PART IV

Intellectual Property

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Law and Intellectual Property in a Stateless Society

I’ve written a large number of articles on intellectual property, or IP, over the years, starting with Against Intellectual Property, first published in 2001.\* This chapter, originally intended for a symposium issue of the Griffith Law Review but withdrawn/rejected because of a dispute with the editors, was originally published in my journal Libertarian Papers in 2013. It was the most comprehensive article I’d written on IP since AIP.† It incorporates much of the material from that work and includes some additional material that I had published in the intervening decade or so. Chapter 15 contains additional arguments developed subsequently and complements this work and AIP. These two chapters, together, contain a good presentation of my current views and arguments related to IP.††

\* *Journal of Libertarian Studies* 15, no. 2 (Spring 2001): 1–53. Hereinafter, *AIP*. In this chapter I will cite the 2008 edition of *AIP* (www.c4sif.org/aip). In *AIP* I thanked “Wendy McElroy and Gene Callahan for helpful comments on an earlier draft.” My article “In Defense of Napster and Against the Second Homesteading Rule,” *LewRockwell.com* (September 4, 2000) presented a summary version of the argument later elaborated in *AIP*. I thanked Gil Guillory for helpful comments on that piece.

† Stephan Kinsella, “Law and Intellectual Property in a Stateless Society,” *Libertarian Papers* 5, no. 1 (2013): 1–44. The publication history is detailed at Kinsella, “Kinsella, ‘Law and Intellectual Property in a Stateless Society,’” *C4SIF Blog* (March 1, 2013). The structure of the article is similar to the more concise “Intellectual Property and Libertarianism,” *Mises Daily* (Nov. 17, 2009). The title is slightly misleading because the article was really about why IP is unjust and had little to do with anarchy or stateless societies; the title and the slight emphasis on stateless societies in the text was intended to make the article fit the theme of the symposium issue it was intended for, which was “Law and Anarchy: Legal Order and the Idea of a Stateless Society.” I’ve chosen to retain the original title here.

†† For those interested in reading my original *AIP*, I suggest instead the similar version “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.).

For other articles and blog posts related to IP, see Kinsella, *You Can’t Own Ideas: Essays on Intellectual Property* (Papinian Press, 2023); also: the *AIP* Supplementary Material linked at www.c4sif.org/aip; the Resources page at www.c4sif.org/resources; Kinsella, “A Selection of my Best Articles and Speeches on IP,” *C4SIF Blog* (Nov. 30, 2015); and my six-lecture Mises Academy course on IP, available at Kinsella, “KOL172 | “Rethinking Intellectual Property: History, Theory, and Economics: Lecture 1: History and Law (Mises Academy, 2011),” *Kinsella on Liberty Podcast* (Feb. 14, 2015). For criticism of IP by other writers from a libertarian or free market perspective, see Kinsella, ed., *The Anti-IP Reader: Free Market Critiques of Intellectual Property* (Papinian Press, 2023).

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a long habit of not thinking a thing *wrong*, gives it a superficial   
appearance of being *right*, and raises at first a formidable   
outcry in defense of custom. But the tumult soon subsides.  
 Time makes more converts than reason.

—Thomas Paine[[1]](#footnote-1)

I. INTRODUCTION

It is widely recognized that the institutional protection of property rights was a necessary (though probably not sufficient)[[2]](#footnote-2) condition for the radical prosperity experienced in the West since the advent of the industrial revolution. And property rights include so-called “intellectual property” (IP) rights which emerged in their modern form around the same time.[[3]](#footnote-3) Or so we have been told. The idea that IP rights are a legitimate type of property right, and a necessary part of a free market economy, has been taken for granted since the dawn of modern patent and copyright approximately two centuries ago.

Despite the widespread assumption that IP is legitimate, even its proponents seem somewhat uneasy with it. Thus most of them favor limited terms for patent and copyright—about 17 years for the former and usually over 100 years for the latter—unlike the potentially perpetual ownership of traditional forms of property.[[4]](#footnote-4) And there is continual dissatisfaction with the state of the law, its ambiguities and arbitrary standards, and with patent office efficiency and competence, or lack thereof. There are incessant calls for “reform,” and for curbs on “misuse” or “abuse” of patent and copyright. But in these complaints and debates, it is almost always taken for granted that some form of copyright and patent are essential, even if reform is needed.

In recent years, however, increasing numbers of libertarians have begun to doubt the very legitimacy of IP.[[5]](#footnote-5) In this chapter I argue that patent and copyright should be abolished entirely, not merely reformed.

As a preliminary matter, it is necessary to describe the libertarian view of property rights. As this discussion will make clear, IP rights such as patent and copyright are inconsistent with the private property order that would characterize a stateless, private-law society. I will follow with a discussion of what practices or laws might prevail in the absence of IP.

II. THE LIBERTARIAN FRAMEWORK[[6]](#footnote-6)

*A. Property, Rights, and Liberty*

Libertarians tend to agree on a wide array of policies and principles. Nonetheless, it is not easy to find consensus on what libertarianism’s defining characteristic is, or on what distinguishes it from other political theories and systems.

Various formulations abound. It is said that libertarianism is concerned with individual rights, property rights,[[7]](#footnote-7) the free market, capitalism, freedom, liberty, justice, or the nonaggression principle. But are any of these ideas truly fundamental or foundational? “Capitalism” and “the free market,” for example, describe the catallactic conditions that arise or are permitted in a libertarian society, but they do not encompass other aspects of libertarianism.[[8]](#footnote-8) And individual rights, justice, and nonaggression collapse into property rights. As Murray Rothbard explained, individual rights are property rights.[[9]](#footnote-9) And justice simply means giving someone his due, which depends on what his (property) rights are.[[10]](#footnote-10)

The nonaggression principle is also dependent on property rights, since what aggression is depends on what our (property) rights are. If you hit me, it is aggression *because* I have a property right in my body. If I take from you the apple you possess, this is trespass—aggression—only *because* you own the apple. One cannot identify an act of aggression without implicitly assigning a corresponding property right to the victim. “Freedom” and “liberty” face difficulties similar to that of the concept of aggression, as indicated in the common saying, “Your freedom ends where my nose begins!”

So capitalism and the free market are too narrow, and justice, individual rights, liberty, freedom, and aggression all boil down to, or are defined in terms of, property rights.

What of property rights, then? Is this what differentiates libertarianism from other political philosophies—that we favor property rights, and all others do not? Surely such a claim is untenable. After all, a property right is simply the *exclusive right to control a scarce resource*. As Professor Yiannopoulos explains:

*Property* may be defined as an *exclusive right to control an economic good*…; it is the name of a concept that refers to the rights and obligations, privileges and restrictions that govern the relations of man with respect to *things of value*. People everywhere and at all times desire the possession of things that are necessary for survival or valuable by cultural definition and which, as a result of the demand placed upon them, *become scarce*. Laws enforced by organized society control the competition for, and guarantee the enjoyment of, these desired things. What is guaranteed to be one’s own is property… [Property rights] *confer a direct and immediate authority over a thing*.[[11]](#footnote-11)

In other words, property rights specify which persons own—that is, have the right to control—various scarce resources in a given region or jurisdiction. Yet every political theory advances *some* theory of property. None of the various forms of socialism deny property rights *per se*; each system will specify an owner for each contestable scarce resource.[[12]](#footnote-12) If the state nationalizes an industry, it is asserting ownership of those means of production. If the state taxes you, it is implicitly asserting ownership of the funds taken. If my land is transferred to a private developer by eminent domain statutes, the developer is now the owner. If the law allows a recipient of racial discrimination to sue his employer for a sum of money, he is the owner of the money.[[13]](#footnote-13)

Protection of and respect for property rights is thus not unique to libertarianism. What is distinctive about libertarianism is its *particular property assignment rules*: that is, the rules that determine who owns each contestable resource.

*B. Property in Bodies*

As indicated above, every legal system assigns a particular owner to each scarce resource. These resources obviously include natural resources such as land, fruits on trees, and so on. Things found in nature are not the only scarce resources, however. Each human actor has, controls, and is identified and associated with a unique human body, which is also a scarce resource.[[14]](#footnote-14) Both human bodies and nonhuman, scarce resources are desired for use as *means* by actors in the pursuit of various goals.[[15]](#footnote-15)

Accordingly, any political theory or system must assign ownership or control rights in human bodies as well as in external things.[[16]](#footnote-16) However, there are relevant differences between these two types of scarce resources that justify treating them separately.

Let us consider first the libertarian property assignment rules with respect to human bodies, and the corresponding notion of aggression as it pertains to bodies. Libertarians often vigorously assert the “nonaggression principle.” As Ayn Rand said, “So long as men desire to live together, no man may *initiate*—do you hear me? No man may *start*—the use of physical force against others.”[[17]](#footnote-17) Or, as Rothbard put it:

The libertarian creed rests upon one central principle, or “axiom”: that no man or group of men may aggress against the person or property of anyone else. This may be called the “nonaggression axiom.” “Aggression” is defined as the initiation of the use or threat of physical violence against the person or property of anyone else. Aggression is therefore synonymous with invasion.[[18]](#footnote-18)

In other words, at least when it comes to human bodies, libertarians maintain that the only way to violate rights is by *initiating* force—that is, by committing aggression. And, correspondingly, that force used *in response* to aggression—such as defensive, restitutive, or retaliatory/retributive force—is justified.[[19]](#footnote-19)

Now in the case of the body, it is clear what aggression is: invading the borders of someone’s body, commonly called battery, or, more generally, using the body of another without his or her consent.[[20]](#footnote-20) The very notion of interpersonal aggression presupposes property rights in bodies—more particularly, that each person is, at least *prima facie*, the owner of his own body.[[21]](#footnote-21) And the notion of self-ownership corresponds to the non-aggression principle. Both imply each other, or are alternate ways of stating the same basic idea: that no person may use another’s body without his or her consent; to do so is unjustified and impermissible aggression.

Non-libertarian political philosophies do not accept the libertarian self-ownership principle. According to them, each person has *some* limited rights in his own body, but not complete or exclusive rights. Society—or the state, purporting to be society’s agent—has certain rights in each citizen’s body, too. The state may limit or override the individual’s control over his own body. This partial slavery is implicit in state actions such as taxation, conscription, drug prohibitions, and other regulations and laws.

The libertarian says that each person is the *full owner* of his body: he has the right to control his body, to decide whether or not he ingests narcotics, joins an army, and so on. Others, however, maintain that the state, or society, is at least a partial owner of the bodies of those subject to such laws—or even a nearly complete owner in the case of conscriptees or nonaggressor “criminals” incarcerated for life or those killed by government bombs. Libertarians believe in *self*-ownership. Non-libertarians—statists—of all stripes advocate some form of slavery. This is virtually implicit in the nature of the state as an agency that asserts the right to be “the ultimate arbiter in every case of conflict, including conflicts involving itself, [and that] allows no appeal above and beyond itself.”[[22]](#footnote-22) This arrangement permits the state to override individuals’ self-ownership rights—to, in effect, become their master or overlord.

As an illustration, consider this exchange between a communist party official and a farmer in China in 1978, when farmers were prohibited from private ownership of their crop yields: “At one meeting with communist party officials, a farmer asked: ‘What about the teeth in my head? Do I own those?’ Answer: No. Your teeth belong to the collective.”[[23]](#footnote-23)

Libertarians believe the farmer should own his teeth, his body, his home, his farm, and his crop yields.

*C. Self-Ownership and Conflict-Avoidance*

There is always the possibility of conflict over contestable (scarce, conflictable)[[24]](#footnote-24) resources. This is in the very nature of scarce, or rivalrous, resources. By assigning an owner to each resource, the legal or property rights system establishes objective, publicly visible or discernible boundaries or borders that nonowners can avoid. This makes conflict-  
free, productive, cooperative use of resources possible. This is true of human bodies as well as of external objects.[[25]](#footnote-25) If we seek rules that permit peaceful, productive, and conflict-free use of our very bodies, some rules allocating body ownership must be established. These basic values, or *grundnorms*—peace, conflict-avoidance, prosperity—and related ones such as justice, cooperation, and civilization, are the reason that libertarians, indeed any civilized person who adopts these basic values, seek property assignment rules in the first place.[[26]](#footnote-26) We prefer society and civilization to mayhem and fighting and violence. Libertarians believe that self-ownership (and other property acquisition rules discussed further below) is the only property assignment rule compatible with these *grundnorms*; it is implied by them.

As noted above, the libertarian view is that the appropriate body-ownership rule is that each person is, *prima facie*, a self-owner: each person owns his own body. It might be argued, however, that *any* property assignment rule would suffice to permit conflict-free use of resources, that the libertarian self-ownership rule is not necessary. As long as everyone knows who owns a given resource—even if it is a king or tyrant—then people can avoid conflict by respecting existing property boundaries. In the case of bodies, this would mean some form of slavery, where some people are owned partially or completely by others.[[27]](#footnote-27) Whether a person *A* is a self-owner, or owned by some other person or group *B,* everyone can know who gets to decide who can use *A*’s body, and thus conflict can be avoided so long as everyone respects this property right allocation.

The libertarian view is that only its particular property assignment rule—*self*-ownership, as opposed to *other*-ownership (slavery)—fulfills the conflict-avoidance role of property rights. This is so for several interrelated reasons.

First, as Professor Hoppe has argued, the assignment of ownership to a given resource must not be random, arbitrary, particularistic, or biased if the property norm is to serve the function of conflict-avoidance.[[28]](#footnote-28) This is because any possible norm designed to avoid conflict must be justified in the context of argumentation, in which participants put forth *reasons* in support of their proposed norms. The norms proposed in genuine argumentation claim universal acceptability, i.e. they must be universalizable. Reasons must be provided that can in principle be acceptable to both sides as grounded in the nature of things, not merely arbitrary or “particularistic” rules such as “I get to hit you, but you do not get to hit me, because I am me and you are you.” Such an arbitrary assertion fails to even attempt to justify the proposed norm. For another example, *B*’s claim that he owns his own body and also owns *A*’s body, while *A* does not get to own his own body, is an obviously particularistic claim that makes arbitrary distinctions between two otherwise-similar agents, where the distinction is not grounded in any objective difference between *A* and *B*. Such particularistic norms or reasons are not universalizable; that is, they are *not reasons at all*, and thus are contrary to the purpose and nature of the activity of justificatory argumentation.

When assigning property title to a disputed or contested resource, such as *A*’s body, some objective link must be found between the claimant and the resource, so that ownership can be established that can be recognized publicly by others and also acceptable as fair and as grounded in the nature of things. As I wrote elsewhere:

[T]here are only two fundamental alternatives for acquiring rights in unowned property: (1) by doing something with the property with which no one else had ever done before, such as the mixing of labor or homesteading; or (2) by mere verbal declaration or decree. The second alternative is arbitrary and cannot serve to avoid conflicts. Only the first alternative, that of Lockean homesteading, establishes an objective link between a particular person and a particular scarce resource; thus, no one can deny the Lockean right to homestead unowned resources.[[29]](#footnote-29)

Thus, as Hoppe has argued, property title has to be assigned to one of competing claimants based on “the existence of an objective, intersubjectively ascertainable link between owner and the” resource claimed.[[30]](#footnote-30) In the case of one’s own body, it is the unique relationship between a person and his body—*his direct and immediate control* over his body and the fact that, at least in some sense, a body is a given person and vice versa—that constitutes the objective link sufficient to give that person a claim to his body superior to those of typical third party claimants.

Moreover, any outsider who claims another’s body cannot deny this objective link and its special status, since the outsider also necessarily presupposes this in his own case. This is so because, in seeking dominion over the other and in asserting ownership over the other’s body, he has to presuppose his own ownership of his body. In so doing, the outsider demonstrates that he *does* place a certain significance on this link, even as (at the same time) he disregards the significance of the other’s link to his own body.[[31]](#footnote-31)

For these reasons, libertarianism recognizes that only the self-ownership rule is universalizable and compatible with the *grundnorms* of peace, cooperation, and conflict-avoidance. We recognize that each person is *prima facie* the owner of his own body because, by virtue of his unique link to and connection with his own body—his direct and immediate control over it—he has a better claim to it than anyone else.[[32]](#footnote-32)

*D. Property in External Things*

Libertarians apply similar reasoning in the case of other scarce resources—namely, external objects in the world. One key difference between bodies and external resources—and the reason for their separate treatment—is that the latter were at one point *unowned* and are *acquired by* human actors who are *already necessarily body-owners*. This difference implies a related distinction: as noted above, in the case of bodies, the idea of aggression being impermissible immediately implies (*prima facie*) self-ownership. In the case of external objects, however, we must identify who the owner of the object is before we can determine what uses of it constitute aggression.

As in the case with bodies, humans need to be able to use external objects as means to achieve various ends. Because these things are scarce (rivalrous), there is also the potential for conflict. And, as in the case with bodies, libertarians favor assigning property rights so as to permit the peaceful, conflict-free, productive use of such resources. Thus, as in the case with bodies, property is assigned to the person with the best claim or link to a given scarce resource—with the “best claim” standard based on the shared *grundnorms* of permitting peaceful, cooperative, conflict-free human interaction and use of resources.

Unlike human bodies, however, external objects are not parts of one’s identity, are not directly controlled by one’s will, and—significantly—they are *initially unowned*.[[33]](#footnote-33) Here, the relevant objective link is *appropriation*—the transformation, possession, or embordering of a previously unowned resource, i.e., Lockean homesteading.[[34]](#footnote-34) Under this approach, the first (prior) user of a previously unowned thing has a *prima facie* better claim than a second (later) claimant solely by virtue of his being earlier.

Why is appropriation the relevant link for determination of ownership? First, keep in mind that the question with respect to such scarce resources is: who is the resource’s *owner*? Recall that ownership is the *right* to control, use, or possess,[[35]](#footnote-35) while possession is *actual* control—“the *factual* authority that a person exercises over a corporeal thing.”[[36]](#footnote-36) The question is not who has physical possession, it is who has ownership. Asking who is the owner of a resource presupposes a crucial *distinction* between ownership and possession—between the right to control and actual control. And the answer has to take into account the nature of previously unowned things—namely, that they must at some point   
become owned by a first owner to become goods at all.

The answer must also take into account the presupposed goals of those seeking this answer: rules that permit conflict-free use of resources. For this reason, the answer cannot be whoever *has the* *resource or whoever is able to take it* is its owner. To hold such a view is to endorse might-makes-right, where ownership collapses into possession for want of a distinction.[[37]](#footnote-37) Such a system, far from avoiding conflict, makes conflict inevitable.[[38]](#footnote-38)

An aspect of ownership and property rights that is not often made explicit is what has been called the “prior-later distinction.” This is the idea that it *makes a difference* who came first.[[39]](#footnote-39) The prior-later distinction is implicit in the very idea of ownership, as the owner has a better claim—again, *prima facie*—to his resource than “latecomers.”[[40]](#footnote-40) If the owner did not have a better claim to the resource than someone who just comes later and physically wrests it from him, then he is not an owner, but merely the current user or possessor, and we are operating under the amoral might-makes-right principle instead of property rights and ownership.

More generally, latecomers’ claims are inferior to those of prior possessors or claimants, who either homesteaded the resource or who can trace their title back to the homesteader or earlier owner.[[41]](#footnote-41) The crucial importance of the prior-later distinction to libertarian theory is the reason Professor Hoppe repeatedly emphasizes it in his writing.[[42]](#footnote-42)

To sum up, the libertarian position on property rights is that in order to permit conflict-free, productive use of scarce resources, property titles to particular resources are assigned to particular owners. As noted above, however, the title assignment must not be random, arbitrary, or particularistic; instead, it has to be assigned based on “the existence of an objective, intersubjectively ascertainable link between owner” and the resource claimed.[[43]](#footnote-43) As can be seen from the considerations presented above, the link is the physical transformation or embordering by the original homesteader, or a contractual chain of title traceable back to him (or to some previous possessor whose claim no one else can defeat).[[44]](#footnote-44)

*E. Consistency and Principle*

Most people give some weight to some of the above considerations. In their eyes, a person is the owner of his own body—usually. A homesteader owns the resource he appropriates—unless the state takes it from him “by operation of law.”[[45]](#footnote-45) This is the principal distinction between libertarians and typical non-libertarians (excluding criminals, sociopaths, tyrants, government leaders, and so on): libertarians are consistently opposed to aggression, defined in terms of invasion of property borders, where property rights are understood to be assigned on the basis of self-ownership in the case of bodies. And in the case of non-bodily external objects, rights are understood on the basis of prior possession or homesteading and contractual transfer of title.

This framework for rights is motivated by the libertarian’s consistent and principled valuing of peaceful interaction and cooperation—in short, of civilized behavior. Consider the Misesian view of human action. According to Mises, human action is aimed at alleviating some *felt uneasiness*.[[46]](#footnote-46) Thus, the actor employs scarce means, according to his understanding of causal laws, to achieve various ends—ultimately, the removal of uneasiness.

Just as felt uneasiness in general is the cause of action aimed at alleviating it, a certain type of “moral” uneasiness gives rise to the practice of normative justification aimed at its alleviation. To-wit, civilized man (evidently) feels morally uneasy at the prospect of violent struggles with others. On the one hand, he wants, for some practical reason, to control a given scarce resource and to use violence against another person, if necessary, to achieve this control. On the other hand, he also wants to avoid a wrongful use of force. Civilized man, for some reason, feels reluctance and uneasiness at the prospect of conflict or violent interaction with his fellow man. Perhaps he is reluctant to violently clash with others over certain objects because he has empathy with them.[[47]](#footnote-47) Perhaps the instinct to cooperate is a result of social evolution. As Mises noted:

There are people whose only aim is to improve the condition of their own ego. There are other people with whom awareness of the troubles of their fellow men causes as much uneasiness as or even more uneasiness than their own wants.[[48]](#footnote-48)

Whatever the reason, because of this uneasiness, when there is the potential for violent conflict, the civilized man *seeks justification* for the use of force or violence to control or defend the use of a desired scarce resource that some other person opposes or threatens. Empathy—or whatever spurs man to adopt the libertarian *grundnorms*—gives rise to a certain form of uneasiness, which gives rise to the attempt to justify violent action.

Civilized man may be thus defined as *he who seeks justification for the use of interpersonal violence*. When the inevitable need to engage in violence arises—for defense of life or property—civilized man seeks justification. Naturally, since this justification-seeking is done by people who are inclined to reason and peace (justification is after all a peaceful activity that necessarily takes place during discourse),[[49]](#footnote-49) what they seek are rules that are fair, potentially acceptable to all relevant parties, grounded in the nature of things, and universalizable, and which permit conflict-free use of resources.

As noted in foregoing sections, libertarian property rights principles emerge as the only candidate that satisfies these criteria. We favor *prima facie* self-ownership of bodies as the only fair and justifiable body ownership rule that permits conflict-free use of the resources of our bodies. And in the case of resources external to human bodies, we favor property rights on the basis of prior possession or homesteading and contractual transfer of title. That is, the libertarian position on property rights in external objects is that in any dispute or contest over any particular scarce resource, the original homesteader—the person who appropriated the resource from its unowned status by embordering or transforming it (or his contractual transferee)—has a better claim than latecomers, those who did not appropriate the scarce resource. This is the only fair and justifiable property assignment rule that permits harmonious, productive, conflict-free use of such external scarce resources.

Thus, if civilized man is he who seeks justification for the use of violence, the libertarian is he who is *serious* about this endeavor. He has a deep, principled, innate opposition to violence and an equally deep commitment to peace and cooperation.

For the foregoing reasons, libertarianism may be said to be the political philosophy that *consistently* favors social rules aimed at promoting peace, prosperity, and cooperation.[[50]](#footnote-50) It recognizes that the only rules that are compatible with the *grundnorms* of civilized men are the self-ownership principle and the Lockean homesteading principle, applied as consistently as possible.

*F. The State*

Libertarians oppose all forms of crime (aggression). Thus we oppose not only private aggression: we also oppose *institutionalized* or public aggression. The opposition to institutionalized aggression is based on the view, espoused by Bastiat, that an act of aggression that is unjust for a private actor to perform remains illegitimate when performed by agencies, institutions, or collectives.[[51]](#footnote-51) Murder or theft by ten, or a hundred, or a million, people is not better than theft by a lone criminal. It is for this reason that libertarians view the state itself as inherently criminal. For the state does not just happen to engage in institutionalized aggression; it necessarily does so on a systematic basis as part of the very nature of the state. As Hoppe notes:

What must an agent be able to do to qualify as a state? This agent must be able to insist that all conflicts among the inhabitants of a given territory be brought to him for ultimate decision-making or be subject to his final review. In particular, this agent must be able to insist that all conflicts involving himself be adjudicated by him or his agent. And implied in the power to exclude all others from acting as ultimate judge, as the second defining characteristic of a state, is the agent’s power to tax: to unilaterally determine the price that justice seekers must pay for his services.[[52]](#footnote-52)

Such an agency necessarily commits aggression against either human bodies or owned property (usually both), either by taxing or by outlawing competition (usually both).[[53]](#footnote-53) For these reasons, the consistent libertarian, in opposing aggression, is also anarchist.[[54]](#footnote-54)

This also implies that legislation is illegitimate—as legislation requires a state—and that a law that is purely a result of legislation, and that cannot emerge in a decentralized legal order, is also invalid.[[55]](#footnote-55)

III. LIBERTARIANISM APPLIED TO IP

Given the foregoing libertarian (and Austrian-economics-informed) understanding of property rights, it is clear that the institutions of patent and copyright are simply indefensible. Here is why.

Copyrights pertain to “original works,” such as books, articles, movies, and computer programs. They are grants by the state that permit the copyright holder to prevent others from using their own property—e.g., ink and paper—in certain ways. Thus copyright literally results in censorship—not surprising given its origins in suppressing the spread of ideas not favored by crown and church.[[56]](#footnote-56) For example, shortly before his death, author J.D. Salinger, author of *Catcher in the Rye*, convinced U.S. courts to actually ban the publication of a novel called *60 Years Later: Coming Through the Rye*, based on copyright claims. And when a grocery store in Canada mistakenly sold 14 copies of a new Harry Potter book a few days before its official release on Saturday, July 16, 2005, a Canadian judge “ordered customers not to talk about the book, copy it, sell it or even read it before it is officially released at 12:01 a.m. July 16.”[[57]](#footnote-57)

Patents grant rights in “inventions”—useful machines or processes. They are grants by the state that permit the patentee to use the state’s court system to prohibit others from using their *own property* in certain ways—from reconfiguring their property according to a certain pattern or design described in the patent, or from using their property (including their own bodies) in a certain sequence of steps described in the patent.[[58]](#footnote-58)

Both patent and copyright are simply state grants of monopoly privilege. In both cases, the state is assigning to *A* a right to control *B*’s property: *A* can force *B* not to engage in certain actions with *B*’s resources. Since ownership is the right to control, IP grants to *A* a co-ownership right (a negative servitude) in *B*’s property.[[59]](#footnote-59) This clearly cannot be justified under libertarian principles. *B* already owns his property. With respect to him, *A* is a latecomer. *B* is the one who appropriated the property, not *A*. It is too late for *A* to homestead the resource in question—*B*, or his ancestor in title, already did that. The resource is no longer unowned. Granting *A* ownership rights in *B*’s property is quite obviously incompatible with basic libertarian principles. It is nothing more than redistribution of wealth. IP is therefore unlibertarian and unjustified.

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

There are various arguments advanced for IP. Professor Nance notes that IP arguments:

… generally fall into two broad categories, deontological and consequentialist. The latter category embraces all theories that purport to justify property rights on the basis of the *good consequences* of their legal recognition, as distinct from their *moral rightness*.[[60]](#footnote-60)

The consequentialist approach is implied by the Constitution’s authorization for IP law, which reads:

The Congress shall have power … To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.[[61]](#footnote-61)

Nance argues that most deontological arguments for IP—which fall into the “moral rights” tradition:

… fall into one of two sub-categories. First, they can be based upon the creator’s deserving to own the fruits of her labors. This “labor theory” of property is generally associated with John Locke, whose influence on American thought is undeniable. An alternative theory, less familiar to Anglo-American thought, is that such rights are based upon respecting the creator’s extension or reification of personality by the occupation of tangible or intangible things. The “personality theory” of property is most commonly attributed to the German philosopher Hegel and is better established in continental law.[[62]](#footnote-62)

Consequentialist (incentive-based) arguments also have two major sub-categories: utilitarianism (maximizing preference satisfaction by incentives) and teleology (using incentives to pursue values that deserve government support or encouragement). There are also other theories, sometimes overlapping with each other, such as contract-based arguments and those related to fairness, welfare, and culture.[[63]](#footnote-63) I will address and criticize some of these arguments in the following sections.

*A. Utilitarianism*

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

The utilitarian perspective itself is bad enough, because all sorts of terrible policies could be justified this way: why not take half of Henry Ford’s fortune and give it to the poor? Wouldn’t the total welfare gains to the thousands of recipients be greater than Ford’s reduced utility? After all, he would still be a billionaire afterwards. To take another example: if a man is extremely desperate for sex, could not his gain be greater than the loss suffered by his rape victim (say, if she is a prostitute), thus justifying rape, in some cases, on utilitarian grounds? Most people will recognize that there is something wrong with utilitarian reasoning if it could lead to such results.

But even if we ignore the ethical and methodological problems[[64]](#footnote-64) with the utilitarian or wealth-maximization approach, what is bizarre is that utilitarian libertarians are in favor of IP when they have not demonstrated that IP does increase overall wealth. They merely assume that it does and then base their policy views on this assumption.

It is beyond dispute that the IP system imposes significant costs, in monetary terms alone, not to mention costs in terms of liberty.[[65]](#footnote-65) The usual argument, that the incentive provided by IP law stimulates additional innovation and creativity, has not even been proven.[[66]](#footnote-66) It is entirely possible (even likely, in my view) that the IP system not only imposes many billions of dollars of cost on society but actually impedes innovation, adding damage to injury.

But even if we assume that the IP system does stimulate some additional, valuable innovation, no one has established that the value of the purported gains is greater than the costs.[[67]](#footnote-67) If one asks advocates of IP how they know there is a net gain, the result is silence (this is especially true of patent attorneys). They cannot point to any study to support their utilitarian contention; they usually just point to Article 1, Section 8 of the Constitution (if they are even aware of it), as if the backroom dealings of politicians two centuries ago are some sort of empirical evidence in favor of state grants of monopoly privilege.

In fact, as far as I am able to tell, *every* study that attempts to tally the costs and benefits of copyright or patent law concludes either that these schemes cost more than they are worth, that they actually reduce innovation, or that the research is inconclusive. There are no studies unambiguously showing a net societal gain.[[68]](#footnote-68) There are only repetitions of state propaganda.

The Founders only had a hunch that copyrights and patents might “promote the Progress of Science and useful Arts”[[69]](#footnote-69)—that the cost of this system would be “worth it.” But they had no serious evidence. A hundred and fifty years later there was still none. In an exhaustive 1958 study prepared for the U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, economist Fritz Machlup concluded:

No economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss upon society. The best he can do is to state assumptions and make guesses about the extent to which reality corresponds to these assumptions… If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one.[[70]](#footnote-70)

And the empirical case for patents has not been shored up at all in the last fifty years. As George Priest wrote in 1986, “[I]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property.”[[71]](#footnote-71) Similar comments are echoed by other researchers. François Lévêque and Yann Ménière, for example, of the Ecole des Mines de Paris (an engineering university), observed in 2004:

The abolition or preservation of intellectual property protection is… not just a purely theoretical question. To decide on it from an economic viewpoint, we must be able to assess all the consequences of protection and determine whether the total favorable effects for society outweigh the total negative effects. Unfortunately, this exercise [an economic analysis of the cost and benefits of intellectual property] is no more within our reach today than it was in Machlup’s day [1950s].[[72]](#footnote-72)

More recently, Boston University Law School Professors (and economists) Michael Meurer and Jim Bessen conclude that on average, the patent system discourages innovation. As they write: “[I]t seems unlikely that patents today are an effective policy instrument to encourage innovation overall” (p. 216). To the contrary, it seems clear that nowadays, “patents place a drag on innovation” (p. 146). In short, “the patent system fails on its own terms” (p. 145).[[73]](#footnote-73)

And in a recent paper, economists Boldrin and Levine state:

The case against patents can be summarized briefly: there is no empirical evidence that they serve to increase innovation and productivity…. This disconnect is at the root of what is called the “patent puzzle”: in spite of the enormous increase in the number of patents and in the strength of their legal protection, the US economy has seen neither a dramatic acceleration in the rate of technological progress nor a major increase in the levels of research and development expenditure…

Our preferred policy solution is to abolish patents entirely to find other legislative instruments, less open to lobbying and rent seeking, to foster innovation when there is clear evidence that laissez-faire undersupplies it.[[74]](#footnote-74)

The Founders’ hunch about IP was wrong. Copyright and patent are not necessary for creative or artistic works, invention, and innovation. They do not even encourage it. These monopoly privileges enrich some at the expense of others, distort the market and culture, and impoverish us all.[[75]](#footnote-75) Given the available evidence, anyone who accepts utilitarianism should be *opposed* to patent and copyright.[[76]](#footnote-76)

*B. Libertarian Creationism*[[77]](#footnote-77)

Another reason why many libertarians favor IP is their confusion about the origin of property and property rights. They accept the careless observation that an individual can come to own things in three ways: through homesteading an unowned thing, by contractual exchange, and by creation. Therefore, they reason, if you own what you create, this is especially true for useful ideas. For example, libertarian philosopher Tibor Machan has stated: “[I]t would seem that so called intellectual stuff is an even better candidate for qualifying as private property than is, say, a tree or mountain.”[[78]](#footnote-78) And Objectivist philosopher David Kelley writes:

[T]he essential basis of property rights lies in the phenomenon of creating value… [F]or things that one has created, such as a new product, one’s act of creation is the source of the right, regardless of scarcity.[[79]](#footnote-79)

The mistake is the notion that creation is an independent source of ownership, independent from homesteading and contracting. Yet it is easy to see that “creation” is neither necessary nor sufficient as a source of ownership. If you carve a statue using your own hunk of marble, you own the resulting creation because you already owned the marble. You owned it before, and you own it now.[[80]](#footnote-80) And if you homestead an unowned resource, such as a field, by using it and thereby establishing publicly visible borders, you own it because this first use and embordering gives you a better claim than latecomers.[[81]](#footnote-81) Thus, creation is not necessary for ownership to arise.

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

This is not to deny the importance of knowledge, or creation and innovation. Human action, which necessarily employs (ownable) scarce means, is also *informed* by technical knowledge of causal laws or other practical information. An actor’s knowledge, beliefs and values affect the ends he chooses to pursue and the causal means he selects to achieve the end sought (as discussed further in the next section).

It is true that creation is an important means of increasing *wealth*. As Hoppe has observed,

One can acquire and increase wealth either through homesteading, *production* and contractual exchange, or by expropriating and exploiting homesteaders, producers, or contractual exchangers. There are no other ways.[[82]](#footnote-82)

While production or creation can certainly increase *wealth*, it is not an independent source of ownership or rights. Production is not the creation of new matter; it is the transformation of things from one form to another—the transformation of things someone already owns, either the producer or someone else. Using your labor and creativity to transform your property into more valuable finished products gives you greater wealth, but not additional property rights.[[83]](#footnote-83) (If you transform someone else’s property, he owns the resulting transformed thing, even if it is now more valuable.)

In other words, creation is not the basis for property rights in scarce goods. Creating something does not make you its owner. A mother who creates a child does not own it. A vandal who creates a mural on someone else’s property does not own it. An employee who creates a consumer device using his employer’s facilities and materials does not own it. Creation is not sufficient to generate rights. And those who transform their own property to create a more valuable product own the resulting product because they already owned the original material, not because of creation. The creator of an idea does not thereby own the idea.[[84]](#footnote-84)

*C. The Contractual Approach*

Many libertarians also argue that some form of copyright or patent could be created by contractual techniques—for example, by selling a patterned medium (book, CD, etc.) or useful machine to a buyer on the condition that it not be copied or revealed to others. For example, Brown sells an innovative mousetrap to Green on the condition that Green not reproduce it.[[85]](#footnote-85)

For such contractual IP to emulate statutory IP, however, it has to bind not only seller and buyer, but all third parties. The contract between buyer and seller cannot do this—it binds only the buyer and seller. In the example given above, even if Green agrees not to copy Brown’s mousetrap, Black has no agreement with Brown. Brown has no contractual right to prevent Black from using Black’s own property in accordance with whatever knowledge or information Black has.

Now if Green were to sell Brown’s watch to Black without Brown’s permission, most libertarians would say that Brown still owns the watch and could take it from Black. Why doesn’t a similar logic apply in the case of the mousetrap design?

The difference is that the watch is a scarce resource that has an owner, while the mousetrap design is merely information, which is not a type of thing that can be owned. The watch is a scarce resource still owned by Brown. Black needs Brown’s consent to use it. But in the mousetrap case, Black merely learns how to make a mousetrap. He uses this information to make a mousetrap, by means of his own body and property. He doesn’t need Brown’s permission, simply because he is not using Brown’s property.

The IP advocate thus has to say that Brown owns the information about how his mousetrap is configured. This move is question begging, however, since it asserts what is to be shown: that there are intellectual property rights.

If Black does not return Green’s watch, Green is without his watch precisely because the watch is a scarce good. But Black’s knowing how to make a mousetrap does not take away Green’s own mousetrap-making knowledge, highlighting the nonscarce nature of information or patterns. In short, Brown may retake his property from Black but has no right to prevent Black from using information to guide his actions. Thus, the contract approach fails as well.[[86]](#footnote-86)

*D. Learning, Emulation, and Knowledge in Human Action*

Another way to understand the error in treating information, ideas, recipes, and patterns as ownable property is to consider IP in the context of human action. Mises explains that “[t]o act means: to strive after ends, that is, to choose a goal and to resort to means in order to attain the goal sought.”[[87]](#footnote-87) Knowledge and information of course play a key role in action as well. As Mises puts it, “Action … is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and *guided by ideas concerning the suitability or unsuitability of definite means*.”[[88]](#footnote-88)

Rothbard further elaborates on the importance of knowledge to *guide* actions:

There is another unique type of factor of production that is indispensable in every stage of every production process. This is the “technological idea” of how to proceed from one stage to another and finally to arrive at the desired consumers’ good. This is but an application of the analysis above, namely, that for any action, there must be some *plan* or idea of the actor about how to use things as means, as definite pathways, to desired ends. Without such plans or ideas, there would be no action. These plans may be called *recipes*; they are ideas of recipes that the actor uses to arrive at his goal. A *recipe* must be present at each stage of each production process from which the actor proceeds to a later stage. The actor must have a recipe for transforming iron into steel, wheat into flour, bread and ham into sandwiches, etc.[[89]](#footnote-89)

Moreover, “[m]eans are necessarily always limited, i.e. scarce, with regard to the services for which man wants to use them.”[[90]](#footnote-90) This is why property rights emerged. Use of a resource by one person excludes use by another. Property rights are assigned to scarce resources to permit them to be used productively and cooperatively, and to permit conflict to be avoided. In contrast, ownership of the information that guides action is not necessary. For example, two people who each own the ingredients (scarce goods) can simultaneously make a cake with the same recipe.

Material progress is made over time because information is *not* scarce. It can be infinitely multiplied, learned, taught, and built on. The more patterns, recipes, and causal laws that are known, the greater the wealth multiplier as individuals engage in ever-more efficient and productive actions. It is *good* that ideas are infinitely reproducible. There is no need to impose artificial scarcity on ideas to make them more like physical resources, which—unfortunately—*are* scarce.[[91]](#footnote-91)

*E. IP, Legislation, and the State*

A final problem with IP remains: patent and copyright are statutory schemes, schemes that can be constructed only by legislation, and therefore *have always* been constructed by legislation. A patent or copyright code could no more arise in the decentralized, case-based legal system of a free society than could the Americans with Disabilities Act or Medicare. IP requires both a legislature and a state. For libertarians who reject the legitimacy of the state,[[92]](#footnote-92) or legislated law,[[93]](#footnote-93) this is the final nail in the IP coffin.

IV. IMAGINING AN IP-FREE WORLD

It is fairly straightforward to explain what is wrong with IP: patent and copyright are artificial state-granted monopoly privileges that undercut and invade property rights, as elaborated above. But the consequentialist and utilitarian mindset is so entrenched that even people who see the ethical problems with IP law sometimes demand that the IP opponent explain how innovation would be funded in an IP-free world. How would authors make money? How would blockbuster movies be funded? Why would anyone invent if they could not get a patent? How could companies afford to develop pharmaceuticals if they had to face competition?

When I see such demands and questions, I am reminded of John Hasnas’s comments in his classic article “The Myth of the Rule of Law.”[[94]](#footnote-94) After arguing against the state and for anarchy, Hasnas observes:

What would a free market in legal services be like?

I am always tempted to give the honest and accurate response to this challenge, which is that to ask the question is to miss the point. If human beings had the wisdom and knowledge-generating capacity to be able to describe how a free market would work, that would be the strongest possible argument for central planning. One advocates a free market not because of some moral imprimatur written across the heavens, but because it is impossible for human beings to amass the knowledge of local conditions and the predictive capacity necessary to effectively organize economic relationships among millions of individuals. It is possible to describe what a free market in shoes would be like *because we have one*. But such a description is merely an observation of the current state of a functioning market, not a projection of how human beings would organize themselves to supply a currently non-marketed good. To demand that an advocate of free market law (or Socrates of Monosizea, for that matter) describe in advance how markets would supply legal services (or shoes) is to issue an impossible challenge. Further, for an advocate of free market law (or Socrates) to even accept this challenge would be to engage in self-defeating activity since the more successfully he or she could describe how the law (or shoe) market would function, the more he or she would prove that it could be run by state planners. Free markets supply human wants better than state monopolies precisely because they allow an unlimited number of suppliers to attempt to do so. By patronizing those who most effectively meet their particular needs and causing those who do not to fail, consumers determine the optimal method of supply. If it were possible to specify in advance what the outcome of this process of selection would be, there would be no need for the process itself.

In other words: the answer such a challenge might be, as Leonard Read said, “I don’t know.”[[95]](#footnote-95)

To return to the current subject: with the advent of state IP legislation, the state has interrupted and preempted whatever other customs, business arrangements, contractual regimes and practices, and so on, that would no doubt have arisen in its absence. So it is natural for those accustomed to IP to be a bit nervous about replacing the current flawed IP system with… a vacuum. It is natural for them to wonder, “Well, what would occur in its absence?” As noted above, the reason we are not sure what an IP-free world would look like is that the state has snuffed out alternative institutions and practices.

Consider the analogous situation in which the FCC preempted and monopolized the field of property rights in airwaves just as they were starting to develop in the common law. Nowadays people are used to the idea of the state regulating and parceling out airwave or spectrum rights and might imagine there would be chaos if the FCC were abolished. Still, we have some idea as to what property rights might emerge in airwaves absent central state involvement.[[96]](#footnote-96)

In any case, because people are bound to ask the inevitable: we IP opponents try to come up with some predictions and solutions and answers. Thus, in the end we must agree with Hasnas:

Although I am tempted to give this response, I never do. This is because, although true, it never persuades. Instead, it is usually interpreted as an appeal for blind faith in the free market, and the failure to provide a specific explanation as to how such a market would provide legal services is interpreted as proof that it cannot. Therefore, despite the self-defeating nature of the attempt, I usually do try to suggest how a free market in law might work.

So, how would content creators be rewarded in an IP-free market? First, we must recognize that what advocates of IP want is a world where competition is tamed. Their view is that:

Governments adopt intellectual property laws in the belief that a privileged, monopolistic domain operating on the margins of the free-market economy promotes long-term cultural and technological progress better than a regime of *unbridled competition*.[[97]](#footnote-97)

Thus, they favor the grant of monopolies by the state that shelter various market actors from competition. But in a free society with no IP rights, content creators and innovators would face competition just as others do.

It must be recognized that the position of the creator of content that is easily copied or imitated is no different in kind from that of any other entrepreneur on the market. Every producer faces competition. If a given entrepreneur makes profit, competitors notice this and start to compete, eroding the initial profits made. Thus market actors continually seek to innovate and find new ways to please consumers in the pursuit of elusive profits. Most producers face a variety of costs, including costs of exclusion. For example:

Movie theaters, for example, invest in exclusion devices like ticket windows, walls, and ushers, all designed to exclude non-contributors from enjoyment of service. Alternatively, of course, movie owners could set up projectors and screens in public parks and then attempt to prevent passers-by from watching, or they could ask government to force all non-contributors to wear special glasses which prevent them from enjoying the movie. “Drive-ins,” faced with the prospect of free riders peering over the walls, installed—at considerable expense—individual speakers for each car, thus rendering the publicly available visual part of the movie of little interest …. The costs of exclusion are involved in the production of virtually every good imaginable.[[98]](#footnote-98)

What this means is that it is the responsibility of entrepreneurs whose products are easily imitated to find a way to profit, and that they may not use state force to stop competitors. In a sense, this is already the situation facing content creators. Piracy is real and is not going away, unless the big media special interests succeed in having the Internet shut down. Even in the face of widespread file sharing and disregard for copyright, creativity is at an all time high.[[99]](#footnote-99) The only solution to piracy and file sharing is to offer a better service.[[100]](#footnote-100) For example, offering DRM-free movies or music for a reasonable price, as comedian Louis C.K. did, earning $1M in about two weeks.[[101]](#footnote-101) Or use crowd-source fundraising mechanisms like Kickstarter—computer game company Double Fine Productions recently used Kickstarter to raise $400,000 to fund a new adventure game ($300,000 for game development, and $100,000 to make a documentary about the process). In fact, as of this writing, $1,095,783 had been raised, from 28,921 backers, in *one day*.[[102]](#footnote-102)

And there are a variety of tactics people can adopt in different industries. A singer or musician can garner fans from his recordings, even if they are distributed for free, and charge fees for concerts. Movie studios can sell tickets to movies that have advantages over home viewing, such as better sound, 3D, large screens, and the like. Most non-fiction authors—such as bloggers or law professors publishing law review articles for free—do not get paid now, but engage in this activity to enhance their reputation and employability, for ad revenues, or for other reasons. A novelist could become popular with her first few books and then get fans to pre-purchase the sequel before releasing it or get paid to be a consultant on/endorser of a movie version.[[103]](#footnote-103)

We cannot forecast all the ways human entrepreneurial creativity will discover to profit and flourish in a free society with no state-granted protections from competition. But there is every reason to think that in a private-law society, we would be unimaginably richer and freer, with more diversity and intellectual creativity than ever before. The state is nothing but a hindrance to everything good about human society.

1. Thomas Paine, “Introduction,” Common Sense (1776). [↑](#footnote-ref-1)
2. See Hans-Hermann Hoppe, “From the Malthusian Trap to the Industrial Revolution: An Explanation of Social Evolution,” in The Great Fiction: Property, Economy, Society, and the Politics of Decline, Second Expanded Edition (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/tgf); see also idem, “PFP041 | Hans-Hermann Hoppe, From the Malthusian Trap to the Industrial Revolution: An Explanation of Social Evolution (PFS 2009),” Property and Freedom Podcast (Jan. 20, 2022; https://propertyandfreedom.org/pfp). [↑](#footnote-ref-2)
3. In this chapter, IP refers primarily to patent and copyright unless the context indicates otherwise. For arguments against other forms of IP, such as trademark and trade secret, see AIP. Although defamation (libel and slander) is not usually considered a type of IP, I believe it should be, since arguments in favor of the “reputation rights” that this law protects are similar to those of other forms of IP, like trademark. 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). For a criticism of defamation law as being incompatible with libertarian property rights principles, 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); Walter E. Block, “The Slanderer and Libeler,” in Defending the Undefendable (2018; https://mises.org/library/defending-undefendable). [↑](#footnote-ref-3)
4. Yet some defenders of IP go so far as to support perpetual terms, such as Lysander Spooner, Andrew J. Galambos, some Randians (though not Rand herself), Robert Wenzel, Victor Yarros, possibly J. Neil Schulman, etc. See, e.g., Lysander Spooner, “A Letter to Scientists and Inventors, on the Science of Justice, and their Rights of Perpetual Property in their Discoveries and Inventions” and “The Law of Intellectual Property or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas,” in Charles Shively, ed., The Collected Works of Lysander Spooner, vol. 3, reprint ed. (Weston, Mass.: M&S Press, 1971 [1855]; www.lysanderspooner.org/works); discussion of Galambos in AIP; Kinsella, “Transcript: Debate with Robert Wenzel on Intellectual Property,” C4SIF Blog (April 11, 2022). Re Yarros, see Kinsella, “Benjamin Tucker and the Great Nineteenth Century IP Debates in Liberty Magazine,” C4SIF Blog (July 11, 2022) and idem, “James L. Walker (Tak Kak), ‘The Question of Copyright’ (1891),” C4SIF Blog (July 28, 2022); “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17). See also Jeffrey A. Tucker, “Eternal Copyright,” C4SIF Blog (Feb. 21, 2012); and Wendy McElroy, “Intellectual Property,” in The Debates of Liberty: An Overview of Individualist Anarchism, 1881–1908 (Lexington Books, 2002; https://perma.cc/ZQM2-82B9), 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). [↑](#footnote-ref-4)
5. See Kinsella, “The Death Throes of Pro-IP Libertarianism,” Mises Daily (July 28, 2010); idem, “The Four Historical Phases of IP Abolitionism,” Mises Economics Blog (April 13, 2011); idem, “The Origins of Libertarian IP Abolitionism,” Mises Economics Blog (April 1, 2011); Kinsella, ed., “The Anti-IP Reader.” [↑](#footnote-ref-5)
6. The issues in this section are elaborated on in other chapters, e.g. “What Libertarianism Is” (ch. 2) and “How We Come to Own Ourselves” (ch. 4). [↑](#footnote-ref-6)
7. As noted in “What Libertarianism Is” (ch. 2), n.1, the term “private” property rights is sometimes used by libertarians, yet property rights are necessarily public, in the sense that the borders or boundaries of property must be publicly visible so that nonowners can avoid trespass. For more on this aspect of property borders, see Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), pp. 167–68; “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), at n.38; AIP, pp. 30–31, 49; also Randy E. Barnett, “A Consent Theory of Contract,” Colum. L. Rev. 86 (1986; www.randybarnett.com/pre-2000): 269–321, at 303. [↑](#footnote-ref-7)
8. “Catallactics” is a term used by the Austrian economist Ludwig von Mises to refer to the economics of an advanced free market system which employs money prices and entrepreneurial calculation, as opposed to a barter or Crusoe economy. See the Wikipedia entry on “Catallactics” at https://en.wikipedia.org/wiki/Catallactics and the Introduction et pass. in Ludwig von Mises, Human Action: A Treatise on Economics, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; https://mises.org/library/human-action-0). [↑](#footnote-ref-8)
9. Murray N. Rothbard, “‘Human Rights’ as Property Rights,” in The Ethics of Liberty (http://mises.org/rothbard/ethics/fifteen.asp); idem, For A New Liberty, 2d ed. (Auburn, Ala.: Mises Institute, 2006; https://mises.org/library/new-liberty-libertarian-manifesto), pp. 42 et pass. [↑](#footnote-ref-9)
10. “Justice is the constant and perpetual wish to render every one his due… The maxims of law are these: to live honestly, to hurt no one, to give every one his due.” J.A.C. Thomas,ed., trans., The Institutes of Justinian: Text, Translation, and Commentary (Amsterdam: North-Holland Publishing Company, 1975). See also Thomas Aquinas, Summa Theologica, I–II, Q 64, art 2, in Anton C. Pegis, ed., Basic Writings of St. Thomas Aquinas (New York: Random House, 1945), 2: 491 (“the act of justice is to render what is due”), quoted in Tom Bethell, The Noblest Triumph: Property and Prosperity through the Ages (New York: St. Martin’s Griffin, 1998), p. 161. See also Thomas Aquinas, Summa Theologica (New Advent, https://www.newadvent.org/summa), Secunda Secundæ Partis, Question 58, arts. 1, 11. [↑](#footnote-ref-10)
11. A.N. Yiannopoulos, Louisiana Civil Law Treatise, Property (West Group, 4th ed. 2001), §§ 1, 2 (first emphasis in original; remaining emphasis added). See also Louisiana Civil Code (https://www.legis.la.gov/legis/Laws\_Toc.aspx?folder=67&level=Parent), art. 477 (“Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law”). See also “What Libertarianism Is” (ch. 2), Appendix I. [↑](#footnote-ref-11)
12. For a systematic analysis of various forms of socialism, such as Socialism Russian-Style, Socialism Social-Democratic Style, the Socialism of Conservatism, and the Socialism of Social Engineering, see Hoppe, A Theory of Socialism and Capitalism, chaps. 3–6. Recognizing the common elements of various forms of socialism and their distinction from libertarianism (capitalism), Hoppe incisively defines socialism as “an institutionalized interference with or aggression against private property and private property claims.” Ibid., p. 2. See also the quote from Hoppe in note 18, below. [↑](#footnote-ref-12)
13. Even the private thief, by taking your watch, is implicitly acting on the maxim that he has the right to control it—that he is its owner. He does not deny property rights—he simply differs from the libertarian as to who the owner is. In fact, as Adam Smith observed: “If there is any society among robbers and murderers, they must at least, according to the trite observation, abstain from robbing and murdering one another.” Adam Smith, The Theory of Moral Sentiments (Indianapolis: Liberty Fund, 1982 [1759]), II.II.3.2. [↑](#footnote-ref-13)
14. As Hoppe observes, even in a paradise with a superabundance of goods:

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

    Hoppe, A Theory of Socialism and Capitalism, 19. See also “Causation and Aggression” (ch. 8) (discussing the use of other humans’ bodies as means). See also “How We Come to Own Ourselves” (ch. 4). [↑](#footnote-ref-14)
15. This analysis draws on Ludwig von Mises’s “praxeological” view of the nature of human action, in which actors or agents employ scarce means to causally achieve desired ends. See the section “The Structure of Human Action: Means and Ends” in Kinsella, “Intellectual Freedom and Learning versus Patent and Copyright,” Economic Notes No. 113 (Libertarian Alliance, Jan. 18, 2011) and idem, “Ideas Are Free: The Case Against Intellectual Property,” Mises Daily (Nov. 23, 2010). See also “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.E. [↑](#footnote-ref-15)
16. The term “thing” here is used as a synonym for scarce resources, including not only material objects but also human bodies. This usage draws on the civil law, in which the term “things” refers to “material objects” that are “susceptible of appropriation”—that is, to “the objects of patrimonial rights.” See Yiannopoulos, Louisiana Civil Law Treatise, Property, §§ 12, 201; Louisiana Civil Code, arts. 448, 453, et pass. For more discussion of the concept of “things,” see “What Libertarianism Is” (ch. 2), Appendix I. [↑](#footnote-ref-16)
17. Ayn Rand, “Galt’s Speech,” in For the New Intellectual, quoted in the “Physical Force” entry, The Ayn Rand Lexicon: Objectivism from A to Z, Harry Binswanger, ed. (New York: New American Library, 1986; https://perma.cc/L4YA-96CC). Ironically, Objectivists often excoriate libertarians for having a “context-less” concept of aggression—that is, that “aggression” or “rights” are meaningless unless these concepts are embedded in the larger philosophical framework of Objectivism—despite Galt’s straightforward definition of aggression as the initiation of physical force against others. However, there are distinctions to be drawn between property rights in an actor’s body and in external resources homesteaded by that actor or some previous owner. See, on this, Kinsella, “The Relation between the Non-aggression Principle and Property Rights: a response to Division by Zer0,” Mises Economics Blog (Oct. 4, 2011). See also the related discussion in “What Libertarianism Is” (ch. 2), at n.13. [↑](#footnote-ref-17)
18. Rothbard, For a New Liberty, 23. See also idem, The Ethics of Liberty: “The fundamental axiom of libertarian theory is that each person must be a self-owner, and that no one has the right to interfere with such self-ownership” (p. 60), and “What…aggressive violence means is that one man invades the property of another without the victim’s consent. The invasion may be against a man’s property in his person (as in the case of bodily assault), or against his property in tangible goods (as in robbery or trespass)” (p. 45). Hoppe writes:

    If … an action is performed that uninvitedly invades or changes the physical integrity of another person’s body and puts this body to a use that is not to this very person’s own liking, this action … is called aggression…. Next to the concept of action, property is the most basic category in the social sciences. As a matter of fact, all other concepts to be introduced in this chapter—aggression, contract, capitalism and socialism—are definable in terms of property: aggression being aggression against property, contract being a nonaggressive relationship between property owners, socialism being an institutionalized policy of aggression against property, and capitalism being an institutionalized policy of the recognition of property and contractualism.

    Hoppe, A Theory of Socialism and Capitalism, pp. 22–23, 18. [↑](#footnote-ref-18)
19. See “Punishment and Proportionality” (ch. 5). [↑](#footnote-ref-19)
20. The following terms and formulations may be considered as roughly synonymous, depending on context: aggression; initiation of force; trespass; invasion; unconsented to (or uninvited) change in the physical integrity (or use, control or possession) of another person’s body or property. [↑](#footnote-ref-20)
21. “Prima facie,” because some rights in one’s body are arguably forfeited or lost in certain circumstances, e.g., when one commits a crime, thus authorizing the victim to at least use defensive force against the body of the aggressor (implying the aggressor is to that extent not the owner of his body). For more on this see “What Libertarianism Is” (ch. 2), at n.17; “How We Come to Own Ourselves” (ch. 4); “A Libertarian Theory of Contract” (ch. 9); “Inalienability and Punishment: A Reply to George Smith” (ch. 10). [↑](#footnote-ref-21)
22. See Hans-Hermann Hoppe, “The Idea of a Private Law Society,” Mises Daily (July 28, 2006; https://mises.org/library/idea-private-law-society):

    Conventionally, the state is defined as an agency that possesses two unique characteristics. First, the state is an agency that exercises a territorial monopoly of ultimate decision-making. That is, it is the ultimate arbiter in every case of conflict, including conflicts involving itself, and it allows no appeal above and beyond itself. Furthermore, the state is an agency that exercises a territorial monopoly of taxation. That is, it is an agency that unilaterally fixes the price private citizens must pay for its provision of law and order.

    See also Hoppe’s definition of the state in note 52, below. [↑](#footnote-ref-22)
23. David Kestenbaum & Jacob Goldstein, “The Secret Document That Transformed China,” NPR’s Planet Money blog (Jan. 20, 2012; https://perma.cc/C4SP-XSC7). [↑](#footnote-ref-23)
24. On the term “conflictable,” see See “Against Intellectual Property After Twenty Years” (ch. 15), text at n.29 et pass.; Kinsella, “On Conflictability and Conflictable Resources,” StephanKinsella.com (Jan. 31, 2022); see also “What Libertarianism Is” (ch. 2), Appendix I; “How We Come to Own Ourselves” (ch. 4), text at n.10; “A Libertarian Theory of Punishment and Rights” (ch. 5), at n.62; “Dialogical Arguments for Libertarian Rights” (ch. 6), at n.6; “Causation and Aggression” (ch. 8), n.19. [↑](#footnote-ref-24)
25. On the importance of the concept of scarcity and the possibility of conflict for the emergence of property rules, see Hoppe, A Theory of Socialism and Capitalism, 160; and the discussion thereof in Kinsella, “Thoughts on the Latecomer and Homesteading Ideas; or, Why the Very Idea of ‘Ownership’ Implies that only Libertarian Principles are Justifiable,” Mises Economics Blog (Aug. 15, 2007). [↑](#footnote-ref-25)
26. “Grundnorm” was legal philosopher Hans Kelsen’s term for the hypothetical basic norm or rule that serves as the basis or ultimate source for the legitimacy of a legal system. See Hans Kelsen, General Theory of Law and State, Anders Wedberg, trans. (Cambridge, Mass.: Harvard University Press, 1949). I employ this term to refer to the fundamental norms presupposed by civilized people, e.g., in argumentative discourse, which in turn imply libertarian political norms.

    That the libertarian grundnorms are, in fact, necessarily presupposed by all civilized people to the extent they are civilized—during argumentative justification, that is—is shown by Hoppe in his argumentation-ethics defense of libertarian rights. On this, see Hoppe, A Theory of Socialism and Capitalism, chap. 7; “What Libertarianism Is” (ch. 2), at n.2; “Dialogical Arguments for Libertarian Rights” (ch. 6); “Defending Argumentation Ethics” (ch. 7).

    For discussion of why people (to one extent or the other) do value these underlying norms, see Kinsella, “The Division of Labor as the Source of Grundnorms and Rights,” Mises Economics Blog (April 24, 2009), and idem, “Empathy and the Source of Rights,” Mises Economics Blog (Sept. 6, 2006). See also “Punishment and Proportionality” (ch. 5), at Part I and IV.G:

    Civilized people are also concerned about justifying punishment. They want to punish, but they also want to know that such punishment is justified. They want to be able to punish legitimately…. Theories of punishment are concerned with justifying punishment, with offering decent people who are reluctant to act immorally a reason why they may punish others. This is useful, of course, for offering moral people guidance and assurance that they may properly deal with those who seek to harm them. [↑](#footnote-ref-26)
27. As Rothbard argues, there are only two alternatives to self-ownership either:

    1. a certain class of people, A, have the right to own another class, B; or

    2. everyone has the right to own his equal quota share of everyone else.

    The first alternative implies that, while class A deserves the rights of being human, class B is in reality subhuman and, therefore, deserves no such rights. But since they are indeed human beings, the first alternative contradicts itself in denying natural human rights to one set of humans. Moreover, allowing class A to own class B means that the former is allowed to exploit and, therefore, to live parasitically at the expense of the latter; but, as economics can tell us, this parasitism itself violates the basic economic requirement for human survival: production and exchange.

    The second alternative, which we might call “participatory communalism” or “communism,” holds that every man should have the right to own his equal quota share of everyone else. If there are three billion people in the world, then everyone has the right to own one-three-billionth of every other person. In the first place, this ideal itself rests upon an absurdity—proclaiming that every man is entitled to own a part of everyone else and yet is not entitled to own himself. Second, we can picture the viability of such a world—a world in which no man is free to take any action whatever without prior approval or indeed command by everyone else in society. It should be clear that in this sort of “communist” world, no one would be able to do anything, and the human race would quickly perish.

    Murray N. Rothbard, “Justice and Property Rights,” in Samuel L. Blumenfeld, ed., Property in a Humane Economy by (LaSalle, Ill.: Open Court, 1974; https://mises.org/library/property-humane-economy), at 107–108 (emphasis added) (also published in Murray N. Rothbard, Economic Controversies (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/economic-controversies)). A similar version of this article under the same title was published in Rothbard, Egalitarianism as a Revolt Against Nature and Other Essays, 2d ed. (Auburn, Ala.: Mises Institute, 2000 [1974]; https://mises.org/library/egalitarianism-revolt-against-nature-and-other-essays). Interestingly, the former piece, published shortly after the latter piece, appended a crucial final paragraph distancing Rothbard from some of the more leftish implications from the latter piece. See Kinsella, “Justice and Property Rights: Rothbard on Scarcity, Property, Contracts…,” The Libertarian Standard (Nov. 19, 2010) and idem, “Rothbard on the ‘Original Sin’ in Land Titles: 1969 vs. 1974,” StephanKinsella.com (Nov. 5, 2014). See Hoppe’s similar argument, discussed in “How We Come to Own Ourselves” (ch. 4), n.14, and similar comments in David Boaz, The Libertarian Mind: A Manifesto for Freedom (New York: Simon & Schuster, 2015), p. 140.

    On Rothbard’s critique of this “communist” approach to property rights assignment, see also “How We Come to Own Ourselves” (ch. 4), at n.14; “Defending Argumentation Ethics” (ch. 7), at n.31; and Kinsella, “Argumentation Ethics and Liberty: A Concise Guide,” Mises Daily (May 27, 2011), at n. 1. [↑](#footnote-ref-27)
28. See Hoppe, A Theory of Socialism and Capitalism, 157–65; “What Libertarianism Is” (ch. 2), at n.23; “How We Come to Own Ourselves” (ch. 4), n.15; “A Libertarian Theory of Punishment and Rights” (ch. 5), Parts III.C and III.D; “Dialogical Arguments for Libertarian Rights” (ch. 6), at n.43; “Defending Argumentation Ethics” (ch. 7); and Kinsella, “The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle,” StephanKinsella.com (Nov. 10, 2011). [↑](#footnote-ref-28)
29. “Punishment and Proportionality” (ch. 5), Part III.F. [↑](#footnote-ref-29)
30. Hoppe, A Theory of Socialism and Capitalism, 23. [↑](#footnote-ref-30)
31. For elaboration on this point, see “How We Come To Own Ourselves” (ch. 4), the sections “Direct Control” and “Summary”; “Defending Argumentation Ethics” (ch. 7), text following n.36; Hoppe, A Theory of Socialism and Capitalism, chaps. 1, 2, and 7. See also Hoppe, “The Idea of a Private Law Society”:

    Outside of the Garden of Eden, in the realm of all-around scarcity, the solution [to the problem of social order—the need for rules to permit conflicts to be avoided] is provided by four interrelated rules… First, every person is the proper owner of his own physical body. Who else, if not Crusoe, should be the owner of Crusoe’s body? Otherwise, would it not constitute a case of slavery, and is slavery not unjust as well as uneconomical? [↑](#footnote-ref-31)
32. See “How We Come to Own Ourselves” (ch. 4). Note that if an agent A has committed an act of aggression against B, as discussed in note 21, above, then B’s claim to be able to do things to A’s body without A’s permission would be making a distinction between A and B, but one grounded in the nature of things. As long as A and B have not attacked each other, there is no relevant distinction between them, rendering any unequal allocation of rights between them (such as B can own or hit A, but not vice-versa) non-universalizable, particularistic, and unacceptable in genuine argumentation. But matters are different if A has forcefully invaded B’s body without B’s consent. In this case we could say A is estopped from denying B’s similar right to invade A’s body, that is, to retaliate or defend himself. For similar reasons, critics of Hoppe’s argumentation ethics who claim that the very possibility of a master arguing with his slave invalidates argumentation ethics are incorrect. In the case of chattel slavery, the master would be unable to argumentatively justify his use of force against the slave. He would be engaged in a contradiction: only peaceful, mutually-rights respecting norms can be argumentatively justified, because of the normatively peaceful presuppositions of argumentation itself; yet at the same time the master would be employing dominating force against the slave. The implicit logic of his stance in argumentation would condemn his enslaving actions. If he is consistent, he would have to quit arguing and simply behave like a brute, or release the slave. But if the “master” is a victim who is employing some kind of force in response to aggression, such as retaliatory force, then in this case there would be no contradiction involved if the master/victim were to engage in discourse with his slave/aggressor, since he could point to a justification for treating the slave/aggressor as a slave. I discuss this point also in “Defending Argumentation Ethics” (ch. 7). [↑](#footnote-ref-32)
33. For further discussion of the difference between bodies and things homesteaded for purposes of rights, see “A Libertarian Theory of Contract” (ch. 9), Part III.B; “What Libertarianism Is” (ch. 2), the sections “Property in Bodies” and “Property in External Things,” and, in particular, n. 26; and “How We Come to Own Ourselves” (ch. 4). [↑](#footnote-ref-33)
34. On the nature of appropriation of unowned scarce resources, see Hoppe’s and de Jasay’s ideas quoted and discussed in Kinsella, “Thoughts on the Latecomer and Homesteading Ideas,” and note 39, below, and accompanying text. In particular, see Hoppe, A Theory of Socialism and Capitalism, 24, 160–62, 169-71; and Anthony de Jasay, Against Politics: On Government, Anarchy, and Order (London & New York: Routledge, 1997), pp. 158 et seq., 171 et seq., et pass. (De Jasay is also discussed extensively in “Review of Anthony de Jasay, Against Politics: On Government, Anarchy, and Order” (ch. 20). See also “What Libertarianism Is” (ch. 2), at n.27.) De Jasay’s argument presupposes the value of justice, efficiency, and order. Given these goals, he argues for three principles of politics: (1) if in doubt, abstain from political action (pp. 147 et seq.); (2) the feasible is presumed free (pp. 158 et seq.); and (3) let exclusion stand (pp. 171 et seq.). In connection with principle (3), “let exclusion stand,” de Jasay offers insightful comments about the nature of homesteading or appropriation of unowned goods. De Jasay equates property with its owner’s “excluding” others from using it, for example by enclosing or fencing in immovable property (land) or finding or creating (and keeping) movable property (corporeal, tangible objects). He concludes that since an appropriated thing has no other owner, prima facie no one is entitled to object to the first possessor claiming ownership. Thus, the principle means “let ownership stand,” i.e., that claims to ownership of property appropriated from the state of nature or acquired ultimately through a chain of title tracing back to such an appropriation should be respected. This is consistent with Hoppe’s defense of the “natural” theory of property. See Hoppe, A Theory of Socialism and Capitalism, 21–25 and chap. 7. For further discussion of the nature of appropriation, see Jörg Guido Hülsmann, “The A Priori Foundations of Property Economics,” Q.J. Austrian Econ. 7, no. 4 (Winter 2004; https://mises.org/library/priori-foundations-property-economics-0): 41–68, at 51. [↑](#footnote-ref-34)
35. See note 11, above, and accompanying text. [↑](#footnote-ref-35)
36. Yiannopoulos, Louisiana Civil Law Treatise, Property, § 301 (emphasis added); see also Louisiana Civil Code, art. 3421 (“Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name” [emphasis added]); and “What Libertarianism Is” (ch. 2), notes 28–29 and accompanying text, et pass. [↑](#footnote-ref-36)
37. See, in this connection, the quote from Adam Smith in note 13, above. [↑](#footnote-ref-37)
38. This is also, incidentally, the reason the mutualist “occupancy” position on land ownership is unlibertarian. See Kinsella, “A Critique of Mutualist Occupancy,” Mises Economic Blog (Aug. 2, 2009); and “What Libertarianism Is” (ch. 2), at n.31. [↑](#footnote-ref-38)
39. See Hoppe, A Theory of Socialism and Capitalism, 202; idem, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” in The Great Fiction; also Kinsella, “Thoughts on the Latecomer and Homesteading Ideas”; also “What Libertarianism Is” (ch. 2), n.32. [↑](#footnote-ref-39)
40. See Kinsella, “Thoughts on the Latecomer and Homesteading Ideas.” [↑](#footnote-ref-40)
41. See Louisiana Code of Civil Procedure (https://www.legis.la.gov/legis/Laws\_Toc.aspx?folder=68&level=Parent), art. 3653, providing:

    To obtain a judgment recognizing his ownership of immovable property … the plaintiff … shall:

    1. Prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant is in possession thereof; or

    2. Prove a better title thereto than the defendant, if the court finds that the latter is not in possession thereof.

    When the titles of the parties are traced to a common author, he is presumed to be the previous owner. [emphasis added]

    See also Louisiana Civil Code, arts. 526, 531–32; Yiannopoulos, Louisiana Civil Law Treatise, Property, §§ 255–79 and 347 et pass.; and “What Libertarianism Is” (ch. 2), at n.33.

    One could make an analogy here between the prior-later distinction and how current title can, in principle, be traced back to the original act of appropriation of a given resource and Mises’s regression theorem that explains the origin of the value of a commodity money by explaining its value today based on the change from its value yesterday, and so on, back to the original use of the commodity as money. On the latter, see Mises, Human Action, chap. 17, § 4. In fact, some of Mises’s comments suggest this analogy. As he writes: “When we consider the natural components of goods, apart from the labour components they contain, and when we follow the legal title back, we must necessarily arrive at a point where this title originated in the appropriation of goods accessible to all.” Ludwig von Mises, Socialism: An Economic and Sociological Analysis, J. Kahane, trans. (Indianapolis, Ind: Liberty Fund, 1981; https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis), chap. 1, §2, p. 32. [↑](#footnote-ref-41)
42. See, e.g., Hoppe, A Theory of Socialism and Capitalism, p. 202; idem, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp), pp. 327–30; see also discussion of these and related matters in Kinsella, “Thoughts on the Latecomer and Homesteading Ideas; “Defending Argumentation Ethics” (ch. 7); and “How We Come to Own Ourselves” (ch. 4). As Hoppe explains in “The Idea of a Private Law Society”:

    every person is the proper owner of all nature-given goods that he has perceived as scarce and put to use by means of his body, before any other person. Indeed, who else, if not the first user, should be their owner? The second or third one? Were this so, however, the first person would not perform his act of original appropriation, and so the second person would become the first, and so on and on. That is, no one would ever be permitted to perform an act of original appropriation and mankind would instantly die out. Alternatively, the first user together with all late-comers become part-owners of the goods in question. Then conflict will not be avoided, however, for what is one to do if the various part-owners have incompatible ideas about what to do with the goods in question? This solution would also be uneconomical because it would reduce the incentive to utilize goods perceived as scarce for the first time.

    See also, in this connection, de Jasay, Against Politics, further discussed and quoted in Kinsella, “Thoughts on the Latecomer and Homesteading Ideas.” See also de Jasay’s argument (note 34, above) that since an appropriated thing has no other owner, prima facie no one is entitled to object to the first possessor claiming ownership. De Jasay’s “let exclusion stand” idea, along with the Hoppean emphasis on the prior-later distinction, sheds light on the nature of homesteading itself. Often the question is asked as to what types of acts constitute or are sufficient for homesteading (or “embordering” as Hoppe sometimes refers to it); what type of “labor” must be “mixed with” a thing; and to what property does the homesteading extend? What “counts” as “sufficient” homesteading? We can see that the answer to these questions is related to the issue of what the thing in dispute is. In other words, if B claims ownership of a thing possessed (or formerly possessed) by A, then the very framing of the dispute helps to identify what the thing is that is in dispute and what counts as possession of it. If B claims ownership of a given resource, he wants the right to control it, to a certain extent, and according to its nature. Then the question becomes, did someone else previously control it (whatever is in dispute), according to its nature; i.e., did someone else already homestead it, so that B is only a latecomer? This ties in with de Jasay’s “let exclusion stand” principle, which rests on the idea that if someone is actually able to control a resource such that others are excluded, then this exclusion should “stand.” Of course, the physical nature of a given scarce resource and the way in which humans use such resources will determine the nature of actions needed to “control” it and exclude others. See also on this Murray N. Rothbard’s discussion of the “relevant technological unit” in “Law, Property Rights, and Air Pollution,” in Economic Controversies; also B.K. Marcus, “The Spectrum Should Be Private Property: The Economics, History, and Future of Wireless Technology,” Mises Daily (Oct. 29, 2004; https://mises.org/library/spectrum-should-be-private-property-economics-history-  
    and-future-wireless-technology), and idem, “Radio Free Rothbard,” J. Libertarian Stud. 20, no. 2 (Spring 2006; https://mises.org/library/radio-free-rothbard): 17–51. [↑](#footnote-ref-42)
43. Hoppe, A Theory of Socialism and Capitalism, 23. [↑](#footnote-ref-43)
44. On the title transfer theory of contract, see “A Libertarian Theory of Contract” (ch. 9). See also references in note 41, above, including art. 3653 of the Louisiana Code of Civil Procedure, providing that, in the case of a dispute over immovable property (land or realty), “When the titles of the parties are traced to a common author, he is presumed to be the previous owner.” See also “What Libertarianism Is” (ch. 2), at n.33. [↑](#footnote-ref-44)
45. State laws and constitutional provisions often pay lip service to the existence of various personal and property rights, but then take it back by recognizing the right of the state to regulate or infringe the right so long as it is “by law” or “not arbitrary.” See, e.g., Constitution of Russia, art. 25 (“The home shall be inviolable. No one shall have the right to get into a house against the will of those living there, except for the cases established by a federal law or by court decision”) and art. 34 (“Everyone shall have the right to freely use his or her abilities and property for entrepreneurial or any other economic activity not prohibited by the law”); Constitution of Estonia, art. 31 (“Estonian citizens shall have the right to engage in commercial activities and to form profit-making associations and leagues. The law may determine conditions and procedures for the exercise of this right”); Universal Declaration of Human Rights, art. 17 (“Everyone has the right to own property alone as well as in association with others… No one shall be arbitrarily deprived of his property”); art. 29(2) (“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”). Even the Thirteenth Amendment to the US Constitution, said to have abolished slavery, makes an exception for “crimes” (which, of course, the state can arbitrarily decree, such as drug crimes, tax evasion, evading conscription, etc.): “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” (Emphasis added.) [↑](#footnote-ref-45)
46. Mises, Human Action, pp. 13–14, et pass. [↑](#footnote-ref-46)
47. For further discussion of the role of empathy in the adoption of libertarian grundnorms, see note 26, above. [↑](#footnote-ref-47)
48. Mises, Human Action, p. 14. [↑](#footnote-ref-48)
49. As Hoppe explains, “Justification—proof, conjecture, refutation—is argumentative justification.” Hoppe, The Economics and Ethics of Private Property, p. 384; see also ibid., p. 413 and Hoppe, A Theory of Socialism and Capitalism, p. 155, et pass. [↑](#footnote-ref-49)
50. See also “What Libertarianism Is” (ch. 2). For this reason, Henry Hazlitt’s proposed name “cooperatism” for the freedom philosophy has some appeal. See Henry Hazlitt, The Foundations of Morality (Irvington-on-Hudson, New York: Foundation for Economic Education, 1994 [1964]; https://fee.org/resources/foundations-of-morality/), p. xii; Kinsella, “The new libertarianism: anti-capitalist and socialist; or: I prefer Hazlitt’s ‘Cooperatism,’” StephanKinsella.com (June 19, 2009). [↑](#footnote-ref-50)
51. As Bastiat writes:

    Sometimes the law defends plunder and participates in it. Thus the beneficiaries are spared the shame and danger that their acts would otherwise involve… But how is this legal plunder to be identified? Quite simply. See if the law takes from some persons what belongs to them and gives it to the other persons to whom it doesn’t belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime. Then abolish that law without delay—No legal plunder; this is the principle of justice, peace, order, stability, harmony and logic.

    Frederic Bastiat, The Law, 17–18 (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, Dean Russell trans. 1950 [1850]; https://fee.org/resources/the-law/). [↑](#footnote-ref-51)
52. See Hans-Hermann Hoppe, “Reflections on the Origin and the Stability of the State,” LewRockwell.com (June 23, 2008; https://www.lewrockwell.com/2008/06/hans-hermann-hoppe/to-battle-the-state/); also Kinsella, “The Nature of the State and Why Libertarians Hate It,” The Libertarian Standard (May 3, 2010; http://libertarianstandard.com/2010/05/03/the-nature-of-the-state-and-why-libertarians-hate-it/). [↑](#footnote-ref-52)
53. States invariably claim both powers, but either one alone is sufficient to give the state its unique status, and in fact each power implies the other. The power to tax alone would provide the agency with the ability to outcompete competing agencies that do not have this power, in the same way that public (government) schools outcompete private schools. Thus, the power to tax gives the taxing agency the practical ability to monopolize the field and outlaw or restrict competition. And the power to exclude competition alone would permit the monopolizing agency to charge monopoly prices for its services, akin to a tax. [↑](#footnote-ref-53)
54. See “What It Means To Be an Anarcho-Capitalist” (ch. 3); also Jan Narveson, “The Anarchist’s Case,” in Respecting Persons in Theory and Practice (Lanham, Md.: Rowman & Littlefield, 2002; https://web.archive.org/web/20140914044736/www.arts.uwaterloo.ca/~jnarveso/articles/Anarchist’s\_Argument.pdf) and Hans-Hermann Hoppe, “Anarcho-Capitalism: An Annotated Bibliography,” LewRockwell.com (Dec. 31, 2001; https://archive.lewrockwell.com/hoppe/hoppe5.html); Kinsella, “The Greatest Libertarian Books,” StephanKinsella.com (Aug. 7, 2006); and other references in “Legislation and the Discovery of Law in a Free Society” (ch. 13), n.25. [↑](#footnote-ref-54)
55. See “Legislation and the Discovery of Law in a Free Society” (ch. 13). [↑](#footnote-ref-55)
56. The Stop Online Piracy Act (SOPA), defeated a few years back through widespreadInternet-based outrage, is a good example of a threat to freedom of expression in the name of copyright law. See Kinsella, “SOPA is the Symptom, Copyright is the Disease:The SOPA wakeup call to ABOLISH COPYRIGHT,” The Libertarian Standard (Jan. 24, 2012). Regarding the origins of copyright, see Karl Fogel, “The Surprising History of Copyright and The Promise of a Post-Copyright World,” Question Copyright (2006; https://perma.cc/DV92-TEH3); Michele Boldrin & David K Levine, Against Intellectual Monopoly (Cambridge University Press, 2008; www.againstmonopoly.org),ch. 2; Eric E. Johnson, “Intellectual Property and the Incentive Fallacy,” Florida State U. L. Rev. 39 (2012; https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1746343): 623–79, at 625 (“[T]he monopolies now understood as copyrights and patents were originally created by royal decree, bestowed as a form of favoritism and control. As the power of the monarchy dwindled, these chartered monopolies were reformed, and essentially by default, they wound up in the hands of authors and inventors.”); Tom W. Bell, Intellectual Privilege: Copyright, Common Law, and the Common Good (Arlington, Virginia: Mercatus Center, 2014; https://perma.cc/JLC2-396Y), chap. 3. For more on the origins of IP, see references in “Introduction to Origitent” (ch. 16), n.3. [↑](#footnote-ref-56)
57. See Kinsella, “The Patent, Copyright, Trademark, and Trade Secret Horror Files,” Mises Economics Blog (Feb. 3, 2010). [↑](#footnote-ref-57)
58. For examples, see ibid. [↑](#footnote-ref-58)
59. See “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), Part IV.B. 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.” See AIP, the section “IP Rights and Relation to Tangible Property,” following n.29. [↑](#footnote-ref-59)
60. Dale A. Nance, “Foreword: Owning Ideas,” Harv. J. L. & Pub. Pol’y 13, no. 3 (Summer 1990): 757–74, p. 763. [↑](#footnote-ref-60)
61. U.S. Constitution, Art. I, Sec. 8, Cl. 8. Nance comments that “the reference to ‘securing’ (rather than, say, ‘granting’) the ‘right’ to authors and inventors suggests a deontological element as well.” Nance, “Foreword: Owning Ideas,” p. 763. [↑](#footnote-ref-61)
62. Nance, “Foreword: Owning Ideas,” p. 764 (citations omitted). Tom G. Palmer, who points out that Wilhelm von Humboldt also linked property rights to personality, critiques the personality justification for IP in “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, at pp. 819–20 and Part III, esp. pp. 843–49). 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. 290 (“Properly elaborated, the labor and personality theories together exhaust the set of morally acceptable justifications of intellectual property. In short, intellectual property is either labor or personality, or it is theft.”). See also Peter S. Menell, Mark A. Lemley, Robert P. Merges & Shyamkrishna Balganesh, Intellectual Property in the New Technological Age: Volume I: Perspectives, Trade Secrets & Patents (Clause 8 Publishing, 2022), chap. 1, § A, “Philosophical Perspectives.”

    The European reception to the personality justification for IP is one reason continental IP systems often include “moral rights,” which, at least until recently, had been less common in Anglo-American jurisdictions. See, on the connection between personality rights in the civil (continental) law and moral rights, John Henry Merryman, “The Refrigerator of Bernard Buffet,” Hastings L. J. 27, no. 5 (May 1976; https://repository.uclawsf.edu/hastings\_law\_journal/vol27/iss5/3/): 1023–49, p. 1025. For a more recent illustration of the application of such principles, see Daniel Grant, “Artist’s lawsuit against school that sought to cover up his murals heads to appeals court,” The Art Newspaper (Feb. 1, 2023; https://perma.cc/9EE3-49SA). See also Palmer, “Are Patents and Copyrights Morally Justified?”, p. 820, n.6 and 841–43. [↑](#footnote-ref-62)
63. See, e.g., Hughes, “The Philosophy of Intellectual Property” (discussing the Lockean and Hegelian justifications); William Fisher, “Theories of Intellectual Property,” in Stephen Munzer, ed., New Essays in the Legal and Political Theory of Property (Cambridge University Press, 2001; https://perma.cc/4YLX-P8JF); idem, “IP Theory” (https://perma.cc/Y48K-HCTV); Mick Soepboer, “Libertarian views on intellectual property law: An analysis of laissez-faire theories applied on the modern day IP system,” University of Cape Town, School for Advanced Legal Studies, Master Dissertation Commercial Law (July 2009; https://perma.cc/4HR6-743V), §3.3; Edwin C. Hettinger, “Justifying Intellectual Property,” Philosophy & Public Affairs 18, no. 1 (Winter 1989): 31–52; Vallabhi Rastogi, “Theories of Intellectual Property Rights,” Enhelion Blogs (Feb. 27, 2021; https://perma.cc/U9D5-9V4U); Oishika Banerji, “Theories of protection of intellectual property rights,” IPleaders.in Blog (Oct. 24, 2021; https://perma.cc/M2BU-T7BC); Kahsay Debesu Gebray, “Justifications for Claiming Intellectual Property Protection in Traditional Herbal Medicine and Biodiversity Conservation: Prospects and Challenges,” WIPO-WTO Colloquium Papers vol. 4 (2013; https://perma.cc/3TXQ-LNFX); Adam D. Moore & Kenneth Einar Himma, “Intellectual Property,” in Edward N. Zalta, ed., Stanford Encyclopedia of Philosophy (Stanford University, 2011; https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1980917), §3. [↑](#footnote-ref-63)
64. On the defects of utilitarianism and interpersonal utility comparisons, see the sources cited in AIP, at n. 40. See also Ronald M. Dworkin, “Is Wealth a Value?”, J. Legal Stud. 9, no. 2 (March 1980; https://perma.cc/6WS4-LPPB): 191–226; idem, “Why Efficiency? — A Response to Professors Calabresi and Posner,” Hofstra L. Rev. 8, no. 3 (Spring 1980; https://scholarlycommons.law.hofstra.edu/hlr/vol8/iss3/5/): 563–90. [↑](#footnote-ref-64)
65. See studies cited in references in note 68, below; also Kinsella, “Reducing the Cost of IP Law,” Mises Daily (Jan. 20, 2010); idem, “What Are the Costs of the Patent System?,” Mises Economics Blog (Sep. 27, 2007); 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, the section “Costs of the Patent System,” p. 89 et seq. [↑](#footnote-ref-65)
66. See Kinsella, “Yet Another Study Finds Patents Do Not Encourage Innovation,” Mises Economics Blog (July 2, 2009). [↑](#footnote-ref-66)
67. See Boldrin & Levine, Against Intellectual Monopoly; Kinsella, “Yet Another Study Finds Patents Do Not Encourage Innovation”; and references in note 65, above and in note 68, below. [↑](#footnote-ref-67)
68. See 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); idem, “KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished,” Kinsella on Liberty Podcast (Nov. 24, 2021); and idem, “Yet Another Study Finds Patents Do Not Encourage Innovation,” Mises Economics Blog (July 2, 2009). [↑](#footnote-ref-68)
69. U.S. Constitution, Art. I, Sec. 8, Cl. 8. For more background on the origins of copyright in America, see references in note 56, above. [↑](#footnote-ref-69)
70. Fritz Machlup, An Economic Review of the Patent System (1958; https://mises.org/library/economic-review-patent-system), pp. 79–80. [↑](#footnote-ref-70)
71. George Priest, “What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung,” Research in Law & Econ. 8 (1986): 19–24. [↑](#footnote-ref-71)
72. François Lévêque & Yann Ménière, The Economics of Patents and Copyrights (Berkely Electronic Press, 2004; https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=642622), at 102. [↑](#footnote-ref-72)
73. James Bessen & Michael J. Meurer, Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk (Princeton University Press, 2008). [↑](#footnote-ref-73)
74. Michele Boldrin & David K. Levine, “The Case Against Patents,” J. Econ. Perspectives 27 no. 1 (Winter 2013; https://perma.cc/Q5NT-9CGA): 3–22. [↑](#footnote-ref-74)
75. See, e.g., Kinsella, “Leveraging IP,” Mises Economics Blog (Aug. 1, 2010); idem, “Milton Friedman (and Rothbard) on the Distorting and Skewing Effect of Patents,” C4SIF Blog (July 3, 2011); Matt Ridley, How Innovation Works: And Why It Flourishes in Freedom (Harper, 2020), p. 347 (“patents tend to favour inventions rather than innovations: upstream discoveries of principles, rather than downstream adaptation of devices to the market.”). [↑](#footnote-ref-75)
76. Another problem with the wealth-maximization approach is that it has no logical stopping point. If adding (and increasing) IP protection is a cost worth paying to stimulate additional innovation and creation over what would occur on a free market—that is, if the amount of innovation and creation absent IP law is not enough, then how do we know that we have enough now, under a system of patent and copyright? Maybe the penalties or terms should be increased: impose capital punishment, triple the patent and copyright term. And what if there still is not enough? Why don’t we expropriate taxpayer funds and set up a government award or prize system, like a huge state-run Nobel prize with thousands of winners, to hand out to deserving innovators, so as to incentivize even more innovation? Incredibly, this has been suggested, too—even by Nobel Prize winners. See Kinsella, “$30 Billion Taxfunded Innovation Contracts: The ‘Progressive-Libertarian’ Solution,” Mises Economics Blog (Nov. 23, 2008); idem, “Libertarian Favors $80 Billion Annual Tax-Funded ‘Medical Innovation Prize Fund,’” Mises Economic Blog (Aug. 12, 2008). [↑](#footnote-ref-76)
77. See also Part IV.C in “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15). [↑](#footnote-ref-77)
78. Tibor Machan, “Intellectual Property and the Right to Private Property,” Mises.org working paper (2006; https://mises.org/wire/new-working-paper-machan-ip), discussed in Kinsella, “Owning Thoughts and Labor,” Mises Economics Blog (Dec. 11, 2006), and in idem, “Remembering Tibor Machan, Libertarian Mentor and Friend: Reflections on a Giant,” StephanKinsella.com (April 19, 2016). See also the similar “ontology” based argument of J. Neil Schulman, mentioned in “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17). [↑](#footnote-ref-78)
79. Quoted in Kinsella, “Rand on IP, Owning ‘Values’, and ‘Rearrangement Rights,’” Mises Economics Blog (Nov. 16, 2009). The idea that you own what you “produce” or “create” is widespread. See, e.g., Kirzner on Mill:

    “The institution of property,” John Stuart Mill remarked, “when limited to its essential elements, consists in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those who produced it. The foundation of the whole is the right of producers to what they themselves have produced.” The purpose of this paper is to point out the ambiguity of the phrase “what a man has produced”, and to draw attention, in particular, to one significant, economically valid, meaning of the term,—a meaning involving the concept of entrepreneurship—which seems to have been overlooked almost entirely.… Precision in applying the term “what a man has produced” seems to be of considerable importance.

    Israel M. Kirzner, “Producer, Entrepreneur, and the Right to Property,” Reason Papers No. 1 (Fall 1974; https://reasonpapers.com/archives/): 1–17, p.1, quoting J.S. Mill, Principles of Political Economy (Ashley Edition, Londen, 1923), p. 218. As another example, patent attorney Dale Halling writes: “A patent is a property right it is not a monopoly. Like all property the source of the property right is creation.” See comments in Kinsella, “Pro-IP Libertarians Upset about FTC Poaching Patent Turf,” Mises Economics Blog (Aug. 24, 2011). [↑](#footnote-ref-79)
80. See, on this point, Sheldon Richman, “Intellectual ‘Property’ Versus Real Property: What Are Copyrights and What Do They Mean for Liberty?,” The Freeman (12 June 2009; https://fee.org/resources/intellectual-property-versus-real-property):

    If someone writes or composes an original work or invents something new, the argument goes, he or she should own it because it would not have existed without the creator. I submit, however, that as important as creativity is to human flourishing, it is not the source of ownership of produced goods… So what is the source? Prior ownership of the inputs through purchase, gift, or original appropriation. This is sufficient to establish ownership of the output. Ideas contribute no necessary additional factor. If I build a model airplane out of wood and glue, I own it not because of any idea in my head, but because I owned the wood, the glue, and myself. If Howard Roark’s evil twin trespassed on your land and, using your materials, built the most creatively original house ever seen, would he own it? Of course not. You would—and you’d have every right to tear it down.

    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-80)
81. See “What Libertarianism Is” (ch. 2); Hoppe, A Theory of Socialism and Capitalism, chaps. 1, 2, and 7; David Hume, A Treatise of Human Nature, Selby-Bigge, ed. (Oxford, 1968), Book III, Part II, Section III n16:

    Some philosophers account for the right of occupation, by saying, that every one has a property in his own labour; and when he joins that labour to any thing, it gives him the property of the whole: But, 1. There are several kinds of occupation, where we cannot be said to join our labour to the object we acquire: As when we possess a meadow by grazing our cattle upon it. 2. This accounts for the matter by means of accession; which is taking a needless circuit. 3. We cannot be said to join our labour to any thing but in a figurative sense. Properly speaking, we only make an alteration on it by our labour. This forms a relation betwixt us and the object; and thence arises the property, according to the preceding principles.

    See also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at notes 56–57. [↑](#footnote-ref-81)
82. Hans-Hermann Hoppe, “Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order,” in The Economics and Ethics of Private Property, at 50 (emphasis added). [↑](#footnote-ref-82)
83. See Kinsella, “Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and ‘Rearranging,’” Mises Economics Blog (Sep. 29, 2010). See also Pierre-Joseph Proudhon, “Les Majorats littéraires,” Luis Sundkvist, trans. (1868), in Lionel Bently & Martin Kretschmer, eds., Primary Sources on Copyright (1450–1900; www.copyrighthistory.org/cam/index.php), at pp. 11 et seq.:

    The masters of science instruct us all—and the supporters of literary property are the first to argue this—that man does not have the capability of creating a single atom of matter; that all his activity consists of appropriating the forces of nature, of channeling these and modifying their effects, of composing or decomposing substances, of changing their forms, and, by this steering of the natural forces, by this transformation of substances, by this separation of elements, of making nature [la création] more useful, more fertile, more beneficial, more brilliant, more profitable. So that all human production consists (1º) of an expression of ideas; (2º) a displacement of matter.

    This is essentially Spooner’s mistake: he has a broad definition of “wealth,” which includes knowledge, ideas, inventions, etc., and then assumes that property is just wealth that can be possessed. Thus, ideas can “be property.” See Spooner, “The Law of Intellectual Property or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas,” §§ 2–3, et pass. This also highlights the importance of using the term property to refer to the property rights individuals have with respect to owned resources, as I note in “What Libertarianism Is” (ch. 2), Appendix I. [↑](#footnote-ref-83)
84. In fact, as Proudhon notes:

    [I]n the strict sense of the term, we do not produce our ideas any more than we produce physical substances. Man does not create his ideas—he receives them. He does not at all make truth—he discovers it. He invents neither beauty, nor justice—they reveal themselves to his soul spontaneously, like the conceptions of metaphysics, in the perception of the phenomena of the world, in the relations between things. The intelligible estate [fonds] of nature is, in the same way as its tangible estate, outside of our domain: neither reason, nor the substance of things are ours. Even that very ideal which we dream about, which we pursue, and which causes us to commit so many acts of folly—this mirage of our understanding and our heart—we are not its creators, we are simply those who are able to see it.

    Proudhon, “Les Majorats littéraires,” at p. 12. Or as Isaac Newton put it, “If I have seen further it is only by standing on the shoulders of giants.” Letter to Robert Hooke (February 15, 1676). [↑](#footnote-ref-84)
85. This is Rothbard’s example, from “Knowledge, True and False,” in The Ethics of Liberty, which is discussed at pp. 51–55 in AIP. See also Kinsella, “Richard O. Hammer: Intellectual Property Rights Viewed As Contracts,” C4SIF Blog (June 13, 2021). [↑](#footnote-ref-85)
86. See also Wendy McElroy’s perceptive comments on the “copyright by contract” approach in her note to me reprinted in Kinsella, “McElroy: ‘On the Subject of Intellectual Property’ (1981),” C4SIF Blog (March 19, 2013); also Boudewijn Bouckaert, “What is Property?”, Harv. J. L. & Pub. Pol’y 13, no. 3 (Summer 1990): 775–816, pp. 795 & 804–805. On the title-transfer theory of contract, see “A Libertarian Theory of Contract” (ch. 9). For criticism of Rothbard’s attempt to justify something he confusingly calls “common-law copyright” (since that is something totally different in the common law) by use of contracts, see Kinsella, AIP, the section “Contract vs. Reserved Rights.” Schulman also seems to think that IP, or “logorights,” is somehow “an intellectual artifact of contract law,” whatever that means. See “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17). [↑](#footnote-ref-86)
87. Ludwig von Mises, The Ultimate Foundation of Economic Science: An Essay on Method (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; https://mises.org/library/ultimate-foundation-economic-science), p. 4. [↑](#footnote-ref-87)
88. Mises, Human Action, 93. [↑](#footnote-ref-88)
89. Murray N. Rothbard, Man, Economy, and State, with Power and Market, Scholars ed., second ed. (Auburn, Ala.: Mises Institute, 2009; https://mises.org/library/man-economy-and-state-power-and-market), p. 11. See also See also Guido Hülsmann, “Knowledge, Judgment, and the Use of Property,” Rev. Austrian Econ. 10, no. 1 (1997; https://perma.cc/DKQ8-JX45): 23–48, p. 44 (“The quantities of means we can dispose of—our property—are always limited. Thus, choice implies that some of our ends must remain unfulfilled. We steadily run the danger of pursuing ends that are less important than the ends that could have been pursued. We have to choose the supposedly most important action, though what we choose is how we use our property Action means to employ our property in the pursuit of what appears to be the most important ends.… In choosing the most important action we implicitly select some parts of our technological knowledge for application.”; emphasis added). See also the related discussion in “Goods, Scarce and Nonscarce” (ch. 18), text at n.32. [↑](#footnote-ref-89)
90. Ibid. [↑](#footnote-ref-90)
91. For elaboration on the ideas discussed in this section, see Kinsella, “Intellectual Freedom and Learning Versus Patent and Copyright” and “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), the section “The Separate Roles of Knowledge and Means in Action.” [↑](#footnote-ref-91)
92. See note 54, above, and accompanying text. [↑](#footnote-ref-92)
93. See “Legislation and the Discovery of Law in a Free Society” (ch. 13). [↑](#footnote-ref-93)
94. John Hasnas, “The Myth of the Rule of Law,” Wis. L. Rev. 1995, no. 1 (1995; https://www.copblock.org/40719/myth-rule-law-john-hasnas/): 199–234. [↑](#footnote-ref-94)
95. Leonard Read, “I Don’t Know,” Mises Daily (Nov. 2, 2011 [1965]; https://mises.org/library/i-dont-know). [↑](#footnote-ref-95)
96. For more on this see David Kelley & Roger Donway, Laissez Parler: Freedom in the Electronic Media (1985), as discussed in Kinsella, “Why Airwaves (Electromagnetic Spectra) Are (Arguably) Property),” Mises Economics Blog (Aug. 9, 2009). [↑](#footnote-ref-96)
97. Jerome H. Reichman, “Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System,” Cardozo Arts & Ent. L.J. 13 (1995; https://scholarship.law.duke.edu/faculty\_scholarship/685/): 475 (emphasis added), quoted in Kinsella, “Intellectual Property Advocates Hate Competition,” Mises Economics Blog (July 19, 2011). [↑](#footnote-ref-97)
98. 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, at 284–85, quoted in AIP, n.67. [↑](#footnote-ref-98)
99. Mike Masnick, “We’re Living In the Most Creative Time In History,” Techdirt (Feb. 12, 2012; https://perma.cc/F6HY-QHG9). [↑](#footnote-ref-99)
100. See, e.g., Mike Masnick, “Hollywood Wants To Kill Piracy? No Problem: Just Offer Something Better,” Techdirt (Feb. 6, 2012; https://perma.cc/73TB-YQX8); Paul Tassi, “You Will Never Kill Piracy, and Piracy Will Never Kill You,” Forbes (Feb. 3, 2012; https://perma.cc/23W2-E2FT). [↑](#footnote-ref-100)
101. Kinsella, “Comedian Louis C.K. Makes $1 Million Selling DRM Free Video via PayPal on his own website,” C4SIF.org (Dec. 22, 2011). [↑](#footnote-ref-101)
102. See Kickstarter, https://perma.cc/MYH4-G38W. See also Mike Masnick, “People Rushing To Give Hundreds Of Thousands Of Dollars In Just Hours For Brand New Adventure Game,” Techdirt (Feb. 9, 2012; https://www.techdirt.com/2012/02/09/people-rushing-to-give-hundreds-thousands-dollars-just-hours-brand-new-adventure-game/); Kyle Orland, “Double Fine seeks to cut out publishers with Kickstarter-funded adventure,” ars technica (Feb. 9, 2012; https://arstechnica.com/gaming/2012/02/double-fine-seeks-to-cut-out-publishers-with-kickstarter-funded-adventure/). [↑](#footnote-ref-102)
103. Kinsella, “Conversation with an author about copyright and publishing in a free society,” C4SIF.org (Jan. 23, 2012); see also idem, “Examples of Ways Content Creators Can Profit Without Intellectual Property,” StephanKinsella.com (July 28, 2010); idem, “Innovations that Thrive Without IP,” StephanKinsella.com (Aug. 9, 2010); and idem, Do Business Without Intellectual Property (Liberty.me, 2014). [↑](#footnote-ref-103)