Kinsella, “The Mountain of IP Legislation,” *C4SIF Blog* (Nov. 24, 2010).

<sup>20</sup> Here, following Hoppe, I am conceiving of socialism in general terms as the institutionalized interference against private property rights. See, e.g., Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989]; [www.hanshoppe.com/tsc](http://www.hanshoppe.com/tsc)), pp. 2, 10; *LFFS*, pp. 13 n.6, 360 n.12, 362 n.18, 377–78, 597 n.26.

<sup>21</sup> Of course communist and socialist countries also have IP law. See Kinsella, “Hello! You’ve Been Referred Here Because You’re Wrong About Intellectual Property,” *C4SIF* (July 13, 2021), subsection “IP can’t be socialistic, since the Soviet Union didn’t recognize IP law.”

Many libertarians today oppose patent and copyright.<sup>22</sup> The case against patent and copyright is fairly simple. In short, patent and copyright are *nonconsensual negative easements* (servitudes) that violate the property rights of those who wish to use their own resources to manufacture devices or to print books.<sup>23</sup> They are legal rights that allow the

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<sup>22</sup> See, e.g., *AIP*; Part IV of *LFFS*; and Kinsella, *You Can't Own Ideas: Essays on Intellectual Property* (Houston, Texas: Papinian Press, 2023). See also in particular, in the last volume cited, the chapters “The Origins of Libertarian IP Abolitionism,” “The Four Historical Phases of IP Abolitionism,” and “The Death Throes of Pro-IP Libertarianism.” Of course, many earlier libertarians supported IP law, such as Lysander Spooner, Gustave de Molinari, Frederic Bastiat, Ayn Rand, Andrew Galambos, J. Neil Schulman, and so on. See e.g. Kinsella, “Classical Liberals, Libertarians, Anarchists and Others on Intellectual Property,” *CASIF Blog* (Oct. 6, 2015). Indeed many of them insanely support perpetual or infinite IP terms, such as Spooner, Galambos, some Randians (though not Rand herself; but including her attorney and follower Murray Franck), Robert Wenzel, Victor Yarros, Schulman, and others. See, e.g., Lysander Spooner, “A Letter to Scientists and Inventors, on the Science of Justice, and their Rights of Perpetual Property in their Discoveries and Inventions” and “The Law of Intellectual Property or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas,” in Charles Shively, ed., *The Collected Works of Lysander Spooner*, vol. 3, reprint ed. (Weston, Mass.: M&S Press, 1971 [1855], [www.lysanderspooner.org/works](http://www.lysanderspooner.org/works)); discussion of Galambos in *AIP*; *idem*, “Transcript: Debate with Robert Wenzel on Intellectual Property,” *CASIF Blog* (April 11, 2022); and Robert Wenzel, “Hans-Hermann Hoppe Slams Walter Block Theory,” *Economic Policy J.* (Oct. 4, 2014; <https://perma.cc/8CUQ-CGTZ>). Re Yarros, see Kinsella, “Benjamin Tucker and the Great Nineteenth Century IP Debates in Liberty Magazine,” *CASIF Blog* (July 11, 2022) and *idem*, “James L. Walker (Tak Kak), ‘The Question of Copyright’ (1891),” *CASIF Blog* (July 28, 2022); Kinsella, “Conversation with Schulman about Logorights and Media-Carried Property,” in *LFFS*. See also Jeffrey A. Tucker, “Eternal Copyright,” *CASIF Blog* (Feb. 21, 2012); and Wendy McElroy, “Intellectual Property,” in *The Debates of Liberty: An Overview of Individualist Anarchism, 1881-1908* (Lexington Books, 2002; <https://perma.cc/ZQM2-82B9>); re Murray Franck, see Kinsella, “Inventors are Like Unto.... GODS....,” *Mises Economics Blog* (Aug. 7, 2008).

<sup>23</sup> See Kinsella, “Against Intellectual Property After Twenty Years,” Part IV.B and *idem*, “Intellectual Property Rights as Negative Servitudes,” *CASIF Blog* (June 23, 2011). The nonconsensual negative easement is somewhat similar to the triangular invention in Rothbard’s typology of aggressive intervention, which includes *autistic intervention*, *binary intervention*, and *triangular intervention*. See Kinsella, “The Undeniable Morality of Capitalism,” at n. 14. To be even *more* precise, IP rights may be classified as *nonapparent, non-consensual negative servitudes*—and also as *incorporeal movables*. See *idem*, “Intellectual Property Rights as Negative Servitudes”; and *idem*, “Are Ideas Movable or Immovable?,” *CASIF Blog* (April 8, 2013).

See also Emory Washburn, *A Treatise on the American Law of Easements and Servitudes*, 2<sup>nd</sup> ed. (Washington: BeardBooks, 2000 [1867]) [4th ed., Revised and Enlarged by Simon Greenleaf Crosswell (Boston: Little, Brown and Company, 1885; [www.google.com/books/edition/A\\_Treatise\\_on\\_the\\_American\\_Law\\_of\\_Easeme/t6szAQAAMAAJ](http://www.google.com/books/edition/A_Treatise_on_the_American_Law_of_Easeme/t6szAQAAMAAJ)); 3<sup>rd</sup> ed [https://books.google.com/vc/books?id=\\_0M9AAAAIAAJ](https://books.google.com/vc/books?id=_0M9AAAAIAAJ)], p. 18, discussing *Pitkin v. Long Island*

owner of the negative easement to prohibit the owner of the “burdened estate” from using his property in certain ways. This is the essence of restrictive covenants and homeowners associations where homeowners can block other neighbors’ uses of their own property, except that those negative easements are *consensually granted* by the owners of the burdened property. In the case of patent and copyright, however, these negative easements are *nonconsensual* and simply granted by the state to the copyright and patent holders. The issue of consent is what distinguishes consensual sexual relations from rape; it is why attacking an innocent person is battery but tackling a football player or punching a boxer is not; likewise, it is what makes the nonconsensual negative servitudes of patent and copyright a violation of property rights, a type of state-sanctioned theft or trespass.

Both of these nonconsensual negative easements are harmful, but in varying ways. Copyright law censors speech and the press, distorts culture, and threatens freedom on the Internet; while patent law distorts and impedes innovation and thus human wealth and prosperity.<sup>24</sup>

The problems with other types of IP, like trademark and trade secret law, can be more difficult to explain and unfortunately even many of those who oppose patent and copyright see no problem with other forms of IP. Libertarian writer Tom Palmer, who penned an early and influential case against patent and copyright, writes that patent and copyright

are creatures of the state, and not the product of an evolutionary process of interaction among interested parties that is later ratified through legal sanctions. (Trademark and trade secrecy laws, however, do emerge from the actions taken in the common law. While they are often lumped together

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*R.R. Co.*, 2 Barb. Ch. 221, 231, which held a negative easement or servitude “to be an incorporeal hereditament....” And on classifying IP itself as incorporeal hereditaments, see Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888; [www.google.com/books/edition/An\\_Essay\\_on\\_Possession\\_in\\_the\\_Common\\_Law/gAoaAAAAYAAJ?hl=en](http://www.google.com/books/edition/An_Essay_on_Possession_in_the_Common_Law/gAoaAAAAYAAJ?hl=en)), p. 37.

<sup>24</sup> See Kinsella, “Patent vs. Copyright: Which is Worse?,” *idem*, “Where does IP Rank Among the Worst State Laws?,” *idem*, “Costs of the Patent System Revisited,” *Mises Economics Blog* (Sep. 29, 2010); *idem*, “The Overwhelming Empirical Case Against Patent and Copyright” (Oct. 23, 2012); *idem*, “Libertarianism After Fifty Years: What Have We Learned?,” in *LFFS*, n.17 and accompanying text; *idem*, “Law and Intellectual Property in a Stateless Society,” Part III.A; *idem*, “Milton Friedman (and Rothbard) on the Distorting and Skewing Effect of Patents,” *CASIF Blog* (July 3, 2011).

with patents and copyrights, my approach would separate them and recognize their legitimacy in a market order.)<sup>25</sup>

But though much if not most legislation is unjust (except for legislatively adopted codifications of private law, like the continental civil codes, large parts of criminal codes, evidence codes, and so on),<sup>26</sup> this does not mean that all evolved law is just. It seems fair to say that a great bulk of the private law that originated on the decentralized Roman law or English common law systems is compatible with basic libertarian precepts, but some law is unjust even if it evolved on the common law.<sup>27</sup> Examples would include blackmail law, defamation law, trademark law, trade secret law, and the common-law doctrine of consideration for contracts.<sup>28</sup>

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<sup>25</sup> Tom G. Palmer, “Intellectual Property: A Non-Posnerian Law and Economics Approach,” *Hamline L. Rev.* 12, no. 2 (Spring 1989; <https://perma.cc/DH7K-ZCRV>): 261–304, p. 280. His second article, published around the same time, is *idem*, “Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects,” *Harv. J. L. & Pub. Pol’y* 13, no. 3 (Summer 1990; <https://perma.cc/J8LY-L4MQ>): 817–65, and has similar comments, e.g. “Trademarks and trade secrets have roots in the common law and enjoy a contractual or quasi-contractual moral grounding.” *Ibid.*, p. 821 n.8. For these reasons, Palmer uses the term intellectual property to refer only to patent and copyright. Palmer, “Intellectual Property: A Non-Posnerian Law and Economics Approach,” p. 264. See also note 43, below, re Jeff Deist’s comments on defamation law if it emerges from the common law.

Interestingly, despite advancing a case against IP rooted in property rights and libertarian principles, Palmer seemed to backtrack on pharmaceutical patents later on, on utilitarian grounds. See Kinsella, “Cato vs. Public Citizen on IP and the TPP,” *C4SIF Blog* (Jan 20, 2014); *idem*, “Cato on IP,” *C4SIF Blog* (Jan. 30, 2023); *idem*, “Palmer on Patents,” *StephanKinsella.com* (Oct. 27, 2004).

<sup>26</sup> For Hoppe’s views on the European civil codes, see Kinsella, “Legislation and the Discovery of Law in a Free Society,” Part V.C and note 152 and accompanying text. This piece also discusses why the bulk of much of (even legislated) continental civil codes, as well as much of the evolved private law developed under the Roman law and English common law, are largely compatible with libertarian principles.

<sup>27</sup> See Kinsella “Legislation and the Discovery of Law in a Free Society,” in *LFFS*, n. 61 and accompanying text, *et pass.*, discussing differences between legislation and decentralized systems of private law.

<sup>28</sup> On blackmail, see Walter Block, “Toward a Libertarian Theory of Blackmail,” *J. Libertarian Stud.* 15, no. 2 (Spring 2001; <https://mises.org/library/toward-libertarian-theory-blackmail>): 55–88; Walter Block, Stephan Kinsella & Hans-Hermann Hoppe, “The Second Paradox of Blackmail,” *Bus. Ethics Q.* 10, no. 3 (July 2000): 593–622; on trade secret law, see *AIP*; on consideration, see Kinsella, “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability,” in *LFFS*, Part I.D. I discuss defamation and trademark below.

Trademark law is unjust because it violates the rights of both competitors of trademark holders, as well as those of the competitors' customers. Let me explain why. One common argument advanced in favor of trademark rights is that trademark protects consumers from fraud.<sup>29</sup> There are several problems with this argument. First, trademark law does not require that fraud be proved, but only "consumer confusion"—and, second, not *actual* consumer confusion, but merely the *likelihood* of consumer confusion.<sup>30</sup> In many cases, such as consumers paying very low prices for knockoff Chanel purses or fake Rolex watches, the consumers are not defrauded or even confused at all; they obviously know the goods they are purchasing are knockoffs. And yet the products are still seized and destroyed. Even though the seller, and the customers, have not violated the rights of the trademark holder.

Third, the right to sue and collect damages is given *not* to the allegedly defrauded/confused consumer, but to the *holder* of the trademark, who is most certainly *not* confused or defrauded, i.e., not a victim.<sup>31</sup> And finally, the legal system *already* recognizes fraud and contract

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<sup>29</sup> See Sherman & Bently, *The Making of Modern Intellectual Property Law*, ch. 8, explaining one reason some scholars opposed treating trademark law as a type of IP or property, is that "trade marks were more concerned with forgery or *fraud*" (emphasis added). As one legal scholar writes:

Trademarks are frequently justified, in the words of one commentator, by the "consumer's right to be told the truth." The Supreme Court itself has endorsed trademark propriety as furthering the "consumer's [right] ... to purchase a given article because it was made by a particular manufacturer." However, this justification based upon consumers' rights is weak. A real consumer's right to the facts would be protected by truth-in-advertising or misrepresentation laws, not by trademark. Trademark is a right of expression for the manufacturer, not a right of the consumer to receive information.

Hughes, "The Philosophy of Intellectual Property," p. 354 (citations omitted). Or as Professor Wendy Gordon writes, "instead of seeing trademark law as allocating rights in a 'thing' called a 'trade-mark', one can rather see trademark doctrines as an elaboration of rights *against fraud*." Gordon, "Intellectual Property," §1.1.2 (emphasis added).

For my own view as to the correct way to view fraud, see Kinsella, "A Libertarian Theory of Contract," Part III.E.

<sup>30</sup> 15 U.S.C. § 1125(a)(1)(A) ([www.law.cornell.edu/uscode/text/15/1125](http://www.law.cornell.edu/uscode/text/15/1125)).

<sup>31</sup> As one law professor writes:

[Trademark] rights are closely but ambiguously related to the idea of preventing deception of the consumer. The ambiguity arises from the fact that neither deception nor consequent damages suffered by consumers need be shown in a trademark infringement action. ... Moreover, insofar as premised upon protection of the consumer from fraudulent misrepresentation, such actions present the rather *anomalous*

breach claims.<sup>32</sup> So trademark law is either redundant with existing law, and thus pointless, or adds *something else* that requires its *own* justification.

Another argument given for trademark is that it protects the *reputation rights* of firms who build up their “good name.” This is implicit in arguments about goodwill (that trademark protects)<sup>33</sup> which is reflected in the *antidilution* rights of modern trademark law. These antidilution rights prohibit uses by competitors that impair or “tarnish” the original mark’s value *even if* no one is defrauded or even confused.<sup>34</sup> The libertarian counter is that there can be no property right in value,<sup>35</sup> nor in the

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*situation of one private person or corporation recovering from another for the latter’s wrongdoing against a third.*

Dale A. Nance, “Foreword: Owning Ideas,” *Harv. J. L. & Pub. Pol’y* 13, no. 3 (Summer 1990) 757–74, p. 758 n.7 (emphasis added).

<sup>32</sup> “Trademark is a right of expression for the manufacturer, not a right of the consumer to receive information.” Hughes, “The Philosophy of Intellectual Property,” p. 354. See also the quote from Hughes in note 29, above.

<sup>33</sup> See note 16, above; also Nance, “Foreword: Owning Ideas,” p. 758 n.7: “... in practice trademarks are as much a protection of its holder’s *goodwill* as a protection of consumers from deception.” See also the reference to Dreyfuss and Pila in note 16, above. Pamela Samuelson also notes that moral rights, which are considered to be a type of IP, help protect authors’ works from alterations that would be harmful to the author’s *reputation*. See Samuelson, “Privacy as Intellectual Property,” pp. 1147–48. Goodwill is viewed as an intangible asset related to the firm’s *reputation* and ability to acquire and retain customer business. See Wikipedia entry for “Goodwill” ([https://en.wikipedia.org/wiki/Goodwill\\_\(accounting\)](https://en.wikipedia.org/wiki/Goodwill_(accounting))).

<sup>34</sup> See 15 U.S.C. §1125(c); Federal Trademark Dilution Act of 1995 (Wikipedia; [https://en.wikipedia.org/wiki/Federal\\_Trademark\\_Dilution\\_Act](https://en.wikipedia.org/wiki/Federal_Trademark_Dilution_Act)); Trademark Dilution Revision Act of 2006 (Wikipedia; [https://en.wikipedia.org/wiki/Trademark\\_Dilution\\_Revision\\_Act](https://en.wikipedia.org/wiki/Trademark_Dilution_Revision_Act)).

<sup>35</sup> See Kinsella, “Hoppe on Property Rights in Physical Integrity vs Value,” *StephanKinsella.com* (June 12, 2011) and various discussions in *LFFS* (search for “physical integrity”); *idem*, “‘Aggression’ versus ‘Harm’ in Libertarianism,” *Mises Economics Blog* (Dec. 16, 2009); *idem*, “A Libertarian Theory of Punishment and Rights,” in *LFFS*, n.16; *idem*, “On Libertarian Legal Theory, Self-Ownership and Drug Laws,” in *LFFS*, n.27; *idem*, “Libertarianism After Fifty Years,”; Hans-Hermann & Walter Block, “Property and Exploitation,” *Int’l J. Value-Based Mgt* 15, no. 3 (2002; <https://perma.cc/UQ8U-UM35>): 225–36; Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism*, p. 23 n.11 & 165–68; *idem*, “The Justice of Economic Efficiency,” in *The Economics and Ethics of Private Property*, at 337–38; Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholar’s ed., 2nd ed. (Auburn, Ala: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 2, § 12, p. 183 (“what the enforcing agency combats in a free society is invasion of the *physical* person and property, *not* injury to the *values* of property.”); *idem*, “Law, Property Rights, and Air Pollution,” in *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>), p. 374.

content of others' brains, nor in reputations.<sup>36</sup> Potential customers are entitled to believe what they want about anybody and to buy or not buy from any seller. The libertarian argument against trademark law is similar to the case against defamation law, which I discuss below.<sup>37</sup>

In brief, patent, copyright, trademark, and other forms of IP all violate property rights and are unjust and should be abolished. The mystery is why they are nowadays grouped together under the term "intellectual property" even though they are all so different—and why defamation has been left out.

## THE CASE AGAINST DEFAMATION LAW AND REPUTATION RIGHTS

Defamation law also protects reputation rights. The arguments in favor of defamation law are thus similar to those in favor of trademark rights, as are the arguments against. In fact, just as some libertarians unfortunately

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Complementing the insight that property rights are not to value but only to the physical integrity of one's resource, is the insight that the non-aggression principle prohibits only actual *aggression* against another, meaning an *invasion of the borders of their property* or *uninvited use* thereof, but does not prohibit "harm" per se. See, on this, references in Kinsella, "A Libertarian Theory of Punishment and Rights," in *LFFS*, n.16, *et pass*.

<sup>36</sup> See note 41, below, and accompanying text, *et pass*. The rights protected by defamation law are routinely referred to as "reputation rights." See, e.g., George E. Stevens, "The Reputation Rights of Students," *J. Law & Educ.* 4, no. 4 (October 1975): 623–32. On the legal treatment of reputation rights flowing from defamation as a type of property right, see Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," *Cal. L. Rev.* 74, no. 3 (May 1986; [www.jstor.org/stable/3480391](http://www.jstor.org/stable/3480391)): 691–742; also David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate, 2008), ch. 4; and Paul Mitchell, *The Making of the Modern Law of Defamation* (Oxford and Portland, Oregon: Hart Publishing, 2005), ch. 4 §1 (discussing the classification of the reputation rights protected by defamation law as a property right, in order to justify the issuance of injunctions).

<sup>37</sup> One could thus view trademark law as a form of nonconsensual negative easement as well, though a more complicated form: trademark law prevents a competitor from using his property in certain ways, even though he has not violated any property rights of the trademark holder. For further criticism of trademark law, see Kinsella, "The Patent, Copyright, Trademark, and Trade Secret Horror Files," *StephanKinsella.com* (Feb. 3, 2010); *idem*, "Trademark versus Copyright and Patent, or: Is All IP Evil?," *Mises Economics Blog* (Feb. 11, 2009); *idem*, "Trademark Ain't So Hot Either...; Trademark and Fraud; Discussion with George Reisman," *CASIF Blog* (Jan. 13, 2013); *idem*, "The Velvet Elvis and Other Trademark Absurdities," *Mises Economics Blog* (Mar. 20, 2011).

support IP law—mainly Objectivists and utilitarian-minarchists—many of them also support defamation law. For example Objectivist David Kelley, who is also a pro-state minarchist and even pro-taxation (unlike Rand)<sup>38</sup> and of course pro-IP<sup>39</sup> once debated civil libertarian Nat Hentoff on defamation and took the pro-defamation law side.<sup>40</sup> Hentoff, to his credit, opposed defamation law. Hentoff’s argument was rooted mostly in “pro-free speech” concepts. It’s not a horrible argument, but it doesn’t get to the root of the issue.

The classic libertarian case against defamation law was made by Murray Rothbard beginning in 1962 and then expanded in subsequent publications.<sup>41</sup> Defamation law protects *reputation rights*;<sup>42</sup> it holds that if you publicize (say, repeat, communicate to others) a false statement to someone else which impugns the other’s reputation, you have *defamed* them and can be liable for damages, which can be truly staggering.<sup>43</sup>

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<sup>38</sup> See Kinsella, “David Kelley on the Necessity of Government,” *StephanKinsella.com* (May 22, 2016)

<sup>39</sup> See *idem*, “Letter on Intellectual Property Rights.”

<sup>40</sup> See “Nat Hentoff and David Kelley on Libel Laws: Pro and Con” [Free Press Association Event, 1986], *The Atlas Society* (Aug. 15, 2010; <https://perma.cc/LP48-CD45>; YouTube: <https://youtu.be/ge57bIoTXoY>). Jacob “Bumper” Hornberger also disappointingly supports defamation law. See Kinsella, “Jacob Hornberger on Defamation and Alex Jones,” *Freedom and Law* (Substack) (Oct. 22, 2022; <https://perma.cc/3CKE-TEGY>), responding to Jacob G. Hornberger, “Alex Jones Got What He Deserved, Part 1,” *Future of Freedom Foundation* (Oct. 17, 2022; <https://perma.cc/K9U9-ZJW2>).

<sup>41</sup> Rothbard, *Man, Economy, and State, with Power and Market*, chap. 2, § 12, pp. 182–83 (p. 157 of the Institute for Humane Studies 1962/1970 version). See also *idem*, *For a New Liberty*, 2<sup>nd</sup> ed. (Auburn, Ala.: Mises Institute, 2006 [1973]; <https://mises.org/library/new-liberty-libertarian-manifesto>); *idem*, “Knowledge, True and False,” in *The Ethics of Liberty* (New York: New York University Press, [1982] 1998; <https://mises.org/library/knowledge-true-and-false>). Many libertarians are ambivalent about defamation law and of course some are in favor (see note 43, below), but many others oppose defamation law. See e.g. Walter E. Block, “The Slanderer and Libeler,” in *Defending the Undefendable* (2018 [1976]; <https://mises.org/library/defending-undefendable>); and Walter E. Block & Jacob Pillard, “Libel, Slander and Reputation According to Libertarian Law,” *J. Libertarian Stud.* 24 (2020; <https://perma.cc/9CMD-45UC>); Gary Chartier, *Anarchy and Legal Order: Law and Politics for a Stateless Society* (Cambridge University Press, 2013), chap. 5, § II.C.2.vi (pp. 278–79), subsection entitled “*Compensation should not ordinarily be available for the non-fraudulent dissemination of false information*”; and Ryan McMaken, “The Dangers of Defamation Laws,” *Mises Wire* (Aug. 14, 2019; <https://mises.org/wire/dangers-defamation-laws>).

<sup>42</sup> See note 36, above.

<sup>43</sup> On the tort of defamation, see, e.g., *Restatement (Second) of Torts* (1977), §558; on damages, see, e.g., Avid Bauder, Randall Chase & Geoff Mulvihill, “Fox, Dominion reach



If the communication is oral, the defamation is called slander; if it's in writing, it's called libel. The reason truth is a defense to a defamation accusation is that a statement must be false to be defamatory. Also, in the US, because of the First Amendment and Supreme Court cases like *Sullivan*, the burden to prove defamation is higher than in other countries, like the UK, which is why sometimes plaintiffs file there when they can.<sup>44</sup>

And yet the free speech issue is not the best argument against defamation law, in part because free speech is not itself a fundamental or independent right. US Supreme Court Justice Holmes famously argued that free speech rights are not absolute because you can't shout fire in a crowded theater. Therefore, some government restrictions on speech are permissible and do not violate the First Amendment. In response, Rothbard rightly noted that all human rights are property rights.<sup>45</sup> This means that there is no independent right to free speech. You have the right to speak on your own property, but not on someone else's property unless you have their permission. The reason you may speak on your own property is not because you have a "right to free speech," but because you own your property and because by using it to mouth words, you are not invading others' property.<sup>46</sup>

Rothbard points out that reputation is *what others think of you*, so owning a reputation would mean owning others' brains or minds or

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\$787M settlement over election claims," AP News (April 18, 2023; <https://perma.cc/XK3K-YL5A>); Joanna Slater, "Alex Jones ordered to pay nearly \$1 billion to Sandy Hook families," *Washington Post* (Oct. 12, 2022; [www.washingtonpost.com/nation/2022/10/12/alex-jones-sandy-hook-verdict/](http://www.washingtonpost.com/nation/2022/10/12/alex-jones-sandy-hook-verdict/)). This result was supported by some libertarians, unfortunately, such as Jacob Hornberger; see note 40, above. My friend Jeff Deist also seems to think in some cases defamation law can be justified, if it's the result of evolutionary common law decisions. See Jeff Deist, "What Clarence Thomas Gets Wrong about Big Tech," *Power & Market* (April 8, 2021; <https://perma.cc/XH5J-LCRU>).

<sup>44</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The burden is higher in the US because the courts recognize a tension between defamation law, which restricts speech and the press, and the First Amendment. Just as courts recognize other "tensions" in statutory law—between copyright law and the First Amendment, between patent and copyright law (which grant monopolies) and antitrust law (which pretends to outlaw monopolization). See Kinsella, "Copyright is Unconstitutional," *C4SIF Blog* (Nov. 27, 2011); *idem*, "The Schizo Feds: Patent Monopolies and the FTC," *Mises Economics Blog* (Aug. 27, 2006).

<sup>45</sup> See Rothbard, "Knowledge, True and False," responding to Justice Oliver Wendell Holmes Jr.'s opinion in *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>46</sup> Although in some contexts speech can play a causal role in aggression. See "Causation and Aggression," in *LFFS*.

opinions, and you don't own that—they do. You don't have a property right in immaterial things or in other's brains, minds, values, or opinions. And additionally, as noted above, property rights are *never in the value of a thing*, but only in its *physical integrity*.<sup>47</sup> Thus the more fundamental argument against reputation rights simply recognizes that property rights are only in scarce, material resources, and those rights only protect the owner's right to the physical integrity of that resource, not to its subjective evaluation by others. Protecting a property right in reputation amounts to weakening property rights in material, scarce resources including our bodies, just as printing money dilutes the value of money held and just as granting positive welfare rights comes at the expense of negative rights.

### WHY NOT DEFAMATION?

It should be clear by now that the arguments for, and against, trademark and defamation law are similar. The arguments for each are based on the notion that there should be legal protection for *reputations*. The libertarian criticism is that one cannot own a reputation. To try to enforce such rights by law necessarily invades natural or justified property rights. Defamation law subjects someone to liability for lying and causing the defamed subject to be “harmed” or lose business from third parties who choose to believe the lie. Trademark law prevents a trademark owner's competitors from using a similar mark based on the notion that he will lose customers who choose to buy from the competitor instead. In both cases, the force of law is wielded against people who have not actually violated the property rights of the plaintiff. Both defamation law and trademark law are justified on grounds of reputation rights, and libertarians ought to oppose both on similar grounds.<sup>48</sup>

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<sup>47</sup> See note 35, above, and accompanying text.

<sup>48</sup> Rothbard never made this connection. He might have become even more anti-IP if he had realized his arguments against defamation law apply also to some types of IP such as trademark. He had already argued against patents, and defamation law. He never argued against trademark law, and in fact seemed to endorse it. See Rothbard, *Man, Economy, and State, with Power and Market*, pp. 670–71. And he thought some form of common-law or contractual copyright could be justified using contract, even though this also contradicted

And yet legal scholars generally do not include defamation law in as a type of IP. Defamation rights are not included in the discussion and list of IP rights in major textbooks and treatises, for example.<sup>49</sup>

Why then do the defenders of IP not include defamation law as a type of IP? If they include trademark, which also exists to protect reputation rights of sellers, why not defamation? It is a puzzle. As noted above, some have opposed the inclusion of trademark as a type of IP; but they lost. So why not defamation?<sup>50</sup>

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his own revolutionary contract theory. See Kinsella, “A Libertarian Theory of Contract.” And his opposition to patent law was also undermined by the fact that his common-law copyright idea also covered inventions, and thus was really a type of patent law.

<sup>49</sup> It is not easy to prove a negative, but I can find no clear recognition of or argument for defamation as a type of IP in various texts such as: James Boyle & Jennifer Jenkins, *Intellectual Property: Law & The Information Society: Cases & Materials*, 5<sup>th</sup> ed. (Center for the Study of the Public Domain, 2021; <https://web.law.duke.edu/cspd/openip>); Craig Allen Nard, Michael J. Madison, Mark P. McKenna, *The Law of Intellectual Property*, 5<sup>th</sup> ed. (Aspen Publishing, 2017); Gordon, “Intellectual Property”; Roger E. Schechter & John R. Thomas, *Intellectual Property: The Law of Copyrights, Patents and Trademarks* (Thomson West, 2003); Dreyfuss & Pila, eds., *The Oxford Handbook of Intellectual Property Law*; Llewelyn & Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*; Deborah E. Bouchoux, *Intellectual Property: The Law of Trademarks, Copyrights, Patents, and Trade Secrets*, 6<sup>th</sup> ed. (Cengage Learning, 2023); Peter S. Menell, Mark A. Lemley, Robert P. Merges & Shyamkrishna Balganesh, *Intellectual Property in the New Technological Age: Volume I: Perspectives, Trade Secrets & Patents* (Clause 8 Publishing, 2022). The *WIPO Intellectual Property Handbook: Policy, Law and Use*, 2<sup>nd</sup> ed. [WIPO Publication No. 489 (E)] (Geneva: WIPO, 2004), ¶2.638, for example, simply observes that defamation law merely “supplements” traditional IP rights, even when they are viewed in their “broadest sense” to include most of the variety of IP rights mentioned in this paper.

The closest I’ve found is occasional offhand comments noticing some similarity. E.g. Objectivist Steve Simpson, supporting defamation law, writes, of the reputation protected from “damage” by defamation law, “*you can think of it almost as an intellectual property right.*” Steve Simpson, “Libel Laws Protect the Value of Your Reputation or Brand,” *Impact Today* [Ayn Rand Institute] (Nov. 3, 2017; <https://perma.cc/L6HE-K2C2>) (emphasis added); accompanying Youtube: <https://youtu.be/KLX45wGakRk>. And regarding the antidilution or “tarnishment” aspect of modern trademark law, IP law professor Dev Gangjee observes: “If blurring was well named—courts struggle to bring the very concept into focus—tarnishment appears more straightforward. *It has the feel of a defamation claim.*” Dev Gangjee, “Trade Marks and Allied Rights,” in Dreyfuss & Pila, eds., *The Oxford Handbook of Intellectual Property Law*, §1.4.2.3.2, pp. 539–40 (references omitted; emphasis added). Simpson thinks the reputation rights of defamation law look like trademark (IP) rights; Gangjee thinks trademark/IP rights look like defamation/reputation rights. There is a reason they sense this. They both protect reputation rights.

<sup>50</sup> As another indication that defamation is just another form of IP: consider that copyright is beginning to be a threat to an emerging new technology, AI, or “artificial

One could argue that defamation is viewed as a *tort*, so should not be treated as a type of property right; but then trademark law is also said to be grounded in fraud, which is also a tort, yet trademark is considered to be a type of IP.<sup>51</sup> And as noted above, the reputation rights that flow from defamation law are regularly classified as property rights.<sup>52</sup>

So why did the defenders of patent and copyright, and the modern supporters of IP, not see a need to include defamation in this category? Again, the concept was cobbled together for propaganda purposes. As noted above, there was some resistance to including trademark in the grouping. And in Europe, the analogous concept of “industrial property” includes trademark, but not copyright. So some wanted to include patent, copyright, and trade secret in the IP heading, but not trademark; and industrial property in Europe does not always include copyright. Clearly these are not really objective legal classifications. It is true that all forms of IP share in common that they are unjust, but there are many other state laws and policies that are unjust that are not considered types

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intelligence.” See, e.g., Emilia David, “Sarah Silverman’s lawsuit against OpenAI partially dismissed,” *The Verge* (Feb. 13, 2024; <https://perma.cc/S36J-U8X8>). And yet now defamation law is also posing a threat to AI. See Charley F. Brown & Jonathan P. Hummel, “Judge Denies Motion to Dismiss AI Defamation Suit,” *Ballard Spahr Legal Alert* (Jan. 24, 2024; <https://perma.cc/76GP-4MQT>).

<sup>51</sup> As Sherman & Bently note:

The second reason why trade marks were considered to fall outside the intellectual property rubric was that whereas copyright, patents and designs were primarily concerned with the creation and protection of property, trade marks were more concerned with forgery or fraud. . . . Combined together, the facts that trade marks dealt with pre-existing subject matter rather than the creation of new material and that they were more concerned with regulating fraud than property, meant that trade marks were said to fall outside the scope of intellectual property law.

Sherman & Bently, *The Making of Modern Intellectual Property Law*, ch. 8.

<sup>52</sup> See references in note 36, above. On the argument that defamation is a tort *instead of* a property right, see, e.g., Raphael Winick, “Intellectual Property, Defamation and the Digital Alteration of Visual Images,” *Colum. VLA J.L. & Arts* 21, no. 2 (1997; <https://cyber.harvard.edu/metaschool/fisher/integrity/Links/Articles/winick.html>): 143–96, p. 185 (“Rights of publicity . . . are a property right (rather than a tort such as defamation) and do not require any form of malicious intent on behalf of the media.”). Note the very title of the article contrasts IP with defamation, as if defamation is not part of IP but something different. See also Juliet Dee, “‘Mere Conduits’ or Editors? ISPs, Web Masters, Immunity and Safe Harbor in Online Defamation versus Online Intellectual Property Cases,” *Free Speech Y.B.* 41 (2004): 80–96.

of IP, such as the drug war, conscription, central banking, government roads, state schools, or taxation.

In the end, trademark and trade secret law are lumped in with patent and copyright law to shore up the latter two. Those defending patent and copyright simply did not *need* to add defamation law to the list; their job was done, once they defeated the anti-IP movement in the late 19<sup>th</sup> century. Their goal was not coherent legal classification; it was *defense of patent and copyright*. Sure, for newer, more innovative and mostly statutory rights, like database rights, boat hull designs, semiconductor maskwork protection, and so on, they'll throw them under their new umbrella term. But including defamation has no upside for them. They didn't need to include it, so they didn't. Even though it would make sense. This shows you their real priorities. It was always to whitewash patent and copyright, not to coherently classify the law.

If legal scholars were consistent, they would classify defamation law as yet another type of IP, sitting on the bench next to trademark law. I agree that trademark law, as well as reputation rights and defamation law, ought to be considered a type of IP right. But I say this not to praise defamation and IP rights, but to bury them.

