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*Against Intellectual Property* After Twenty Years:   
Looking Back and Looking Forward

This chapter is previously unpublished, other than a working draft posted on c4sif.org. It provides a perspective on the IP debates since my *Against Intellectual Property* (*AIP*) was published in 2001, and provides an overview of newer arguments about IP that I’ve made in the twenty-plus years since the publication of *AIP*. It also discusses changes I would make to the original arguments presented in *AIP*. This chapter complements chapter 14, which itself was originally published about a decade after *AIP*.

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I. BACKGROUND

*Against Intellectual Property* originated as a *Journal of Libertarian Studies* article in 2001.[[1]](#footnote-1) At the time there was less interest among libertarians in the topic of intellectual property (IP) than there is now. Libertarian attention was more focused on issues such as taxes, war, central banking, the drug war, government education, asset forfeiture, business regulations, civil liberties, and so on. Not so much on patent and copyright, the two primary forms of IP.

I had no reason to think it was an especially important issue, but I had always been dissatisfied with various libertarian arguments for IP, and it kept nagging at me throughout college and law school. Ayn Rand’s brief article on patent and copyright, for example, included strained arguments as to why a 17 year patent term and a life-plus-50 year copyright term were just about right.[[2]](#footnote-2) She also offered a confused argument as to why it was fair for the first guy to race to the patent office to get a monopoly that could be used against an independent inventor just one day behind him.[[3]](#footnote-3)

It made no sense to me and didn’t seem to fit in well with other aspects of libertarian theory and individual rights. I believed Rand’s approach was wrong, or at least flawed, since natural property rights can’t expire at an arbitrary time, much less one decreed by legislation, but I still assumed IP rights were, somehow, legitimate property rights. Since I was increasingly interested in libertarian theory (my first scholarly libertarian article was published in 1992)[[4]](#footnote-4) and was beginning to specialize in IP in my law practice (in 1993),[[5]](#footnote-5) I figured that I might be able to come up with a better defense of IP than previous libertarians had managed, since most of them really didn’t have a good grasp of how actual patent and copyright law worked. So I dove deep into the literature and tried to find a way to justify IP rights, only to keep hitting dead ends.[[6]](#footnote-6) Every argument I could come up with was as flawed and shaky as Ayn Rand’s.

And in my research I came across libertarian and other criticisms of IP,[[7]](#footnote-7) and also deepened my understanding of the crucial role of *scarcity* to property rights, as emphasized in particular by Hans-Hermann Hoppe.[[8]](#footnote-8) I began to see that older criticisms of IP, such as the writings of Benjamin Tucker, Wendy McElroy, Sam Konkin, and Tom Palmer, were correct, even if their criticisms were not comprehensive or complete.[[9]](#footnote-9) With a relief similar to the one I felt when I finally gave up minarchism and ceded the ground to anarchism, I finally concluded that patent and copyright are completely statist and unjustified derogations from libertarian principles and property rights. No wonder I had been failing in my attempts: I had been trying to justify the unjustifiable!

So I sought to build on the work done by previous thinkers, and clarify and expand it. I gave a few local talks and wrote some short articles on the topic starting in 1995,[[10]](#footnote-10) often with a somewhat tentative tone as I was initially concerned that publicly opposing IP law might harm my budding IP law practice (turns out, it never caused a problem). I then wrote a lengthier treatment, which became *AIP*, mostly to get it out of my system, intending to then turn my attention back to other fields that interest me more, like rights theory, contract theory, causation, and other aspects of libertarian legal theory.[[11]](#footnote-11)

I presented the paper, then entitled “The Legitimacy of Intellectual Property,” at the Ludwig von Mises Institute’s Austrian Scholars Conference in March 2000. This was the year Objectivist George Reisman started attending Mises Institute events, after having been ousted from Objectivist circles over his favorable remarks about Barbara Branden’s biography of Rand, and had reunited with his old friend Ralph Raico, from whom he had been estranged for many years. I remember Reisman asking me, after I delivered my paper, something like, “Let me make sure I understand you. Are you saying all patent and copyright law should be abolished?” I answered yes and, seeming somewhat stunned, he slowly walked away. In any case, I submitted the paper to the *JLS*, where it was published as “Against Intellectual Property,” a title suggested by Professor Hans-Hermann Hoppe, then the journal’s editor.

*AIP*, and some other articles around the same time, argues that all forms of intellectual property—including patent, copyright, trademark, and trade secret, but especially the first two—are unjust and unlibertarian laws and should be abolished.[[12]](#footnote-12)

II. THE INTERNET ERA AND   
THE GROWING IP THREAT

As noted above, IP had not received a great deal of attention from libertarians before the internet era. But IP’s wallflower status was about to change. Some were starting to sense that the IP issue was becoming more important. The need to shine a light on patent and copyright, heretofore relegated to the shadows and the bailiwick of specialists, was becoming more apparent. An early sign of this among Austro-libertarians, perhaps, was the Mises Institute’s awarding me the O.P. Alford III Prize for 2002 for *AIP*.[[13]](#footnote-13)

The Internet is the reason for IP emerging from the shadows. The Internet—and digital information and file sharing, social media, and related technologies like cell phones, texting, and ubiquitous video cameras—was at this time gaining steam and becoming a huge social force. It was becoming one of the most important tools to fight statism and to preserve and extend human freedom and prosperity. And this is why it has been under attack by the state, in the guise of anti-pornography, anti-gambling, and anti-terrorism, as well as anti-piracy/copyright protection efforts.

The Internet became the world’s biggest copying machine, leading to a dramatic increase in the amount of copyright infringement, and thus in the amount of copyright lawsuits and penalties.[[14]](#footnote-14) At the same time, news of shockingly excessive, absurd, and outrageous copyright persecutions were instantly and widely communicated over the Internet—college students and single mothers sued for millions of dollars for sharing a few songs.[[15]](#footnote-15) No longer were these lawsuits hidden in the dark; Internet users were starting to be made aware of them. Writes Siva Vaidhyanathan:

By 1991 I noticed that [hip-hop] music had changed. The new work lacked the texture and richness that had marked the finest albums of the late 1980s, such as Public Enemy’s *It Takes a Nation of Millions to Hold Us Back* and the Beastie Boys’s *Paul’s Boutique*. Instead, the digital samples of others’ music that made up the intricate bed of sound in those great albums was replaced by a thinner, less interesting, less intricate collection of more obvious samples. The language of sampling seemed to become simpler and less interesting. There was less play and less depth to the music by 1992. I knew that several hip-hop artists had faced copyright suits over sampling in 1990 and 1991. So I wondered if the law had had such a profound effect on the art. After a bit of research, I concluded that it had. With a bit more research, I sought to explain the larger, longer relationship between copyright and creativity in American history. That project … became the germ of my first book, published in 2001, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity.*

By 2001 copyright had exploded into public consciousness, largely through the remarkable rise and fall of Napster, the first easy-to-use digital file-sharing service. The United States had radically expanded copyright law in the 1990s in anticipation of the “digital moment.” But nothing had prepared the copyright industries for the torrent of unauthorized peer-to-peer distribution over the Internet, starting in about 2000. Meanwhile, computer software had blossomed from a mere hobby to a multibillion-dollar global industry in the 1980s and 1990s without any clear sense of how intellectual property would work for it (or against it). At about the same time that U.S. courts ruled that software could enjoy the protection of patent law as well as copyright, the movement to lock computer code open for the benefit of security, stability, quality, and creativity (and, to some, humanity) grew to be called the “Free and Open-Source Software” movement. As someone thrown into the copyright battles of the early twenty-first century despite my training as a nineteenth-century cultural historian, I felt compelled to make sense of these and other trends that were remaking our global information ecosystem. Those interests are reflected in my second book, published in 2004, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System*.

The copyright wars of the first decade of the twenty-first century yielded a global “Free Culture” movement, with law professor Lawrence Lessig as its intellectual leader. Globally, others concerned with issues beyond copyright and creativity, including biopiracy and the cost of pharmaceuticals in developing nations, launched the “Access to Knowledge” movement. During the decade the industries devoted to expanding and strengthening intellectual property succeeded in legislatures and courts around the world. And the United States embedded intellectual property standards into trade treaties with other nations. The issues were becoming more interesting and important every week.

Then, in late 2004 Google announced it would begin to scan into electronic form millions of books from dozens of university libraries—many of which would still be covered by copyright. The ensuing debate and lawsuits drew me into the fascinating world of search engines, Internet policy, and the future of libraries and books. That research generated my third book, published in 2011, *The Googlization of Everything and Why We Should Worry.*[[16]](#footnote-16)

Or as Declan McCullogh writes:

Over the past few years, intellectual property has morphed from an arcane topic of interest mostly to academicians and patent attorneys to the stuff of newsmagazine cover stories. Courtrooms’ klieg lights have illuminated how copyright law has been stretched in ways unimaginable just five years ago. Software patents have roiled the computer industry and alarmed developers of open-source programs. Meanwhile, displaying all the temperance of a methadone addict, Congress keeps handing more and more power to copyright owners.[[17]](#footnote-17)

Patent outrages and abuse also increased along with a growing tech sector and economy and were also communicated at light speed to blogs and RSS feeds. And in the meantime the traditional content-producers,  
ever-resistant to new technologies that disrupt comfortable, established business models, kept lobbying Congress to ratchet up patent and copyright scope and terms and penalties and enforcement,[[18]](#footnote-18) while at the same time the US bullied other countries to keep ratcheting up their own IP laws and enforcement.[[19]](#footnote-19) This culminated in the attempt to   
enact anti-piracy legislation such as the Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA), which was—at least for the moment—derailed by a historic Internet uprising.[[20]](#footnote-20)

For these reasons, in the last couple decades, as IP becomes a more apparent threat to property rights, freedom of expression, and the Internet, the issue became more prominent, and libertarians of various stripes—Austrians, anarchists, left-libertarians, civil libertarians, and the young and Internet dependent—started to become more interested in the IP issue and more receptive to anti-IP arguments.[[21]](#footnote-21) And more and more libertarians are writing on this important topic and building on, incorporating, or extending previous analyses, calling for significant reform of IP law or even outright abolition.[[22]](#footnote-22) In addition, outside of libertarianism proper, a host of economists, empirical researchers, and legal scholars, most notably economists Michele Boldrin and David Levine, authors of the groundbreaking *Against Intellectual Monopoly*, have expressed deep skepticism, on empirical grounds, of the claimed pro-innovation effects of patent and copyright.[[23]](#footnote-23)

The issue continues to receive attention from a variety of institutions and outlets. I have myself, lectured, debated, and been interviewed countless times on this topic, including on the *Stossel* show and the *Reason.tv*-sponsored Soho Forum debate.[[24]](#footnote-24) I also gave a six-part lecture course on IP for the Mises Academy in 2010 and reprised in 2011,[[25]](#footnote-25) and I have continued to write on this topic.[[26]](#footnote-26)

What about the prospects for reform of patent and copyright law? While more and more libertarians have come to see IP law as unjust, it is unlikely there will be much legislative progress on this matter due to widespread confusion about property rights and entrenched special interests, in particular Hollywood and the American music industry, which rely on copyright, and the pharmaceutical industry, which profits from the patent system. That said, it seems unlikely that copyright terms—once 14 years extendable to 28, and then life of the author plus 50 years, and now life of the author plus 70 years—will be extended any further. And while patent and copyright law will stay on the books for a long time, technology will make them increasingly harder to enforce. Piracy of copyrighted works is already rampant due to the Internet and encryption. As 3D printing technology advances, we may see an increased ability of consumers to evade patent law as well.[[27]](#footnote-27)

III. CHANGES

I’ve been asked from time to time what changes I would make to *AIP*. In my assessment, the basic arguments in *AIP* are sound. I have yet to see a valid criticism.[[28]](#footnote-28) I might change the structure somewhat, or an emphasis or wording here and there. For example, I would clarify that *scarcity* is meant in the technical economics sense of rivalrousness.   
I might even propose the use of the term “conflictable,” to emphasize the nature of resources that gives rise to property rights in the first place, and to head off silly arguments like, “Well, IP is justified since good ideas are scarce.”[[29]](#footnote-29) Also, I might use “corporeal” or “material” instead of “tangible.”[[30]](#footnote-30) I would try to be more careful to use the term *property* to refer *not* to the owned resource that is the subject of property rights, but only to the relationship between the owner and the resource owned, although this can be tedious if overdone.[[31]](#footnote-31) I would streamline the initial section providing a positive legal description of the main forms of IP and eliminate the Appendix providing examples of obvious IP abuse, since this can be done now in an easily updated online page or post.[[32]](#footnote-32) I would now be a bit harsher on trademark than I was in *AIP*; all trademark law is evil and should be abolished. The aspects of it that can be defended are already present in contract and fraud law.

IV. ADDITIONS

But I would not change much, substantively speaking. However, since writing *AIP* over 20 years ago, I have found additional ways of explaining the fundamental problem with IP law—additional arguments, examples, and evidence.[[33]](#footnote-33) So I would add some material, as I did to some degree in a later paper.[[34]](#footnote-34) I’ll briefly outline below some of the arguments developed after the initial publication of *AIP*.

*A. Empirical Evidence*

In the “Utilitarian Defenses of IP” section of *AIP,* I explained various defects in the utilitarian case for IP. First, as Austrians have explained, value is not a measurable, cardinal quantity that can be interpersonally compared.[[35]](#footnote-35) Second, even if violating someone’s rights by taking their resources and redistributing them to someone else makes the recipient better off, it is still a rights violation. And third, the proponent of IP, arguing that IP laws lead to net utility gains, has the burden of proof.[[36]](#footnote-36) And it has become increasingly clearer, in the last 60+ years, that those arguing for IP on empirical grounds have not yet satisfied and cannot satisfy their burden of proof that IP makes us better off.[[37]](#footnote-37) As I wrote in a subsequent paper, “Given the available evidence, anyone who accepts utilitarianism should be *opposed* to patent and copyright.”[[38]](#footnote-38)

*B. IP Rights as Negative Easements*[[39]](#footnote-39)

Additionally, I have come to understand that IP rights can be properly classified as *non-consensual negative easements* (or servitudes),[[40]](#footnote-40) which makes plain exactly how they infringe justly-acquired property rights.[[41]](#footnote-41) All property rights are enforceable rights in material, scarce—conflictable—resources, the type of (causally efficacious) scarce means that human actors can possess and manipulate and employ to causally interfere in the world. It is not that assigning property rights in information or knowledge is *wrong*, but that it is *impossible*.[[42]](#footnote-42) Force cannot be applied to “ideas” or information, but only to scarce resources. Any IP right is just a disguised reassignment of property rights in existing scarce resources. One reason for the confusion here is that people are not careful in distinguishing between motivations and means.

For example, it is sometimes said that people “fight over religion.” But this is not accurate. Religion is not a scarce resource over which there can be conflict. Any interpersonal human conflict is *always* over scarce, material, *conflictable* resources. If *A* kills *B* or takes his land or cows in a religious dispute, the religious disagreement is merely the *motivation* or reason for the conflict or clash—the explanation for why parties act as they do—but the clash itself is always over the material things that are the real subject of property rights. We can *explain* a given human action by reference to the ends aimed at and the means employed. One’s motivations and goals factor into the ends; but the actual means employed and the actions taken are what property rights concern.[[43]](#footnote-43)

All rights are human rights, and all human rights are property rights,[[44]](#footnote-44) and property rights just are rights to the exclusive control of certain conflictable resources.[[45]](#footnote-45) In the end, every law, every dispute, boils down to some actor being assigned ownership rights in a given contested (conflictable) resource. A copyright grant gives the holder a partial property right in the printing press and computers of other people. A patent grant gives the holder a partial property right in the factories and raw material already owned by others. Such rights are negative easements that permit the holder to veto or prevent certain uses by the owner. Negative easements are legitimate when consented to, but in the case of IP, the state grants these rights to the IP holder *without the consent* of the owner of the burdened property (the so-called “servient estate”). As I noted in *AIP*, “ownership of an idea, or ideal object, effectively gives the IP owners a property right in every physical embodiment of that work or invention.”[[46]](#footnote-46) Thus, IP rights amount to a taking or infringement of property rights otherwise established in accordance with the principles of original appropriation and contract.[[47]](#footnote-47) This insight buttresses the argument in *AIP* that “a system of property rights in ‘ideal objects’ necessarily requires violation of other individual property rights, e.g., to use one’s own tangible property as one sees fit.”[[48]](#footnote-48)

*C. Lockean Creationism*[[49]](#footnote-49)

In the “Creation vs. Scarcity” section of *AIP,* I pointed out that one mistake made by many proponents of IP is the notion that *creation is a source of property rights*. But it is not. I have elaborated on this topic in subsequent writing, pointing out that creation—i.e., production, transformation, or rearrangement[[50]](#footnote-50) of existing resources—is a source of *wealth* but not a source of property rights. After all, transforming a set of input resources into a more valuable output product requires that the input factors already be owned. The resulting product is thus owned according to standard property rights and contract principles.[[51]](#footnote-51)

Property rights in one’s body are based in one’s direct control over one’s body.[[52]](#footnote-52) Property rights in external, previously unowned scarce resources come from original appropriation, or homesteading—first use and transformation or embordering—of an *unowned* scarce resource or by contractual transfer from a previous owner.[[53]](#footnote-53) Production or transformation of existing, already-owned resources may increase or create wealth, but is not a source of rights. This is a common confusion among libertarians, especially Randians and those influenced by the confused labor theory of property and the related labor theory of value, as can be seen in nonsensical sayings like, “You have a right to the fruits of your labor.”[[54]](#footnote-54)

*D. The Labor Metaphor*

Overreliance on “labor” metaphors also leads to confusion about IP. Locke correctly argued that the first person to “mix his labor with” an unowned resource owns it, since he thereby establishes an objective link to the resource which gives him a better claim to it than latecomers.[[55]](#footnote-55) However, Locke based his argument on the confused and unnecessary idea that a person “owns” his labor and “therefore” owns resources that he mixes it with. But labor is not owned—it is an *action*, something a person performs with his body, which he does own—and this assumption is not needed for the Lockean labor-mixture argument to work.[[56]](#footnote-56) This mistaken notion leads some people to favor IP because they figure that if you own a scarce resource because you mix your labor with it, you also own useful ideas that are produced with your labor. The related Smith-Ricardo-Marx labor theory of value, which underlies Marxism and socialism, is also sometimes used to support IP, as when people argue that if you work or labor, you “deserve” some kind of reward or profit. All this focus on labor must be rejected as overly metaphorical and confused, and, frankly, Marxian.[[57]](#footnote-57)

*E. The Separate Roles of Knowledge and Means in Action*

The purpose of property rights is to permit conflict-free use of resources, the scarce means of action that humans employ to causally interfere with the course of events in an attempt to achieve their ends. But this applies only to *conflictable* resources. Human action also implies the *possession of knowledge* by the actor—knowledge of what ends are possible and knowledge of what scarce means might be employed to *causally achieve* the desired end. Thus all successful human action requires *two separate components*: the availability of scarce means or resources and knowledge to guide one’s action.[[58]](#footnote-58) Property rights apply *only* to the scarce means or conflictable resources that humans employ, but not to the knowledge or information people possess, which guides their behavior, since anyone can use the same or similar knowledge to guide their own actions without conflict. In fact, it is the accumulation of this technological knowledge over time that enables increasing material prosperity. Property rights are needed to permit conflict-free use of scarce resources, but imposing restrictions on the emulation, learning, and use of knowledge, which is what IP attempts to do, impoverishes the human race.[[59]](#footnote-59) This is why I concluded one article with these words:

It is obscene to undermine the glorious operation of the market in producing wealth and abundance by imposing artificial scarcity on human knowledge and learning…. Learning, emulation, and information are good. It is good that information can be reproduced, retained, spread, and taught and learned and communicated so easily. Granted, we cannot say that it is *bad* that the world of physical resources is one of scarcity—this is the way reality is, after all—but it is certainly a challenge, and it makes life a struggle. It is suicidal and foolish to try to hamper one of our most important tools—learning, emulation, knowledge—by imposing scarcity on it. Intellectual property is theft. Intellectual property is statism. Intellectual property is death. Give us *intellectual freedom* instead![[60]](#footnote-60)

*F. Resources, Properties, Features, and Universals*[[61]](#footnote-61)

As noted above (see note 31), confusion about the IP issue sometimes stems from identifying “property” with the owned resource. People then get bogged down in loaded or confused questions like, “Are ideas property?” If one keeps in mind that the question is not what is property, but rather who is the owner of a conflictable resource, then the IP mistake is harder to make. A related mistake stems from the failure to understand that all human rights are property rights and all property rights *just are* rights to the exclusive control of a given scarce (conflictable) resource.[[62]](#footnote-62) But every property right is an ownership right held by a particular person or owner with respect to a particular conflictable resource. It is the actual resource itself which is owned, *not* its characteristics.

For example, if you own a red car, you own that car, but you do not own its color; you do not own red or redness. If owning a red car meant you owned its characteristics, you would own not only that particular car, but its age, weight, size, shape, color, and so on, and, thus, would thereby have an ownership claim over any other object that is red, and so on. This would amount to reassigning ownership rights in someone else’s red car to you, even though he owns that car and you did not homestead it or obtain it by contract. Likewise, information cannot be owned since it is not an *independently existing thing*; information is *always* the *impatterning* of an underlying medium or carrier or substrate, which is itself a scarce resource that has an owner.[[63]](#footnote-63) If I own a copy of *Great Expectations*, I own that physical object: paper and glue and ink. It has various characteristics: an age, a size, a shape, and a certain arrangement of ink on its pages—the way the ink is impatterned so that it represents letters and words and meanings to someone who can read and who can observe the features of the book. But just as you don’t own the color of your car, you don’t own the way an object is arranged or shaped.[[64]](#footnote-64)

As Roderick Long explains:

It may be objected that the person who originated the information deserves ownership rights over it. But information is not a concrete thing an individual can control; it is a *universal*, existing in other people’s minds and other people’s property, and over these the originator has no legitimate sovereignty. You cannot own information without owning other people.[[65]](#footnote-65)

*G. Selling Does Not Imply Ownership*[[66]](#footnote-66)

As noted in Part IV.B, above, it is literally impossible to own or have property rights in information or knowledge. People only manipulate and have conflict over scarce resources (they are means of action, after all), so that IP rights are just disguised reassignments of property rights in existing conflictable or scarce resources. And as noted in Part IV.F, above, information cannot be owned since it is not an *independently existing thing*; information is *always* the *impatterning* of an underlying medium or carrier or substrate, which is itself a scarce resource that already has an owner, in accordance with principles of original appropriation, contract, and rectification.

Yet IP proponents sometimes point out that information, ideas, know-how, and so on (as well as labor), can be *sold*. And so, the reasoning goes, something that can be *sold* must have been *owned* by the seller. Therefore, information can, in fact, be owned. As I have explained elsewhere, this reasoning is fallacious and based on conflation of two senses of the word “sell.”[[67]](#footnote-67) When *A* and *B* exchange two owned objects, such as an apple for an orange, then there are two title transfers. *A* sells his apple to *B,* and *B* sells his orange to *A*.

But other contracts only involve one title-transfer. Suppose *B* pays *A* to perform some action (labor, a service, providing information, etc.). In this case, *B*’s owned resource (money or something else) transfers to *A,* but nothing that *A* owns transfers to *B*. It is simply that *A* performed some action that *B* desired, and was induced to do so by *B*’s payment. In this case, the end of *B*’s act of agreeing to pay *A* was not the attainment of a property right or title transfer, but the achievement of a new state of affairs in which *A* performed some action desired by *B*.[[68]](#footnote-68) *A* is sometimes said to “sell” his labor or information to *B* because of the analogy to a normal exchange of title, but here the word “sell” is used in the economic sense to simply explain *A*’s motivations and to properly characterize his actions: to understand his ends or goals. In order to get *B*’s payment, *A* performed the action desired by *B*. *A* does not “sell” his labor or knowledge in a juristic or legal sense, and thus did not “own” it in a legal sense. Thus, “selling” in the economic sense does not imply owning. Information is unownable.[[69]](#footnote-69)

*H. All Property Rights Are Limited*

One final argument may be addressed, which is touched on in some of the above sections.[[70]](#footnote-70) When explaining why IP rights violate property rights, we IP opponents explain that the grant of an IP right is tantamount to a nonconsensual negative easement on someone else’s property—it limits what the owner of a resource may do with the resource.[[71]](#footnote-71) Or, as Roderick Long would say, “Owning Ideas Means Owning People.”[[72]](#footnote-72)

A common response runs something like this:

Yes, IP rights limit what you can do with your own property. But this is true of all property rights. My ownership of a home, or my body, means you can’t shoot your gun at it. So my property rights limit your property rights. Therefore, just because intellectual property rights limit your property rights doesn’t mean they are illegitimate any more than my self-ownership limits your property rights in your gun.

There are many problems with this argument, as I have detailed elsewhere.[[73]](#footnote-73) First, even if we grant that in some cases property rights can be limited, it does not imply that just *any* limit is legitimate. If a woman objects to being raped, it will not do to say “stop complaining that we are violating your property right in your own body; after all, all property rights are limited.” You would need to articulate why it’s justified to limit property rights. In the examples given by IP proponents, someone’s property rights are limited as needed to keep them from exercising those rights to commit aggression against others’ property rights. But IP rights limit the owner’s property rights (again, in the form of a negative servitude), even though the owner, in rearranging *his own resources* in a certain way, does not invade the borders of the inventor’s or author’s property. In response to this, the IP proponent will say, “Yes, by making a copy of the author/inventor’s creation, the copier is infringing the author/inventor’s property rights.” But this is question-begging. It presupposes that there *are* rights to universals, when this is the issue under dispute.

Second, it is simply not true that property rights limit other property rights. Rather, property rights limit *actions*. If *A* owns his body, then *B* may not shoot it with a gun, *whether he owns the gun or not*. The point is that *B* may not use or invade the borders of *A*’s body—his owned resource—with *any* means at all, whether it be the use of *B*’s hands, or some other means such as a gun, even if he stole the gun from *C* and is not its owner. People are responsible for their *actions*, and actions always employ some means to achieve the end. The means may be simply the actor’s own body, or it may be some external object, one that may be owned by the actor, or not.[[74]](#footnote-74)

Therefore, it *is* a valid criticism of IP that it unjustly limits others’ use of their own resources.

*I. The Structural Unity of Real and Intellectual Property*

Another argument made in support of IP is that it is, legally, structurally similar to normal property rights in scarce resources, such as property rights in realty (land or immovables) or personalty (corporeal movables).[[75]](#footnote-75) This is an odd argument. It is true that the state, via legislation, is able to set up positive rights that, in modern legal systems, are treated similarly to property rights in scarce resources (land and personalty). But so what? In antebellum America, under chattel slavery, slaves—innocent human beings—were legally ownable and thus subject to the various legal incidents of property, such as sale, mortgages, and so on. The fact that the state, by artificial legislation, can make inventions and artistic creations the subject of contracts, sales, and so on does not show that the law is just. This is just a facile argument.[[76]](#footnote-76)

First, patent and copyright were not originally called property rights. They were referred to accurately as state-granted privileges or monopolies.[[77]](#footnote-77) Referring to patent and copyright as “property rights” was a later innovation, engaged in for propaganda purposes. 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.”*[[78]](#footnote-78)

And as Machlup wrote in a later study commissioned by the US Congress:

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.[[79]](#footnote-79)

Professor Michael Davis also explores the strategy of those who insist on erroneously classifying patents as property rights. He calls this tactic “the trump of property,” which is

a strategy of defining patents according to property law concepts far removed from debates over the public interest in the issuance of patents …. [T]he foregoing description of patent law as a form of competition regulation, let alone as a form of national industrial policy, is obviously not the conventional one. Organized patent interests (the patent bar, patent proprietors, and their sponsors) do not espouse that view, but instead habitually offer a more cramped description of patent law. One might call that description the trump of property—a strategy to secure the claim that proprietors can exclusively own patents, and to eliminate any argument that the public has a continuing interest in issued patents. That description promotes patents as just another kind of property, but firmly rejects any suggestion that patent law represents either a form of competition regulation or a national industrial policy. With a firm foundation in free market theories, the strong claim that patents are just another form of property implicitly rejects the idea that patent law serves any regulatory function….[[80]](#footnote-80)

Davis also notes, of the attempt by defenders of patents to deny that they are monopolies:

This “debate” seemingly has only one point: to sanitize the patent monopoly so that it more closely resembles simple property. A monopoly, of course, virtually compels the public interest. Thus, the trump of property depends on asserting not only that a patent is simple property, but also that it does not constitute an economic phenomenon, like a monopoly, in which the public has a particular interest.[[81]](#footnote-81)

It is clear that, despite the assertions of defenders of IP, these rights are *not* like normal property rights in scarce resources. First, unlike property rights in scarce resources like personalty (movables) and real estate or land (immovables), IP rights in inventions (patents) and creative works (copyright) expire after a finite term—about 17 or so years for patents, and life of the author plus 70 years for copyright (say, about 120 years for a 40 year old author who lives to age 90). Second, the “borders” or boundaries defined by copyright law in “works” and by patent law for “inventions” is inherently murky, vague, arbitrary, and non-objective.

Scholars have noted other differences between IP and normal property rights. Writes Professor Tom Bell:

Copyrights and patents differ from tangible property in fundamental ways. Economically speaking, copyrights and patents are not rivalrous in consumption; whereas all the world can sing the same beautiful song, for instance, only one person can swallow a cool gulp of iced tea. Legally speaking, copyrights and patents exist only thanks to the express terms of the U.S. Constitution and various statutory enactments. In contrast, we enjoy tangible property thanks to common law, customary practices, and nature itself. Even birds recognize property rights in nests. They do not, however, copyright their songs.

Those represent but some of the reasons I have argued that we should call copyright an *intellectual privilege*, reserving *property* for things that deserve the label. Another, related reason: Calling copyright *property* risks eroding that valuable service mark.[[82]](#footnote-82)

Regarding Epstein’s contentions about the “structural unity” between IP and real property rights, Professor Peter Menell concludes that:

[T]he Property Rights Movement is too limited and grounded in absolutist ideology to support the needs of a dynamic, resource-sensitive intellectual property system. Professor Epstein’s simplistic equation of real and intellectual property generates more heat than light. It is not particularly helpful to think of real and intellectual property as structurally unified. The differences matter significantly and resorting to rhetorical metaphors distracts attention from critical issues. As Judge (later Justice) Cardozo cautioned in 1926, “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”[[83]](#footnote-83)

There are even further dissimilarities between IP rights and normal property rights. For example, as Professors Dorfman and Jacob write:

In these pages we seek to integrate two claims. First, we argue that, taken to their logical conclusions, the considerations that support a strict form of protection for tangible property rights do not call for a similar form of protection when applied to the case of copyright. More dramatically, these considerations *demand*, on pain of glaring inconsistency, a substantially weaker protection for copyright. In pursuing this claim, we show that the form of protecting property rights (including rights in tangibles) is, to an important extent, a feature of certain normal, though contingent, facts about the human world. Second, the normative question concerning the selection of a desirable protection for creative works is most naturally pursued from a tort law perspective, in part because the normative structure of copyright law simply is that of tort law.[[84]](#footnote-84)

Thus, as Wendy Gordon writes,

The “property” portion of the “intellectual property” label has caused practical as well as conceptual difficulties. Too many courts have assumed that all things called “property” should be treated similarly, ignoring the important physical, institutional, and statutory differences that distinguish intellectual “property” from the tangible kind.[[85]](#footnote-85)

Incidentally, I should note that, to my knowledge, none of the above-quoted scholars is an IP or patent abolitionist, except perhaps for Davis re patents. But they are honest scholars who recognize IP as being an unnatural legal regime distinct from natural, common law property rights.

In sum, IP rights, especially patent and copyright, are not like property rights in scarce resources. And even if they were, this would not make them just, any more than the ability to make human slaves property justifies that institution.

*J. John Locke and the Founders on IP as a Natural Right*

In what seems to be nothing more than an appeal to authority, some defenders of IP argue that IP rights are not artificial state-granted monopoly privileges, but rather natural property rights, and that this was recognized by Locke and the Founders of the US Constitution and various constitutional interpretations of patent and copyright.[[86]](#footnote-86)

First, it must be said that it is irrelevant whether Locke and some Founding Fathers thought of IP as a natural right or not. If they did, they were just wrong.

It is clear that Jefferson did not.[[87]](#footnote-87) He was not opposed to patent and copyright, but clearly viewed them as grants of monopoly privilege, a policy tool. After all, during the drafting of the Bill of Rights, Jefferson, in a Letter to James Madison, proposed an amendment to the draft Bill of Rights to limit the terms of “monopolies” (patent and copyright) to a fixed number of years, to-wit:

Art. 9. Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding — years but for no longer term and no other purpose.[[88]](#footnote-88)

In another letter, to Isaac McPherson, he wrote:

Accordingly, it is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices.[[89]](#footnote-89)

As for Locke, he did favor copyright for authors, but only as a policy tool. He did not view IP rights as natural property rights. As Professor Tom Bell explains, Locke’s:

… labor-desert justification of property gives authors clear title to the particular tangible copy in which they fix their expression. If an author has already acquired property rights in paper and ink by dint of creating them or, more likely, consensual exchange, and then mixes those two forms of chattel property, tracing ink words on cellulose paper, then the author enjoys natural and common-law rights in the newly arranged physical property. But it remains a separate—and contestable—question whether that argument establishing rights in *atoms* also justifies giving an author property rights to a parcel in the imaginary realm of ideas. Locke himself did not try to justify intangible property. He appears, in fact, to have viewed copyright as merely a policy tool for promoting the public good. Modern commentators who would venture so far beyond the boundaries of Locke’s thought, into the abstractions of intellectual property, thus go further than Locke ever dared and further than they should in his name.…

Unlike Epstein, I find that natural property rights theory can help fully explain a broad range of human behavior and offers a useful tool for assessing the justifiability of social institutions. Like him, however, I doubt that Locke’s theory can justify copyright. To Epstein’s trenchant critiques, I add one targeted at any supposed natural property right in expressive works: copyright contradicts Locke’s own justification of property. Locke described legislation authorizing the Stationers’ Company monopoly on printing—the nearest thing to a Copyright Act in his day—as a “manifest … invasion of the trade, liberty, and property of the subject.” Today, by invoking government power a copyright holdercan impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of tangible property. Copyright law violates the very rights—the tangible property rights—that Locke set out to defend. …

As our careful review of the historical record has showed … the Founders probably did not regard copyright as a natural right.[[90]](#footnote-90)

In support of his contentions here, Bell cites Ronan Deazley, who “reads Locke’s correspondence to indicate that ‘Locke himself did not consider [that] his theory of property extended to intellectual properties such as copyrights and patents,’ and instead recognized that it could exist only [by] grace of parliamentary action.”[[91]](#footnote-91)

In sum, IP rights, especially patent and copyright, have always been viewed as mere policy tools, not as natural property rights. These laws cannot be justified by appeals to authority.

V. CONCLUSION

I may someday provide such an updated treatment, tentatively to be entitled *Copy This Book*, building on *AIP* and taking into account more recent arguments, evidence, and examples.[[92]](#footnote-92) In the meantime, those interested in reading further on this topic may find useful the additional material suggested in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.‡.

1. “Against Intellectual Property” first appeared as part of the symposium Applications of Libertarian Legal Theory, published in the Journal of Libertarian Studies, vol. 15, no. 2 (Spring 2001): 1–53; it was later published as a monograph by the Mises Institute in 2008 and again by Laissez-Faire Books in 2012 (hereinafter AIP, citing the 2008 version). The 2001 article was based on “The Legitimacy of Intellectual Property,” a paper presented at the Law and Economics panel, Austrian Scholars Conference, Ludwig von Mises Institute, Auburn, Ala., March 25, 2000. It has also been translated into various languages, including, to date, Czech, French, Georgian, German, Italian, Polish, Portuguese, Romanian, and Spanish. See www.stephankinsella.com/translations. AIP and many other works cited herein are available at www.stephankinsella.com/publications and www.c4sif.org/aip. And yes, it’s actually been 22 years, not 20. [↑](#footnote-ref-1)
2. Ayn Rand, “Patents and Copyrights,” in Capitalism: The Unknown Ideal (New York: New American Library, 1967), p. 133. The term is now life plus 70 years, thanks to the Sonny Bono Copyright Term Extension Act of 1998, aka the Mickey Mouse Protection Act (https://en.wikipedia.org/wiki/Copyright\_Term\_Extension\_Act). [↑](#footnote-ref-2)
3. As Rand wrote there:

   As an objection to the patent laws, some people cite the fact that two inventors may work independently for years on the same invention, but one will beat the other to the patent office by an hour or a day and will acquire an exclusive monopoly, while the loser’s work will then be totally wasted. This type of objection is based on the error of equating the potential with the actual. The fact that a man might have been first does not alter the fact that he wasn’t. Since the issue is one of commercial rights, the loser in a case of that kind has to accept the fact that in seeking to trade with others he must face the possibility of a competitor winning the race, which is true of all types of competition.

   As it turns out, Rand was incorrect about the US patent law she thought she was defending. At the time she wrote, under US patent law, in the case of two inventors who independently invented and filed patent applications for the same invention, the first to invent (the first to conceive of the invention) won, not the first to file. It was not until the Leahy-Smith America Invents Act, signed into law by President Obama in 2011, that the US switched to the first-to-file standard common in most other countries. See, e.g., “Leahy–Smith America Invents Act,” Wikipedia (https://en.wikipedia.org/wiki/Leahy%E2%80%93Smith\_America\_Invents\_Act); and Kinsella, “KOL164 | Obama’s Patent Reform: Improvement or Continuing Calamity?: Mises Academy (2011),” Kinsella on Liberty Podcast (Dec. 9, 2014). Rand’s argument defending what she thought was current US patent law was clearly makeweight; if she had known it was first-to-invent, she would no doubt have cobbled together some flimsy, disingenuous argument to justify that. Likewise, the patent term of 17 years is now 20 years from the date of filing, and the copyright term of life of the author plus 50 years has been extended to life of the author plus 70 years; there is little doubt she would have found a way to justify that, too. In other words, according to the US-Constitution-worshipping Rand, whatever the nearly infallible US Congress decrees just happens to mirror natural rights. Just so happens. One may recall the scene near the end of Atlas Shrugged (1957) in which Judge Narragansett had to make only a few amendments to the Constitution:

   He sat at a table, and the light of his lamp fell on the copy of an ancient document. He had marked and crossed out the contradictions in its statements that had once been the cause of its destruction. He was now adding a new clause to its pages: “Congress shall make no law abridging the freedom of production and trade….”

   Ah, that almost-perfect US Constitution! One can understand Rand’s enthusiasm for the relative superiority of the US system over the communist system of the USSR that she fled, but that doesn’t make it presumptively libertarian in absolute terms. Let’s not be naïve.

   As I point out in “Ayn Rand Finally Right about the First-to-File US Patent System,” C4SIF Blog (Sep. 9, 2011), Rand was also incorrect in stating “An idea as such cannot be protected until it has been given a material form. An invention has to be embodied in a physical model before it can be patented ….” No working model needs to be made to get a patent. For other mistakes she made about how the actual IP system works, see Kinsella, “Ayn Rand and Atlas Shrugged, Part II: Confused on Copyright and Patent,” C4SIF Blog (Oct. 21, 2012). [↑](#footnote-ref-3)
4. See “Estoppel: A New Justification for Individual Rights,” Reason Papers No. 17 (Fall 1992): 61–74; elaborated in “A Libertarian Theory of Punishment and Rights” (ch. 5). See also Kinsella, “The Genesis of Estoppel: My Libertarian Rights Theory,” StephanKinsella.com (Mar. 22, 2016). [↑](#footnote-ref-4)
5. I started practicing law in 1992, initially specializing in oil & gas law and started transitioning to patent law in 1993, taking and passing the US Patent Bar Exam in 1994. See “On the Logic of Libertarianism and Why Intellectual Property Doesn’t Exist” (ch. 24); also Kinsella, “The Start of my Legal Career: Past, Present and Future: Survival Stories of Lawyers,” KinsellaLaw.com (Dec. 6, 2010) and www.stephankinsella.com/about. I became interested in libertarianism in 10th grade, around 1980, after reading Ayn Rand’s The Fountainhead. See “How I Became a Libertarian” (ch. 1); Kinsella, “Faculty Spotlight Interview: Stephan Kinsella,” Mises Economics Blog (Feb. 11, 2011); idem, “What Sparked Your Interest in Liberty?”, FEE.org (April 21, 2016); and other biographical pieces at www.stephankinsella.com/publications/#biographical. [↑](#footnote-ref-5)
6. See also the discussion in “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17) of how both J. Neil Schulman and I tried to find arguments to justify IP, given our dissatisfaction with previous attempts. [↑](#footnote-ref-6)
7. Some of the works that influenced me and helped me change my mind on IP include 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 and 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; Wendy McElroy, “Contra Copyright,” The Voluntaryist (June 1985), included in idem, “Contra Copyright, Again,” Libertarian Papers 3, art. no. 12 (2011; http://libertarianpapers.org/12-contra-copyright); Boudewijn Bouckaert, “What is Property?”, Harv. J. L. & Pub. Pol’y 13, no. 3 (Summer 1990): 775–816; and idem, “From Property Rights to Property Order,” Encyclopedia of Law and Economics (Springer, forthcoming 2023). Some of these, and others, are included in Kinsella, ed., The Anti-IP Reader: Free Market Critiques of Intellectual Property (Papinian Press, 2023). [↑](#footnote-ref-7)
8. See Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010 [1989], www.hanshoppe.com/tsc); also idem, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” in The Great Fiction: Property, Economy, Society, and the Politics of Decline (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf). [↑](#footnote-ref-8)
9. See Kinsella, “The Origins of Libertarian IP Abolitionism,” Mises Economics Blog (April 1, 2011) and idem, “The Four Historical Phases of IP Abolitionism,” C4SIF Blog (April 13, 2011). On Benjamin Tucker, see also Wendy McElroy, “Intellectual Property,” in The Debates of Liberty: An Overview of Individualist Anarchism, 1881–1908 (Lexington Books, 2002; https://perma.cc/ZQM2-82B9), reprinted without endnotes as “Copyright and Patent in Benjamin Tucker’s Periodical,” Mises Daily (July 28, 2010; https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical); See also Kinsella, “Benjamin Tucker and the Great Nineteenth Century IP Debates in Liberty Magazine,” StephanKinsella.com (July 11, 2022). See also the writings by these and others in Kinsella, ed., “The Anti-IP Reader.” [↑](#footnote-ref-9)
10. See, e.g., Kinsella, “Letter on Intellectual Property Rights,” IOS J. 5, no. 2 (June 1995), pp. 12–13 (see references in idem, “Letter on Intellectual Property Rights,” IOS Journal (June 1995),” C4SIF Blog (Aug. 31, 2022)); and idem, “Is Intellectual Property Legitimate?”, Pennsylvania Bar Association Intellectual Property Newsletter 1 (Winter 1998): 3, republished in the Federalist Society’s Intellectual Property Practice Group Newsletter, 3, no. 3 (Winter 2000); available at www.stephankinsella.com/publications/#againstip. [↑](#footnote-ref-10)
11. See, e.g., various chapters in this book. [↑](#footnote-ref-11)
12. My article “In Defense of Napster and Against the Second Homesteading Rule,” LewRockwell.com (September 4, 2000), presented a summary version of the argument also made around the same time in the original version of AIP. “Law and Intellectual Property in a Stateless Society” (ch. 14) restates the basic case against IP; a more concise version may be found in Kinsella, “Intellectual Property and Libertarianism,” Mises Daily (Nov. 17, 2009).

    For more extensive criticism of trademark law, see Kinsella, “Defamation Law and Reputation Rights as a Type of Intellectual Property,” in Elvira Nica & Gheorghe H. Popescu, eds., A Passion for Justice: Essays in Honor of Walter Block (New York: Addleton Academic Publishers, forthcoming). [↑](#footnote-ref-12)
13. https://perma.cc/E33D-JST6. [↑](#footnote-ref-13)
14. In fact, one of my earliest publications on IP concerned one of the first streaming-music services, which was killed by the copyright industry. See Kinsella, “In Defense of Napster and Against the Second Homesteading Rule.” Napster “originally launched on June 1, 1999, as a pioneering peer-to-peer (P2P) file sharing software service with an emphasis on digital audio file distribution.… As the software became popular, the company ran into legal difficulties over copyright infringement. It ceased operations in 2001 after losing a wave of lawsuits and filed for bankruptcy in June 2002.” “Napster,” Wikipedia (retrieved May 11, 2022; https://en.wikipedia.org/wiki/Napster). [↑](#footnote-ref-14)
15. See, e.g., Kinsella, “The Patent, Copyright, Trademark, and Trade Secret Horror Files,” StephanKinsella.com (Feb. 3, 2010); idem, “KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished,” Kinsella on Liberty Podcast (Nov. 24, 2021); and idem, “First Amendment Defense Act of 2021,” C4SIF Blog (Jan. 17, 2021). See also idem, “We are all copyright criminals: John Tehranian’s ‘Infringement Nation,’” Mises Economics Blog (Aug. 22, 2011); idem, “The tepid mainstream ‘defenses’ of Aaron Swartz,” C4SIF Blog (Jan. 29, 2013); and idem, “Tim Lee and Lawrence Lessig: ‘some punishment’ of Swartz was ‘appropriate,’” C4SIF Blog (Jan. 13, 2013). [↑](#footnote-ref-15)
16. Siva Vaidhyanathan, Intellectual Property: A Very Short Introduction (Oxford University Press, 2017), at xviii–xx. 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. 288 (citations omitted):

    In the centuries since our founding, the concept of property has changed dramatically in the United States. One repeatedly mentioned change is the trend towards treating new things as property, such as job security and income from social programs. A less frequently discussed trend is that historically recognized but nonetheless atypical forms of property, such as intellectual property, are becoming increasingly important relative to the old paradigms of property, such as farms, factories, and furnishings. As our attention continues to shift from tangible to intangible forms of property, we can expect a growing jurisprudence of intellectual property.

    And: Ejan Mackaay, “Economic Incentives in Markets for Information and Innovation,” Harv. J. L. & Pub. Pol’y 13, no. 3 (Summer 1990): 867–910, p. 868 (citation omitted):

    Recent advances in reprography and computer technology have once more brought the issue of the theoretical status of intellectual rights into question. These advances greatly facilitate and reduce the cost of copying information from one medium to another. Information has become less dependent on the vehicle through which it is conveyed; it has become “purer.” [↑](#footnote-ref-16)
17. Declan McCullagh, “Foreword,” in Adams Thierer & Wayne Crews, Jr., eds., Copy Fights: The Future of Intellectual Property in the Information Age (Cato, 2002), p. xi. [↑](#footnote-ref-17)
18. See Kinsella, “The Mountain of IP Legislation,” C4SIF Blog (Nov. 24, 2010); Mike Masnick, “How Much Is Enough? We’ve Passed 15 ‘Anti-Piracy’ Laws In The Last 30 Years,” Techdirt (Feb. 15, 2012; https://perma.cc/TG7U-768F); and Timothy B. Lee, “Copyright enforcement and the Internet: we just haven’t tried hard enough?”, ars technica (Feb. 16, 2012; https://perma.cc/75P9-KM7E). [↑](#footnote-ref-18)
19. See, e.g., the following posts from the C4SIF Blog: “Intellectual Property Imperialism” (Oct. 24, 2010); “Covid-19 Relief Bill Adds Criminal Copyright Streaming Penalties and IP Imperialism” (Dec. 22, 2020); “Intellectual Property Rights: A Critical History and US IP Imperialism” (Dec. 31, 2014); “Blowback from IP Imperialism: Chinese Companies Again Using Patents To Punish Foreign Competitors” (July 14, 2012); “‘Free-trade’ pacts export U.S. copyright controls” (Oct. 17, 2011); “China and Intellectual Property” (Dec. 27, 2010); “Wikileaks cables reveal that the US wrote Spain’s proposed copyright laws” (Dec. 3, 2010); and other posts at www.c4sif.org/tag/ip-imperialism. See also Michael Geist, “U.S. Copyright Lobby Takes Aim at Canadian Copyright Term Through Trans-Pacific Partnership,” MichaelGeist.com (Aug. 7, 2013; https://perma.cc/9NW4-EMAN); idem, “Japan Considering Copyright Term Extension, Canada Next?,” MichaelGeist.com (July 15, 2013; https://perma.cc/G4R8-SDEF); idem, “The Canadian Government Makes its Choice: Implementation of Copyright Term Extension Without Mitigating Against the Harms,” MichaelGeist.com (April 27, 2022; https://perma.cc/3DER-JUK2); Declan McCullagh, “Free-trade pacts export U.S. copyright controls,” CNET (Oct. 14, 2011; https://perma.cc/7LJE-PG4J). [↑](#footnote-ref-19)
20. See, e.g., Kinsella, “SOPA is the Symptom, Copyright is the Disease: The SOPA wakeup call to ABOLISH COPYRIGHT,” The Libertarian Standard (Jan. 24, 2012). See also idem, “Where does IP Rank Among the Worst State Laws?”, C4SIF Blog (Jan. 20, 2012); idem, “Masnick on the Horrible PROTECT IP Act: The Coming IPolice State,” C4SIF Blog (June 2, 2012); idem, “Copyright and the End of Internet Freedom,” C4SIF Blog (May 10, 2011); and idem, “Patent vs. Copyright: Which is Worse?”, C4SIF Blog (Nov. 5, 2011). [↑](#footnote-ref-20)
21. See Kinsella, “The Death Throes of Pro-IP Libertarianism,” Mises Daily (July 28, 2010); idem, “‘We, The Web Kids’: Manifesto For An Anti-ACTA Generation,” C4SIF Blog (March 3, 2012). Even many Randians are now anti-IP. See, e.g., idem, “An Objectivist Recants on IP,” C4SIF Blog (Dec. 4, 2009); idem, “Yet another Randian recants on IP,” C4SIF Blog (Feb. 1, 2012); Timothy Sandefur, “A Critique of Ayn Rand’s Theory of Intellectual Property Rights,” J. Ayn Rand Stud. 9, no. 1 (Fall 2007; https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1117269): 139–61. But see Kinsella, “Does Cato’s New Objectivist CEO John Allison Presage Retrogression on IP?”, C4SIF Blog (Aug. 27, 2012). [↑](#footnote-ref-21)
22. See, for example, Butler Shaffer, A Libertarian Critique of Intellectual Property (Auburn, Ala.: Mises Institute, 2013; https://mises.org/library/libertarian-critique-intellectual-property); Jacob Huebert, “The Fight against Intellectual Property,” in Libertarianism Today (Santa Barbara, CA: Praeger, 2010; https://mises.org/library/fight-against-intellectual-property); Walter Block, “The Intellectual-Property Denier,” in Defending the Undefendable II: Freedom in All Realms (UK and USA: Terra Libertas Publishing House, 2013; reprint edition Auburn, Ala.: Mises Institute, 2018; https://mises.org/library/defending-undefendable-2); Jeffrey A. Tucker, “Ideas, Free and Unfree,” and other chapters in the “Can Ideas Be Owned?” section of idem, It’s a Jetsons World: Private Miracles & Public Crimes (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/its-jetsons-world-private-miracles-and-public-crimes) (chaps. 37–41); idem, several chapters in the “Technology” section of idem, Bourbon for Breakfast: Living Outside the Statist Quo (Auburn, Ala.: Mises Institute, 2010; https://mises.org/library/bourbon-breakfast); Adam Kokesh, “Intellectual Property,” in Freedom! (2014; https://archive.org/details/FREEDOMEbook), §VI; Sandefur, “A Critique of Ayn Rand’s Theory of Intellectual Property Rights”; Chase Rachels, “Property,” in A Spontaneous Order: The Capitalist Case For A Stateless Society (2015; https://archive.org/details/ASpontaneousOrder0), section “Intellectual Property”; Vin Armani, “The Ownable and the Unownable,” in Self Ownership: The Foundation of Property and Morality (2017); Tom W. Bell, “Copyright, Philosophically,” in Intellectual Privilege: Copyright, Common Law, and the Common Good (Arlington, Virginia: Mercatus Center, 2014; https://perma.cc/JLC2-396Y); Jerry Brito, ed., Copyright Unbalanced: From Incentive to Excess (Arlington, Va.: Mercatus Center, 2013); Jack Lloyd, “Property Rights,” in The Definitive Guide to Libertarian Voluntaryism (2022); Isaac Morehouse, “How I Changed My Mind on Intellectual Property,” FEE.org (Sept. 27, 2016; https://perma.cc/324H-TPRY), also in Keith Knight, ed., The Voluntaryist Handbook: A Collection of Essays, Excerpts, and Quotes (2022; https://perma.cc/N8UX-4PX4). See also various resources collected at www.c4sif.org/resources and Kinsella, ed., “The Anti-IP Reader.” [↑](#footnote-ref-22)
23. Michele Boldrin & David K. Levine, Against Intellectual Monopoly (Cambridge University Press, 2008; https://tinyurl.com/bdkn5885). See also Kinsella, “The Overwhelming Empirical Case Against Patent and Copyright,” C4SIF Blog (Oct. 23, 2012); idem, “Legal Scholars: Thumbs Down on Patent and Copyright,” C4SIF Blog (Oct. 23, 2012); and idem, “Yet Another Study Finds Patents Do Not Encourage Innovation,” Mises Economics Blog (July 2, 2009). [↑](#footnote-ref-23)
24. See Kinsella, “KOL308 | Stossel: It’s My Idea (2015),” Kinsella on Liberty Podcast (Dec. 29, 2020) and idem, “KOL364 | Soho Forum Debate vs. Richard Epstein”; and dozens of speeches and appearances on radio shows and podcasts, collected on the Kinsella on Liberty podcast feed at www.stephankinsella.com/kinsella-on-liberty-podcast. [↑](#footnote-ref-24)
25. See Kinsella, “KOL172 | “Rethinking Intellectual Property: History, Theory, and Economics: Lecture 1: History and Law” (Mises Academy, 2011),” Kinsella on Liberty Podcast (Feb. 14, 2015). [↑](#footnote-ref-25)
26. See, e.g., Kinsella, “A Selection of My Best Articles and Speeches on IP,” C4SIF Blog (Nov. 30, 2015), idem, You Can’t Own Ideas: Essays on Intellectual Property (Houston, Texas: Papinian Press, 2023; www.stephankinsella.com/own-ideas), and other material at www.stephankinsella.com/publications and www.c4sif.org/aip. [↑](#footnote-ref-26)
27. See Kinsella, “Gary North on the 3D Printing Threat to Patent Law,” C4SIF Blog (Jan. 31, 2022), and links and references therein. [↑](#footnote-ref-27)
28. See Kinsella, “There are No Good Arguments for Intellectual Property,” Mises Economics Blog (Feb. 24, 2009); idem, “Absurd Arguments for IP,” C4SIF Blog (Sep. 19, 2011); idem, “KOL367 | Disenthrall with Patrick Smith: Fisking Strangerous Thoughts’ Critique of ‘Intellectual Communism,’” Kinsella on Liberty Podcast (Dec. 20, 2021); idem, “KOL076 | IP Debate with Chris LeRoux,” Kinsella on Liberty Podcast (Aug. 30, 2013). [↑](#footnote-ref-28)
29. See Kinsella, “On Conflictability and Conflictable Resources,” StephanKinsella.com (Jan. 31, 2022). [↑](#footnote-ref-29)
30. In AIP I sometimes used the term “tangible” to indicate scarce resources that can be subject to property rights. (I’ve also sometimes used the term corporeal, a civil-law term.) Hardy Bouillon argues that it might be more precise to focus on the difference between material vs. non-material goods, rather than tangible vs. non-tangible goods, as the touchstone of things subject to property rights. As Bouillon writes:

    Though some speak exclusively of tangible and non-tangible goods, I prefer to talk of material and immaterial goods.… The point about material goods is not that they are tangible, for some are not. For instance, atoms and many other small material units are not tangible; they are identifiable only indirectly, though this does not prevent us from calling them material.

    Hardy Bouillon, “A Note on Intellectual Property and Externalities,” Mises Daily (Oct. 27, 2009), previously published in Jörg Guido Hülsmann & Stephan Kinsella, eds., Property, Freedom and Society: Essays in Honor of Hans-Hermann Hoppe (Auburn, Ala.: Mises Institute, 2009). I see some merit in his argument, though as noted above I think the essence of what makes some thing a possible subject of property rights is whether it is conflictable or not. [↑](#footnote-ref-30)
31. See “What Libertarianism Is” (ch. 2), n.5; also Kinsella, “Property: Libertarian Answer Man: Self-ownership for slaves and Crusoe; and Yiannopoulos on Accurate Analysis and the term ‘Property,’” StephanKinsella.com (April 3, 2021). [↑](#footnote-ref-31)
32. As I did in a later article based on AIP, “The Case Against Intellectual Property,” in Handbook of the Philosophical Foundations of Business Ethics, Prof. Dr. Christoph Lütge, ed. (Springer, 2013) (chapter 68, in Part 18, “Property Rights: Material and Intellectual,” Robert McGee, section ed.). [↑](#footnote-ref-32)
33. See, generally, Kinsella, “A Selection of My Best Articles and Speeches on IP.” [↑](#footnote-ref-33)
34. “Law and Intellectual Property in a Stateless Society” (ch. 14) restates the basic case against IP and incorporates some new arguments developed after AIP. [↑](#footnote-ref-34)
35. See AIP, n.41; also Murray N. Rothbard, “Toward a Reconstruction of Utility and Welfare Economics,” in Economic Controversies (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/economic-controversies). For a recent article debunking David Friedman’s scientistic and confused contention that “Von Neumann proved” that utility can be measured or expressed cardinally, see Robert P. Murphy, “Why Austrians Stress Ordinal Utility,” Mises Wire (Feb. 3, 2022; https://mises.org/wire/why-austrians-stress-ordinal-utility). [↑](#footnote-ref-35)
36. See Kinsella, “There’s No Such Thing as a Free Patent,” Mises Daily (Mar. 7, 2005); Palmer, “Are Patents and Copyrights Morally Justified?”, pp. 849–50 (emphasis added):

    [U]tilitarian arguments of a certain class can cut for or against intellectual property rights claims. As dealt with in much of the economics literature, for example, the utility gains from increased incentives for innovation must be weighed against the utility losses incurred from monopolization of innovations and their diminished diffusion. Some have argued that the first part of the comparison may be either negative or positive; patents or copyrights may actually decrease innovation, rather than increase it.

    As Matt Ridley writes:

    A further problem is that patents undoubtedly raise the costs of goods. That is the point: to keep competition at bay while the innovator reaps a reward. This slows the development and spread of the innovation. As the economist Joan Robinson put it: “The justification of the patent system is that by slowing down the diffusion of technical progress it ensures that there will be more progress to diffuse.” But this does not necessarily happen. Indeed, history is replete with examples of bursts of innovation that follow the ending of a patent.

    Matt Ridley, How Innovation Works: And Why It Flourishes in Freedom (Harper, 2020), p. 347. The Robinson quote is from Joan Robinson, The Accumulation of Capital, 3d ed. (Palgrave Macmillan, 2013 [1969]), p. 87. This quote is paraphrased (with approval) by free-market economist William Shughart. See William F. Shughart II, “Ideas Need Protection: Abolishing Intellectual-property Patents Would Hurt Innovation: A Middle Ground Is Needed,” Baltimore Sun (December 21, 2009); Kinsella, “Independent Institute on The ‘Benefits’ of Intellectual Property Protection,” C4SIF Blog (Feb. 15, 2016). [↑](#footnote-ref-36)
37. See Boldrin & Levine, Against Intellectual Monopoly; Kinsella, “The Overwhelming Empirical Case Against Patent and Copyright”; idem, “Legal Scholars: Thumbs Down on Patent and Copyright.”; idem, “Tabarrok, Cowen, and Douglass North on Patents,” C4SIF Blog (March 11, 2021). [↑](#footnote-ref-37)
38. “Law and Intellectual Property in a Stateless Society” (ch. 14), text at n.76. [↑](#footnote-ref-38)
39. See also Part IV.F, below. [↑](#footnote-ref-39)
40. Servitude is the civil law term; easement the common law term. See Gregory W. Rome & Stephan Kinsella, Louisiana Civil Law Dictionary (New Orleans, La.: Quid Pro Books, 2011). These rights are also “nonapparent.” See Kinsella, “Intellectual Property Rights as Negative Servitudes,” C4SIF Blog (June 23, 2011). IP rights can also be classified legally as incorporeal movables, although this classification has no relevance here. See Louisiana Civil Code (https://www.legis.la.gov/legis/Laws\_Toc.aspx?folder=67&level=Parent), arts. 461, 462, 475; Kinsella, “Are Ideas Movable or Immovable?”, C4SIF Blog (April 8, 2013). See also related discussion in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), n.39 and references and quotes in “What Libertarianism Is” (ch. 2), n.5, related to the nature of “things” in the civil law. [↑](#footnote-ref-40)
41. Kinsella, “Intellectual Property Rights as Negative Servitudes.” [↑](#footnote-ref-41)
42. See also Part IV.G, below, and “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11). [↑](#footnote-ref-42)
43. For more on this, see the various discussions of what it means to have a “fight over religion,” in “On the Logic of Libertarianism and Why Intellectual Property Doesn’t Exist” (ch. 24); also Kinsella, “The Limits of Libertarianism?: A Dissenting View,” StephanKinsella.com (April 20, 2014); and the comments in the transcripts to these episodes of the Kinsella on Liberty Podcast: “KOL337 | Join the Wasabikas Ep. 15.0: You Don’t Own Bitcoin—Property Rights, Praxeology and the Foundations of Private Law, with Max Hillebrand” (May 23, 2021); “KOL154 | ‘The Social Theory of Hoppe: Lecture 2: Types of Socialism and the Origin of the State’” (Oct. 16, 2014); “KOL076 | IP Debate with Chris LeRoux” (Aug. 30, 2013); and “KOL038 | Debate with Robert Wenzel on Intellectual Property” (April 1, 2013). [↑](#footnote-ref-43)
44. See Murray N. Rothbard, “‘Human Rights’ as Property Rights,” in The Ethicsof Liberty (New York: New York University Press, 1998; https://mises.org/library/human-rights-property-rights). [↑](#footnote-ref-44)
45. See Hoppe, A Theory of Socialism and Capitalism, chaps. 1–2 & 7. [↑](#footnote-ref-45)
46. See AIP, the section “IP Rights and Relation to Tangible Property,” p. 15. Rothbard recognizes this in a limited way when he writes: “[P]atents actually invade the property rights of those independent discoverers of an idea or invention who made the discovery after the patentee. Patents, therefore, invade rather than defend property rights.” Murray N. Rothbard, Man, Economy, and State, with Power and Market, Scholar’s ed., 2d ed. (Auburn, Ala.: Mises Institute, 2009; https://mises.org/library/man-economy-and-state-power-and-market), chap. 10, §7, p. 749. Yet patents invade not only the rights of those who independently discover the same invention; they also invade the rights of competitors and copiers who have every right to use publicly available information to guide their actions and to manipulate their own resources. And as noted in “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.C, and Kinsella, AIP, the section “Contract vs. Reserved Rights,” Rothbard does not really oppose patents. He defends what he erroneously calls copyright or “common law copyright,” with a flawed contract-based argument that contradicts his own contract theory and his criticism of defamation law (another type of IP; see Kinsella, “Defamation Law and Reputation Rights as a Type of Intellectual Property”). But the copyright Rothbard advocates is not like current, legislated copyright, and it also includes inventions, like Brown’s mousetrap (which is the domain of patent law). (For Rothbard’s mousetrap example, see Murray N. Rothbard, “Knowledge, True and False,” in The Ethics of Liberty (New York: New York University Press, 1998; https://mises.org/library/knowledge-true-and-false), p. 123.) So what he really advocates is a contractual version of patent law (and presumably copyright law, if his argument extends not only to inventions but also to artistic works and things like books). And his contract-based IP/copyright idea is not “common law copyright”; that was doctrine in the common law that was similar to trade secrets and had nothing to do with this contractual IP argument Rothbard is making, or to actual copyright that was not at all rooted in contract. See Wikipedia, https://en.wikipedia.org/wiki/Common\_law\_copyright. Writes Rothbard: “Violation of (common law) copyright is an equivalent violation of contract and theft of property.” Ibid. I criticize this view in AIP, the section “Contract vs. Reserved Rights.” His reasoning here also makes some of the same mistakes as his view of “implicit theft” that I criticize in “A Libertarian Theory of Contract” (ch. 9), Part III.D. [↑](#footnote-ref-46)
47. For further discussion of the principles of original appropriation, contractual title transfer, and the relation principle of transfer for purposes of rectification, see “What Libertarianism Is” (ch. 2), n.11 and accompanying text et pass. [↑](#footnote-ref-47)
48. AIP, text at n.94; and Roderick T. Long, “The Libertarian Case Against Intellectual Property Rights,” Formulations (Autumn 1995):

    It may be objected that the person who originated the information deserves ownership rights over it. But information is not a concrete thing an individual can control; it is a universal, existing in other people’s minds and other people’s property, and over these the originator has no legitimate sovereignty. You cannot own information without owning other people.

    (Emphasis added) See also note 65, below, and Roderick T. Long, “Owning Ideas Means Owning People,” Cato Unbound (Nov. 19, 2008; https://www.cato-unbound.org/2008/11/19/roderick-t-long/owning-ideas-means-owning-people); Palmer, “Intellectual Property:   
    A Non-Posnerian Law and Economics Approach,” p. 281 and idem, “Are Patents and Copyrights Morally Justified?”, pp. 830–31, 862, 863, 865. See also John M. Kraft & Robert Hovden, “Natural Rights, Scarcity & Intellectual Property,” N.Y.U. J. L. & Liberty 7, no. 2 (2013; https://perma.cc/HLW8-YNVQ): 464–96, p. 480: “What is clear is that the observance of such “rights” does interrupt and infringe on others’ natural right to self-ownership” (citing Palmer, “Are Patents and Copyrights Morally Justified?”, pp. 834, 862); also Wojciech Gamrot, “The type individuation problem,” Studia Philosophica Wratislaviensia 16, no. 4 (2021; https://wuwr.pl/spwr/article/view/13718): 47–64, p. 49 (“IP rights are about the control of matter” (emphasis  
    added), citing Hughes, “The Philosophy of Intellectual Property,” pp. 330–50; Hugh Breakey, “Natural intellectual property rights and the public domain,” Modern L. Rev. 73 (2010; https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2856883): 208–39; and Radu Uszkai, “Are Copyrights Compatible with Human Rights?,” Romanian J. AnalyticPhil. 8 (2014; https://philarchive.org/rec/USZACC): 5–20)). See also Bell, writing:

    By invoking state power, a copyright or patent owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of tangible property. Because it thus gags our voices, ties our hands, and demolishes our presses, the law of copyrights and patents violates the very rights Locke defended.

    Tom W. Bell, “Indelicate Imbalancing in Copyright and Patent Law,” in Thierer & Crews, Jr., eds., Copy Fights (https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=984085), p. 4 (citations omitted, emphasis added). [↑](#footnote-ref-48)
49. See also the discussion of “rearrangement” in Part IV.F, below, and also Part III.B, “Libertarian Creationism,” in “Law and Intellectual Property in a Stateless Society” (ch. 14). [↑](#footnote-ref-49)
50. For more on this concept, see Kinsella, “Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and ‘Rearranging’,” C4SIF Blog (Sep. 29, 2010); also Kinsella, “KOL037 | Locke’s Big Mistake: How the Labor Theory of Property Ruined Political Theory,” Kinsella on Liberty Podcast (March 28, 2013). [↑](#footnote-ref-50)
51. See also the section “Creation of Wealth versus Creation of Property” in Kinsella, “Intellectual Freedom and Learning Versus Patent and Copyright,” Economic Notes No. 113 (Libertarian Alliance, Jan. 18, 2011) (also published as “Intellectual Freedom and Learning Versus Patent and Copyright,” The Libertarian Standard (Jan. 19, 2011)); “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.B; and Kinsella, “KOL012 | ‘The Intellectual Property Quagmire, or, The Perils of Libertarian Creationism,’ Austrian Scholars Conference 2008,” Kinsella on Liberty Podcast (Feb. 6, 2013). And see Gary Chartier, Anarchy and Legal Order: Law and Politics for a Stateless Society (Cambridge University Press, 2013), at 78 (“the ability to control a possession means that one can transform it as needed in a way that may enhance its value either to the possessor, to others, or to both”; emphasis added); and Israel M. Kirzner, “Producer, Entrepreneur, and the Right to Property,” Reason Papers No. 1 (Fall 1974; https://reasonpapers.com/archives): 1–17, p. 1 (“Precision in applying the term ‘what a man has produced’ seems to be of considerable importance.”). See also Uszkai, “Are Copyrights Compatible with Human Rights?,” p. 13, discussing my argument in AIP that creation:

    … is neither necessary nor sufficient to establish ownership. The focus on creation distracts from the crucial role of first occupation as a property rule for addressing the fundamental fact of scarcity. First occupation, not creation or labor, is both necessary and sufficient for the homesteading of unowned scarce resources. [↑](#footnote-ref-51)
52. “How We Come to Own Ourselves” (ch. 4). [↑](#footnote-ref-52)
53. See note 47, above. [↑](#footnote-ref-53)
54. See references in Part IV.D, below. See also International News Service v. Associated Press, 248 U.S. 215 (1918; https://supreme.justia.com/cases/federal/us/248/215/), where the Supreme Court recognized a quasi-property right in the fruits of one’s labor, what is sometimes called the “sweat of the brow” doctrine (a doctrine later rejected in the copyright context in Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991; https://supreme.justia.com/cases/federal/us/499/340/)). [↑](#footnote-ref-54)
55. See Hoppe, A Theory of Socialism and Capitalism, chaps. 1–2 & 7. [↑](#footnote-ref-55)
56. As J.P. Day, in a critique of Locke’s homesteading argument, correctly observes:

    [O]ne cannot talk significantly of owning labour1. For labour1, or labouring, is an activity, and although activities can be engaged in, performed or done, they cannot be owned.

    J.P. Day, “Locke on Property,” Philosophical Quarterly 16 (1966): 207–220, p. 212 (also reprinted in Gordon J. Schochet, ed. Life, Liberty, And Property: Essays on Locke’s Political Ideas (Belmont, California: Wadsworth Publishing Company, 1971), p. 113). By “labour1,” Day is referring to the activity or action of working or labouring, as opposed to a task (labour2), an achievement (labour3), force times distance (labour4), or workers themselves (labour5) (see the Appendix, p. 220). Day’s comments are briefly discussed in Kirzner, “Producer, Entrepreneur, and the Right to Property,” p. 6. See also Kinsella, “Cordato and Kirzner on Intellectual Property,” C4SIF Blog (April 21, 2011). See also the Hume quote in the following note.

    In Kirzner’s words, Day summarizes Locke’s theory of property argument thusly: “(1) Every man has a (moral) right to own his person; therefore (2) every man has a (moral) right to own the labor of his person; therefore (3) every man has a (moral) right to own that which he has mixed the labor of his person with.” Kirzner, op. cit., p. 5, citing Day, op. cit., p. 208 (and p. 109 of the Schochet book). [↑](#footnote-ref-56)
57. See Kinsella, “Locke, Smith, Marx; the Labor Theory of Property and the Labor Theory of Value; and Rothbard, Gordon, and Intellectual Property,” StephanKinsella.com (June 23, 2010); idem, “KOL 037 | Locke’s Big Mistake: How the Labor Theory of Property Ruined Political Theory,” Kinsella on Liberty Podcast (March 28, 2013); and idem, “Cordato and Kirzner on Intellectual Property.” As Hume observes, “We cannot be said to join our labour to any thing but in a figurative sense.” David Hume, A Treatise of Human Nature, Selby-Bigge, ed. (Oxford, 1968), Book III, Part II, Section III, n.16; discussed in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.81. On the perils of metaphors see also note 83, below. See also Dan Sanchez, “The Fruit of Your Labor … is a good, not its form,” Medium (Oct. 30, 2014; https://perma.cc/GD28-JS44). [↑](#footnote-ref-57)
58. For elaboration, see Kinsella, “Intellectual Freedom and Learning Versus Patent and Copyright”; also idem, “The Death Throes of Pro-IP Libertarianism” and “Intellectual Property and the Structure of Human Action,” Mises Economics Blog (Jan. 6, 2010). I also discuss these issues in “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.D and in “Goods, Scarce and Nonscarce” (ch. 18), n.28.

    As Hoppe explains, Carl Menger pointed out four requirements for objects to become goods:

    The first is the existence of a human need. The second requirement is such properties as render the thing capable of being brought into a causal connection with a satisfaction of this need. That is, this object must be capable, through our performing certain manipulations with it, to cause certain needs to be satisfied or at least relieved. The third condition is that there must be human knowledge about this connection, which explains, of course, why it is important for people to learn to distinguish between goods and bads. Thus, we have human knowledge about the object, our ability to control it, and the causal power of this object to lead to certain types of satisfactory results. And the fourth factor is, as I already indicated, that we must have command of the thing sufficient to direct it to the satisfaction of the need.

    Hans-Hermann Hoppe, Economy, Society, and History (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/esh), p. 9; see also Carl Menger, Principles of Economics (Auburn, Ala.: Mises Institute, 2007 [1871]; https://mises.org/library/principles-economics), chap. I, §1, p. 52 et pass. The second requirement corresponds to the means being causally efficacious; the third to the actor’s knowledge of causal laws; and the fourth to the availability of the means. See also related discussion in “Goods, Scarce and Nonscarce” (ch. 18), n.28, and in Eugen von Böhm-Bawerk, “Whether Legal Rights and Relationships Are Economic Goods,” George D. Huncke, trans., in Eugen von Böhm-Bawerk, Shorter Classics of Eugen von Böhm-Bawerk  
    (South Holland, Ill.: Libertarian Press, 1962 [1881]), p. 57 et pass., discussed in Gael J. Campan, “Does Justice Qualify as an Economic Good?: A Böhm-Bawerkian Perspective,” Q. J. Austrian Econ. 2, no. 1 (Spring 1999; https://perma.cc/G3CK-B8WB): 21–33, p. 24. [↑](#footnote-ref-58)
59. For elaboration, see Kinsella, “Hayek’s Views on Intellectual Property,” C4SIF Blog (Aug. 2, 2013) and “Intellectual Property and the Structure of Human Action,” discussing Hayek’s comments about how the accumulation of a “fund of experience” helps aid human progress and the creation of wealth. See also Kinsella, “Tucker, ‘Knowledge Is as Valuable as Physical Capital,’” C4SIF Blog (March 27, 2017) and George Reisman, “Progress In a Free Economy,” The Freeman (July 1, 1980; https://perma.cc/2HW6-JJ8J). See also Julio H. Cole, “Patents and Copyrights: Do the Benefits Exceed the Costs?”, J. Libertarian Stud. 15, no. 4 (Fall 2001; https://mises.org/library/patents-and-copyrights-do-benefits-exceed-costs-0): 79–105, p. 84 et seq., discussing the importance of technical progress (not to be confused with patents) to economic growth. Cole cites several studies in n.12. [↑](#footnote-ref-59)
60. Kinsella, “The Death Throes of Pro-IP Libertarianism.” [↑](#footnote-ref-60)
61. See also Part IV.B, above. [↑](#footnote-ref-61)
62. To be even more precise, I would say that a property right is not a right to use a resource, but a right to exclude others from using a resource. In practical terms this gives the owner the ability to use it as he sees fit so long as he is not using trespassing on others’ property rights. This follows from the analysis in Kinsella, “The Non-Aggression Principle as a Limit on Action, Not on Property Rights,” StephanKinsella.com (Jan. 22, 2010) and idem, “IP and Aggression as Limits on Property Rights: How They Differ,” StephanKinsella.com (Jan. 22, 2010). However, this nuance need not concern us here. See also “What Libertarianism Is” (ch. 2), p. 32; George Mavrodes, “Property,” in Samuel L. Blumenfeld, Property in a Humane Economy (LaSalle, Ill.: Open Court, 1974; https://mises.org/library/propertyhumane-economy), p. 184; “A Libertarian Theory of Contract” (ch. 9), n.1; Connell v. Sears, Roebuck Co., 722 F.2d 1542, 1547 (Fed. Cir. 1983; https://casetext.com/case/connell-v-sears-roebuck-co) (“the right to exclude recognized in a patent is but the essence of the concept of property”), citing Schenck v. Nortron Corp., 713 F.2d 782 (Fed. Cir. 1983; https://casetext.com/case/carl-schenck-ag-v-nortron-corp). Further, property rights are rights as between human actors, but with respect to particular resources. See “A Libertarian Theory of Contract” (ch. 9), n.1. [↑](#footnote-ref-62)
63. J. Neil Schulman argued for years for a form of IP known as “logorights.” Oddly, perhaps partially in response to my relentless criticism of his flawed argument, he eventually changed his argument to argue for “media-carried property,” thus implicitly acknowledging that he was in favor of property rights in characteristics, or features, of owned objects, i.e., universals. See “Introduction to Origitent” (ch. 16) and “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17). [↑](#footnote-ref-63)
64. Even the pro-IP Ayn Rand implicitly acknowledged this. As she wrote:

    The power to rearrange the combinations of natural elements is the only creative power man possesses. It is an enormous and glorious power—and it is the only meaning of the concept “creative.” “Creation” does not (and metaphysically cannot) mean the power to bring something into existence out of nothing. “Creation” means the power to bring into existence an arrangement (or combination or integration) of natural elements that had not existed before.

    See Kinsella, “Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and ‘Rearranging,’” quoting Ayn Rand, “The Metaphysical and the Man-Made,” in Philosophy: Who Needs It (New American Library, 1984), p. 25. See similar quotes by Rothbard, J.S. Mill, and Mises in ibid; and Reisman, “Progress In a Free Economy.”

    Neil Schulman and I bat these ideas around in “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17). [↑](#footnote-ref-64)
65. Long, “The Libertarian Case Against Intellectual Property Rights” (emphasis added). See also idem, “Owning Ideas Means Owning People” and idem, “Bye-Bye for IP,” Austro- Athenian Empire Blog (May 20, 2010; https://perma.cc/HD5A-TTX8), and Part IV.B, above, and Kinsella, “Mr. IP Answer Man Time: On Steel and Swords,” C4SIF Blog (Feb. 4, 2022); idem, “How To Think About Property,” StephanKinsella.com (April 25, 2021); idem, “Libertarian Answer Man: Mind-Body Dualism, Self-Ownership, and Property Rights,” StephanKinsella.com (Jan. 29, 2022); idem, “KOL337 | Join the Wasabikas Ep. 15.0: You Don’t Own Bitcoin—Property Rights, Praxeology and the Foundations of Private Law, with Max Hillebrand”; idem, “KOL219 | Property: What It Is and Isn’t: Houston Property Rights Association,” Kinsella on Liberty Podcast,” Kinsella on Liberty Podcast (April 28, 2017); and idem, “Nobody Owns Bitcoin,” StephanKinsella.com (April 21, 2021). See also idem, “Patrick Smith, Un-Intellectual Property,” C4SIF Blog (March 4, 2016). [↑](#footnote-ref-65)
66. The ideas in this section are developed more fully in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11). [↑](#footnote-ref-66)
67. See ibid.; also Kinsella, “The ‘If you own something, that implies that you can sell it; if you sell something, that implies you must own it first’ Fallacies,” StephanKinsella.com (June 1, 2018); “A Libertarian Theory of Contract” (ch. 9). [↑](#footnote-ref-67)
68. See also Kinsella, “Human Action and Universe Creation,” StephanKinsella.com (June 28, 2022). [↑](#footnote-ref-68)
69. As is bitcoin. Bitcoins are just abstract informational entries on a distributed ledger, that is, the impatternings of the memory devices of many people’s computers; but they own those computers; nobody owns “how they are arranged.” See Kinsella, “Nobody Owns Bitcoin.” [↑](#footnote-ref-69)
70. See, e.g., the discussion in Part IV.F, above. [↑](#footnote-ref-70)
71. See Part IV.B, above. [↑](#footnote-ref-71)
72. See Long, “Owning Ideas Means Owning People.” [↑](#footnote-ref-72)
73. See Kinsella, “The Non-Aggression Principle as a Limit on Action, Not on Property Rights”; idem, “IP and Aggression as Limits on Property Rights: How They Differ”; and “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), n.11 and accompanying text. [↑](#footnote-ref-73)
74. Likewise, many libertarians, having in mind some form of “strict liability,” advance the confused idea that we are responsible for harms done with property (resources) that we own. This is incorrect. We are responsible only for our actions, not for uses to which inanimate objects are put. If I possess a stolen knife, I am liable if I stab an innocent person with it, even though I don’t own the knife, since it is my actions that I am responsible for. And if some thief steals a knife and uses it to harm an innocent victim, it is the thief that is responsible, not the owner of the knife. One common confusion held even by many libertarians is the idea (which underlies many assertions about “strict liability”) that ownership implies responsibility (some have even confusingly said that you “own your actions,” which is incoherent). It does not. Ownership means the right to control (or, more precisely: the right to exclude others from controlling) a given resource; it does not imply responsibility. We are responsible only for our actions, regardless of whatever means are employed by the actor to achieve the illicit end. It is misleading and confusing for libertarians to carelessly use expressions such as “I own that action” to mean “I am responsible for harm I cause.” The term ownership should be restricted to property rights in conflictable resources—and should be used as a synonym for possession, either, as I point out in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), the sections “External Resources” and “Economic vs. Normative Realms of Analysis: Ownership vs. Possession.”

    On negligence and strict liability, see Kinsella, “The Libertarian Approach to Negligence, Tort, and Strict Liability: Wergeld and Partial Wergeld,” Mises Economics Blog (Sep. 1, 2009); “A Libertarian Theory of Punishment and Rights” (ch. 5), at n.78; “Causation and Aggression” (ch. 8), at n.60; and “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), n.6. [↑](#footnote-ref-74)
75. See, e.g., Richard A. Epstein, The Structural Unity of Real and Intellectual Property (The Progress and Freedom Foundation, 2006; archived version at 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; Wendy J. Gordon, “An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory,” Stan. L. Rev. 41 (1989; https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3581843), Part I; Adam Mossoff, “Commercializing Property Rights in Inventions: Lessons for Modern Patent Theory from Classic Patent Doctrine,” in Geoffrey A. Manne & Joshua D. Wright, eds., Competition Policy and Patent Law Under Uncertainty: Regulating Innovation (Cambridge University Press, 2011; https://perma.cc/SD7Q-F7U9); idem, “The Trespass Fallacy in Patent Law,” Florida L. Rev. 65, no. 6 (2013; https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2126595): 1687–1711; 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. 915, 923, 940, et pass. Mackaay unpersuasively argues that something resembling patent and copyright can emerge through private legal arrangement like trade secret and contractual structures, a “simulated property right,” which the legislator can then “complement” by “by adding the possibility of systematically ensuring exclusivity against third parties.” Mackaay, “Economic Incentives in Markets for Information and Innovation,” p. 904; see also p. 899–901 et pass. Or, as summarized by Dale Nance, Mackaay sees IP rights:

    … as representing a compromise that appears relatively warranted because they do not have the kind of features associated with the worst kinds of governmental meddling in the economy, and because their functional equivalents could, to a considerable extent but perhaps at greater cost, be achieved by carefully protected trade secrets combined with contractually imposed restrictions on copying by buyers or licensees of the information in question. In other words, he sees patents and copyrights as little more troublesome than state-provided form contracts.

    Dale A. Nance, “Foreword: Owning Ideas,” Harv. J. L. & Pub. Pol’y 13, no. 3 (Summer 1990): 757–74, p. 770. Easterbrook makes a similar, and similarly untenable, claim, when he writes: “[I]n the end intellectual property may be understood as the result of voluntary undertakings, which the government simply enforces.” Frank H. Easterbrook, “IntellectualProperty Is Still Property,” Harv. J. L. & Pub. Pol’y 13, no. 1 (Winter 1990; https://chicagounbound.uchicago.edu/journal\_articles/309/): 108–118, p. 114.

    And many other proponents of IP argue for parallels between IP rights and normal property rights. See, e.g., “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17).

    Yet elsewhere, Epstein concedes there are some significant differences between IP and real property. As he writes, “There are in fact no ‘natural’ boundaries here [in patent and copyright law], similar to the metes and bounds of land.” Richard A. Epstein, “Why Libertarians Shouldn’t Be (Too) Skeptical about Intellectual Property,” Progress & Freedom Foundation, Progress on Point, Paper No. 13.4 (February 2006; https://perma.cc/6F5S-7KNS), p. 8. So much for the “structural unity.” [↑](#footnote-ref-75)
76. See my posts “Yet more disanalogies between copyright and real property,” C4SIF Blog (Feb. 4, 2013); “Mossoff: Patent Law Really Is as Straightforward as Real Estate Law,” C4SIF Blog (Aug. 17, 2012); “Classifying Patent and Copyright Law as ‘Property’: So What?”, Mises Economics Blog (Oct. 4, 2011); and “Richard Epstein on ‘The Structural Unity of Real and Intellectual Property,’” Mises Economics Blog (Oct. 4, 2006). Anyone who thinks there can be a straightforward analogy between normal property rights and property rights in intangibles should consult Peter Drahos, A Philosophy of Intellectual Property (Ashgate, 1996; https://press-files.anu.edu.au/downloads/press/n1902/html/cover.xhtml), pp. 16–19 et pass., and Alexander Peukert, A Critique of the Ontology of Intellectual Property Law, Gill Mertens, trans. (Cambridge University Press, 2021), p. 101 et pass. [↑](#footnote-ref-76)
77. See Kinsella, “Intellectual Properganda,” Mises Economics Blog (Dec. 6, 2010). See also the discussion of Böhm-Bawerk on the use of inaccurate terms, in “On the Logic of Libertarianism and Why Intellectual Property Doesn’t Exist” (ch. 24), n.32. [↑](#footnote-ref-77)
78. 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). They go on (ibid.; footnotes omitted):

    This was a very deliberate choice on the part of politicians working for the adoption of a patent law in the French Constitutional Assembly. De Bouffler, reporting the bill to the Assembly, knew that “the spirit of the time was so much for liberty and equality, and against privileges and monopolies of any sort” that there was no hope of saving the institution of patent privileges except under an acceptable theory. Thus, according to Rentzsch, De Bouffler and his friends in deliberate insincerity “construed the artificial theory of the property rights of the inventor” as a part of the rights of man. De Bouffler obviously knew “what’s in a name.” As monopoly privileges, the patents for inventions would be rejected by the Assembly or, if accepted, would be disdained by the people; as natural property rights, they would be accepted and respected. [↑](#footnote-ref-78)
79. Fritz Machlup, U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, An Economic Review of the Patent System (85th Cong., 2nd Session, 1958, Study No. 15; https://mises.org/library/economic-review-patent-system), p. 26 (footnotes omitted). As explained in Machlup & Penrose, “The Patent Controversy in the Nineteenth Century,” and as summarized in Machlup, An Economic Review of the Patent System, free market economists began to object to the patent system in the mid-1800s, leading some countries to repeal or delay adopting patent laws. The primary criticism was that protectionist patent grants are incompatible with free trade. However, the “Long Depression” starting in 1873 turned public opinion against free trade, leading the anti-patent movement to collapse and for modern patent systems to eventually become dominant world-wide. See also, on this, Meiners & Staaf, “Patents, Copyrights, and Trademarks: Property or Monopoly,” p. 911–12. [↑](#footnote-ref-79)
80. Michael H. Davis, “Patent Politics,” S. Carolina L. Rev. 56, no. 2 (Winter 2004; https://scholarcommons.sc.edu/sclr/vol56/iss2/6): 337–86, pp. 338–39 & 373–74 (footnote omitted); discussed in Kinsella, “Patent Lawyers Who Don’t Toe the Line Should Be Punished!” C4SIF Blog (April 12, 2012). Amusingly, the left-leaning Davis, somewhat perplexed, writes “Many libertarians, practically wedded to the free market system, surprisingly oppose patent rights,” citing my AIP. Davis, op cit., p. 374, n.142. [↑](#footnote-ref-80)
81. Ibid., p. 374, n.141. See also Kinsella, “Are Patents and Copyrights ‘Monopolies’?”, C4SIF Blog (Aug. 13, 2013). As Hayek wrote:

    Perhaps it is not a waste of your time if I illustrate what I have in mind by quoting a rather well-known decision in which an American judge argued that “as to the suggestion that competitors were excluded from the use of the patent we answer that such exclusion may be said to have been the very essence of the right conferred by the patent” and adds “as it is the privilege of any owner of property to use it or not to use it without any question of motive.” It is this last statement which seems to me to be significant for the way in which a mechanical extension of the property concept by lawyers has done so much to create undesirable and harmful privilege.

    F.A. Hayek, “‘Free’ Enterprise and Competitive Order,” in Individualism and Economic Order (Chicago: University of Chicago Press, 1948; https://mises.org/library/individualism-and-economic-order), p. 114 (emphasis added; citation omitted). See also idem, The Fatal Conceit (Chicago: University of Chicago Press, 1988), pp. 36–37; and Cole, “Patents and Copyrights: Do the Benefits Exceed the Costs?”, at 82–83. [↑](#footnote-ref-81)
82. Tom Bell, “Copyright Erodes PropertySM,” Agoraphilia (July 14, 2011; https://perma.cc/L25V-A8X8). See also idem, “Copyright as Intellectual ~~Property~~ Privilege,” Syracuse L. Rev. 58 (2007; https://perma.cc/7ZLM-CDWA): 523–46. Bell also writes elsewhere: “to call copyright ‘property’ risks vesting copyright holders with more powers than they deserve. To call it ‘privilege’ offers a rhetorical counterbalance, reminding copyright holders of what they owe to the public and recalling lawmakers to their duties.” Bell, Intellectual Privilege, p. 98 (footnote omitted). [↑](#footnote-ref-82)
83. Peter S. Menell, “The Property Rights Movement’s Embrace of Intellectual Property: True Love or Doomed Relationship?”, UC Berkeley Public Law Research Paper No. 965083 (Feb. 26, 2007; https://perma.cc/F6X9-5L9D), quoting Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926; https://casetext.com/case/berkey-v-third-avenue-railway-co). See also idem, “Intellectual Property and the Property Rights Movement,” Regulation 30, no. 3 (Fall 2007; https://perma.cc/F6X9-5L9D): 36–42, at 42 (“Suggesting that ‘intellectual property’ must be treated as part of a monolithic “property” edifice masks fundamental differences and distracts attention from critical issues”); and Christina Mulligan & Brian Patrick Quinn, “Who are You Calling a Pirate?: Shaping Public Discourse in the Intellectual Property Debates,” Brandeis University Department of English Eighth Annual Graduate Conference (2010; https://perma.cc/7SCS-8P3J), pp. 7–8 (regarding overuse of the “piracy” metaphor for copyright infringement).

    On the perils of misuse of metaphors, see Kinsella, “On the Danger of Metaphors in Scientific Discourse,” StephanKinsella.com (June 12, 2011) and idem, “Objectivist Law Prof Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors,” Mises Economics Blog (Jan. 3, 2008). [↑](#footnote-ref-83)
84. Avihay Dorfman & Assaf Jacob, “Copyright as Tort,” Theoretical Inquiries in Law 12, no. 1 (Jan. 2011; https://perma.cc/4HZM-QPHU): 59–97, p. 96–97. [↑](#footnote-ref-84)
85. Wendy J. Gordon, “Intellectual Property,” in Oxford Handbook of Legal Studies (Peter Cane & Mark Tushnet ed., 2003; https://perma.cc/59GP-HRD8), § 1.1.3. But see idem, “An Inquiry into the Merits of Copyright,” at 1353, 1354, 1378 (“The noncontractual restraints imposed by copyright are of the same nature as those imposed by other areas of the law…. [T]he commonalities in structure predominate over the differences.… [I]ntellectual and tangible property serve similar economic roles.… [T]he tangible and intangible property structures are quite similar…. [C]opyright is functionally as well as structurally consistent with tangible property.”). Perhaps the apparent difference in Gordon’s views is due to some evolution of views, as they were published fourteen years apart. See also Adam Mossoff, “Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause,” Boston U. L. Rev. 87 (2007; https://perma.cc/G7JW-NZNE): 689–724, at pp. 698–99 (mentioning some scholars who, accepting the “claim that patents and copyrights were special, limited monopoly grants in the early American Republic … today condemn recent expansions in intellectual property rights, which they refer to as ‘propertizing’ intellectual property. They also criticize the use of ‘property rhetoric’ in intellectual property doctrines today, which they consider both a novel practice and a contributing factor in the ‘propertization’ of intellectual property doctrines”; footnotes omitted); and Mulligan & Quinn, “Who are You Calling a Pirate?,” p. 1 (arguing that the “analogy between physical property and intellectual property is troubled for a number of reasons”). See also Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity (New York: Penguin Press, 2004; https://perma.cc/J8ZM-FT46), pp, 117–18, who argues that the desire to treat IP rights the same as other property rights has:

    … no reasonable connection to our actual legal tradition. … While ‘creative property’ is certainly ‘property’ in a nerdy and precise sense that lawyers are trained to understand, it has never been the case, nor should it be, that ‘creative property owners’ have been ‘accorded the same rights and protection resident in all other property owners.’ Indeed, if creative property owners were given the same rights as all other property owners, that would effect a radical, and radically undesirable, change in our tradition. [↑](#footnote-ref-85)
86. See, e.g., Adam Mossoff, “Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent ‘Privilege’ in Historical Context,” Cornell L. Rev. 92 (2007; https://perma.cc/UZ9H-RK77): 953–1012; idem, “Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory,” Social Philosophy and Policy 29, no. 2 (2012; https://perma.cc/QG87-BAMY): 283–317; idem, “The Constitutional Protection of Intellectual Property,” Heritage Foundation (March 8, 2021; https://perma.cc/8ZUN-L4XZ); idem, “Life, Liberty and Intellectual Property by Adam Mossoff,” Ayn Rand Institute, YouTube (Sep. 21, 2021; https://youtu.be/CfMd1fHc2mE); Randolph J. May & Seth L. Cooper, The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective (Carolina Academic Press, 2015).

    As can be seen, there are a variety of arguments in favor of IP: the utilitarian or consequentialist or incentive-based argument implied by the Constitution’s authorization for IP law (“to promote the progress…”) (see ch. 16, the section “IP in the Industrial Age”; ch. 14, Part III.A); natural rights, and “creationism” (Part IV.C, above; ch. 14, Part III.b); and others, such as theories related to personality or personhood, fairness, welfare, and culture. See references in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.76. [↑](#footnote-ref-86)
87. See, e.g., Mossoff, “Who Cares What Thomas Jefferson Thought About Patents?” [↑](#footnote-ref-87)
88. See “Letter From Thomas Jefferson to James Madison, 28 August 1789,” Founders Online (https://founders.archives.gov/documents/Jefferson/01-15-02-0354); also Kinsella, “Thomas Jefferson’s Proposal to Limit the Length of Patent and Copyright in the Bill of Rights,” C4SIF Blog (Dec. 1, 2011). [↑](#footnote-ref-88)
89. See “Thomas Jefferson to Isaac McPherson 13 Aug. 1813,” Founders Online (text formatted; emphasis added; https://founders.archives.gov/documents/Jefferson/03-06-02-0322). [↑](#footnote-ref-89)
90. Bell, Intellectual Privilege, pp. 69–71 (footnotes omitted). [↑](#footnote-ref-90)
91. Ibid., p. 192 n.52, quoting Ronan Deazley, Rethinking Copyright: History, Theory, Language (Cheltenham, UK: Edward Elgar, 2006)), at 144 n.32. See also Seana Valentine Shiffrin, “Lockean Arguments for Private Property,” in Munzer, ed., New Essays in the Legal and Political Theory of Property (https://perma.cc/3TWB-4Z8A), p. 141:

    Despite the attractions of a Lockean approach and its apparent amenability to intellectual property, I side with Jefferson. I will challenge the claim that Lockean foundations straightforwardly support most strong natural rights over intellectual works—such things as articles, plays, books, songs, paintings, methods, processes, and other inventions. I will also challenge the related claim that Lockean foundations for strong property rights come easier for these forms of intellectual property than for real property. As Jefferson observed and as I hope to explain, the nature of intellectual works makes them less, rather than more, susceptible to Lockean justifications for private appropriation. [↑](#footnote-ref-91)
92. See www.copythisbook.com. [↑](#footnote-ref-92)