

## Is There Room for Intellectual Property Rights in Austrian Economics?

Paul F. Cwik, Ph.D.

Associate Professor of Economics

Mount Olive College

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### Introduction:

In today's society, intellectual property (IP) rights have become increasingly important, especially with the increased use of computer programs, digital music, digital videos, and digital forms of printed material. Austrian Economics has a long history of examining IP. During this history, the conclusions about whether IP exists and can form property rights have not been uniform. Böhm-Bawerk was explicit in his stance against them.<sup>1,2</sup> Mises accepted copyrights, although he moderated their importance.<sup>3</sup> Rothbard has come out in favor of some forms of IP, specifically copyright.<sup>4</sup> Most recently, Kinsella (2001) has reignited the debate and has generated a tremendous amount of discussion stating that they do not exist.<sup>5</sup> His system of grounding property rights on the basis of scarcity seems to be the leading alternative to the system which includes IP rights.

While Kinsella has made some excellent arguments against the current system of IP laws in the U.S., against the notion of owning ideas and against the building of IP rights upon utilitarian grounds, this paper argues that his argument against using Natural

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<sup>1</sup> Böhm-Bawerk (1962) states, “[Authors’ copyrights] have been a source of especial embarrassment to jurists who have been unable satisfactorily to classify them with either objective or personal rights. The conception of authors’ copyrights as *intellectual property* (the word, property, being used in a strictly legalistic sense and designating an objective right) bears so plainly the stamp of a fiction, resorted to in order to evade the burden of explanation, that it could not possibly prove satisfactory.” (Italics in original) p. 128.

<sup>2</sup> Menger's position on IP is unclear. It seems that either side could read him in a favorable light. While Wieser mentions copyrights and patents in *Social Economics* (1967), he only does so in his positive economic discussion of monopoloids, where he considers their effects on prices as private monopolies.

<sup>3</sup> Mises (1966) downplays the significance of the monopoly prices that patents and copyrights create, (pp. 680-1), arguing that authors would not devote as much time to the production of IP goods (p. 386), and declaring that the issue is the result of legal evolution and is still controversial (p. 662).

<sup>4</sup> By focusing on the “crucial difference in their *legal enforcement*,” Rothbard (1993) argues in favor of copyright and against patents (pp. 652-60). (Italics in original) Rothbard refines and extends his position in *The Ethics of Liberty* (1998), which will be the focus of this paper.

<sup>5</sup> See Kinsella (2001) and <http://blog.mises.org>. While there has been a remarkable amount blogged on IP, I consider this forum to be akin to having a discussion at a dinner party or a hotel conference room. Since it is more of a “shoot from the hip” forum and not peer reviewed, I find it inappropriate to use as a source for citations nor necessary to respond to all points asserted in various blogs on the topic. Thus, this paper will not be citing nor considering arguments from such forums.

Rights as the basis for IP rights is not persuasive and is flawed. Kinsella does make significant arguments against grounding IP in Natural Rights in the way Ayn Rand and Andrew Joseph Galambos did. However, Kinsella groups Rothbard's system of Natural Rights with those of Rand, Galambos and others, and by grouping Rothbard in this way, Kinsella does not address Rothbard's insights or the completeness of Rothbard's system of liberty.

The purpose of this paper is to survey the arguments (specifically on copyright) put forth by Rothbard and then Kinsella. It will then survey Kinsella's alternative, basing rights upon scarcity, and follow that with a critique of his system. The paper will then reassert the superiority of the Rothbardian system and conclude with a few final thoughts.

### **Rothbard's Model of Natural Rights:**

Rothbard's *The Ethics of Liberty* stands as a complete system that integrates an ethical basis of liberty and libertarianism, doing so within the context of an Austrian economic framework. It is important to examine his work on Natural Rights as they relate to IP because it is upon that bedrock that this paper argues that IP rights (at least with regards to copyright) are valid.

Rothbard's analysis is actually very Lockean in its approach—his analysis generally follows the idea of “mixing one's labor” to create a property right.<sup>6</sup> Rothbard's approach begins with the observation that everything has a nature to it and that nature can be discovered by reason. From this observation, he deduces that it follows from man's nature that he owns himself and his labor. Rothbard uses the example of Crusoe on the island to clarify the process. It is through his labors that man

stamp[s] the imprint of his personality and his energy on the land, he has naturally converted the land and its fruits to his *property*. Hence, the isolated man *owns* what he *uses* and *transforms*; therefore, in his case there is no problem of what *should be* A's property against B's. Any man's property is *ipso facto* what he *produces*, i.e., what he transforms into use by his own effort. His property in land and capital goods continues down the various stages of production, until Crusoe comes to *own* the consumer goods which he has produced, until they finally

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<sup>6</sup> Rothbard (1998) makes extensive use of Locke's analysis throughout the book (see pp. 21-3, and in several other passages). Rothbard also makes extensive use of Locke in his essay “Justice and Property Rights” (1997).

disappear through the consumption of them. ... Crusoe, in natural fact, owns his own self and the extension of his self into the material world, neither more nor less.<sup>7</sup>

It is through the simple extension of this logic that Rothbard arrives to the conclusion of the existence of copyrights.<sup>8</sup> A person uses his labor and creates a particular pattern of words, or musical notes or lines of computer code. This creation happens in a state of anarcho-capitalism and is not the result of some artificial creation of rights by the state.

### **Kinsella's Attack on IP Rights:**

Kinsella's grounds his system of property rights on his argument concerning scarcity (which will be explored in more detail below). He contends correctly that property rights are established to reduce conflict. He states that tangible goods exhibit rivalrous consumption characteristics and, by their nature, they are a source of potential conflict. As a result, property rights are needed. Therefore he states that property rights are only assigned to scarce goods and scarce goods are only those goods that display rivalrous consumption characteristics. Thus, he concludes that since ideas cannot be scarce, they cannot be protected by property rights.

Kinsella's main contention against the Lockean establishment of IP rights is that "creation" cannot be the source of property rights because it is neither necessary nor sufficient. He argues that when it comes to unowned resources, they can be homesteaded, i.e., appropriated by the first possessor. He uses the examples of picking an unowned apple, fencing in a plot of farm land, creating a sword from raw materials and carving a statue out of a block of marble to demonstrate this homesteading principle. He makes a careful distinction between occupation and creation (and also labor) as a potential source of property rights. Kinsella states,

We can see from these examples that creation is relevant to the question of ownership of a given "created" scarce resource, such as a statue, sword, or farm, only to the extent that the act of creation *is* an act of occupation, or is otherwise evidence of first occupation. However, "creation" itself does not justify ownership of things; it is neither necessary nor sufficient.<sup>9</sup>

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<sup>7</sup> Rothbard (1998) p. 34. (Italics in original)

<sup>8</sup> Rothbard (1998) p. 123-4.

<sup>9</sup> Kinsella (2001) p. 26-7. (Italics in original)

He claims that creation is not necessary for the formation of property rights because the individual does not create the land; he is merely occupying it. Creation is also not sufficient to form property rights. In the example from Kinsella, suppose that Smith were to create a statue out marble owned by Jones. Smith would not own the statue, because it was already owned by Jones. Smith's adding labor to the statue would not make him a co-owner in any sense. Thus, Kinsella concludes that "[f]irst occupation, not creation or labor, is both necessary and sufficient for the homesteading of unowned scarce resources."<sup>10</sup>

Finally, a corollary argument would be to ask the Lockean, "Mix one's labor with what?" Lockean argue that in order to establish a property right, one has to mix labor with the thing that will be protected by the property right. So it begs the question, since IP is intangible, what exactly is one mixing labor with? If it is not mixing labor with anything, then it would seem that IP proponents are creating rights out of whole cloth and, as shown in the example of Brown and Green, are aggressing against the rights of tangible property owners.

### **Kinsella's Alternative—Scarcity:**

As mentioned before, the function of rights is to reduce conflict. Kinsella states, "A little reflection will show that it is these [tangible] goods' scarcity—the fact that there can be *conflict* over these goods by multiple human actors. [sic] The very possibility of conflict over a resource renders it scarce, giving rise to the need for ethical rules to govern its use."<sup>11</sup> He continues, "Property rights are not applicable to things of infinite abundance, because there cannot be conflict over such things."<sup>12</sup> And later, "Moreover, property rights can apply only to scarce resources."<sup>13</sup> The key for Kinsella's argument is that scarcity is the source of property rights. Without the establishment of this position, his argument cannot stand, for he bases his entire argument upon the notion that ideas are not scarce and therefore, cannot be a source of conflict.

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<sup>10</sup> Kinsella (2001) p. 27.

<sup>11</sup> Kinsella (2001) p. 19. (Italics in original)

<sup>12</sup> Kinsella (2001) p. 22.

<sup>13</sup> Kinsella (2001) p. 22.

Since ideas are not scarce, Kinsella argues that they cannot be included under the protection of property rights. To illustrate his point, he uses as an example the copying of a book. Suppose that Green were to copy a book written by Brown. The copying of the book would not diminish Brown's use of the particular pattern of words. Brown would still have his book. Green has not taken it away from him. "Since use of another's idea does not deprive him of its use, no conflict over its use is possible; ideas, therefore, are not candidates for property rights."<sup>14</sup> Kinsella argues that not only should Green have full use of the copied book, but if Brown were to attempt to stop Green, then Brown would be violating Green's rights! Kinsella continues,

[B]y merely authoring an original expression of ideas, by merely thinking of and recording some original *pattern* of information, or by finding a new way to use his own property (recipe), the IP creator instantly, magically becomes a partial owner of others' property. He has some say over how third parties can use their property. IP rights change the *status quo* by redistributing property from individuals of one class (tangible-property owners) to individuals of another (authors and inventors). *Prima facie*, therefore, IP law trespasses against or "takes" the property of tangible owners, by transferring partial ownership to authors and inventors. It is this invasion and redistribution of property that must be justified in order for IP rights to be valid.<sup>15</sup>

Indeed, IP rights proponents must justify this claim.

It has been my intention to explain Kinsella's position and neither to add nor subtract from his analysis. Kinsella's arguments are well reasoned and I think that he has made some significant strides in clearing up several issues that have been either confused or simply ignored in the past. We are indebted to him for his efforts. Nevertheless, it is my contention that he overextends his analysis by grouping Rothbard with other IP rights supporters and subsequently rejects the Rothbardian system of rights. By doing so, he creates the need to reground property rights and does so with the concept of scarcity. It is this concept that this paper will now address.

### **Reply to the Scarcity Standard:**

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<sup>14</sup> Kinsella (2001) p. 22-3.

<sup>15</sup> Kinsella (2001) p. 25. (Italics in original)

The first point examined relates to the definition of scarcity. Economists use the term “scarcity” in a very particular sense. People consume goods and services<sup>16</sup> in order to benefit from their use. As more of a good is used, the marginal benefit diminishes. When the marginal benefit of a good reaches zero, the users of the good are satiated and the good is defined as non-scarce. It becomes a non-economic good. An economic good is one in which the marginal benefit is still positive; the users of the good are not satiated.

Furthermore, the scarcity of a good is not dependent upon the physical characteristics of the good, but on how it is used. The relative scarcity of a good is a result of the interaction of *both* supply and demand. For example, today oil is a scarce good. However, several centuries ago, not only was oil *not* an economic good, it was an “economic bad.” If oil were to come bubbling up from the ground, it could destroy one’s crops and result in the starvation of one’s family. The physical characteristics of oil have not changed, rather what has changed is how it is used. This change was a “demand-side” change. For an example of a “supply-side” change, we could look at lifeboats on a cruise ship and see that the scarcity of a good is heavily dependent upon the circumstances. Lifeboats in most circumstances are not scarce goods, but there is the rare situation where they become so scarce that people would give nearly anything to be on one.

Kinsella states that if there is a possibility of conflict over a good, then it is scarce. As long as there can be conflict, why then, according to this definition, would the physical characteristics of the good matter? It seems as though they would not. Nevertheless, under Kinsella’s alternative system, the physical characteristics of a good are reduced to the following: first, the good has to be tangible and second, there has to be rivalrous consumption. However, these implications do not follow from his first premise of the possibility of conflict. While it is true that the possibility of conflict arises over tangible and rivalrous goods, how does this standard exclude intangible and non-rivalrous things? How many times has there been conflict over non-tangible and non-rivalrous items? Wars have been fought over religion. Does this mean that one can have property rights for religion? And why would there not be conflict between an author and a copier?

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<sup>16</sup> The analysis that follows just uses the word “good,” but economists group “goods and services” together. The analysis on scarcity is equally valid for both goods and services.

If an author believes that he *should* have a copyright over his work, if people believe that IP is ownable, would the mere lack of a legal copyright stop conflict? And what about those goods that are no longer economic goods? Suppose that the demand for good X drops so much that it is no longer scarce. Does the property right to it disappear? Would the property rights over lifeboats disappear, reappear and disappear again as a ship transitions from safety to danger and back to safety again?

Upon further examination of scarcity, an Austrian economist would be quick to point out that *all means are scarce*, regardless of their physical characteristics. Does not this fact suggest that all the various means I could use to achieve my ends could be protected by property rights? It is because means are scarce, that we have to choose—act. This fundamental point is the foundation of economics as a science of praxeology. Furthermore, *time is scarce*. Can I also have property rights over time? If so, how does one homestead time?

Additionally, why is it assumed that scarcity leads to private property rights with one owner? Why does scarcity not lead to some sort of sharing arrangement? Of course, sharing is an inferior system, but this would be comparing outcomes, not the basis of property rights arrangements.

Of course, these arguments are pushing the notion of scarcity to the extreme. If Kinsella argues that he really meant that property rights can only be found in tangible goods with rivalrous consumption characteristics, then he is arbitrarily assuming his position. There have been conflicts over intangible, non-rivalrous goods, such as the wars which have been fought over religion. This fact completely counters Kinsella's position.

Turning to the issue of homesteading, Kinsella argues that there are two types of homesteading—that of the first occupier and that of IP rights.<sup>17</sup> As noted above, Kinsella argues that the ownership of the sword and the statue come not from the labor of creating these items, but from the prior ownership of the resources used to make these items. An

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<sup>17</sup> Kinsella (2001) states, “[T]he IP advocate must propose some homesteading rule along the following lines: ‘A person who comes up with some useful or creative idea which can guide or direct an actor in the *use* of his own tangible property thereby instantly gains a right to control all other tangible property in the world, with respect to that property’s similar use.’ This new-fangled homesteading technique is so powerful that it gives the creator rights in third parties’ *already owned* tangible property.” p. 32. (Italics in original)

obvious objection to his argument, however, is that homesteading—being the first occupier—also depends upon labor; perhaps physically moving oneself onto the parcel of land and declaring in a loud voice, “This is mine!” It takes labor to gain the initial resources to make the sword and statue.<sup>18</sup> Merely standing on the ground does not make one the first occupier of anything. Kinsella’s argument of “necessary and sufficient” can be redirected toward his own argument. If I am standing in a neighbor’s dining room, does it make it mine? Obviously not. Occupying an area does not make it yours. Can I buy some land “sight unseen?” Surely. Why then does labor not meet the necessary and sufficient criteria, while first occupier does?

The Rothbardian system clearly bases homesteading upon the Lockean idea of mixing labor with unowned resources, not upon scarcity. When Crusoe lands on the island, he may claim the entire island, but is this claim based upon his first being there or upon his mixing of labor with the island? If the property right were based upon being the first on the island, then Friday could not set foot on the island no matter the size of the island and no matter if Crusoe were to do anything on the island.<sup>19</sup> Suppose instead that Crusoe had not landed on an island but a continent instead—one without any other inhabitants. Could he truly claim the entire continent?<sup>20</sup> If not, then what would be the scope of his claim? All that he could see? All who could hear his voice? Or would it be restricted to the few square inches that his feet were physically touching? There is no logical answer to the scope of his claim.

When Kinsella’s argument is pressed, he claims that possession is antecedent to any mixing of labor because laboring “*indicates* that the user has *possessed* the property (for property must be possessed to be labored upon).”<sup>21</sup> Kinsella takes this line of reasoning to its conclusion by arguing that “[i]t is a misleading metaphor to speak of

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<sup>18</sup> It also takes labor to pick the unowned apple and fence in the plot of farm land.

<sup>19</sup> Rothbard (1998) states, “[S]uppose that Crusoe decides to claim more than his natural degree of ownership [that which he mixed his labor with], and asserts that, by virtue of merely landing first on the island, he ‘really’ owns the entire island, even though he made no previous use of it. If he does so, then he is, in our view, illegitimately pressing his property claim beyond its homesteading—natural law boundaries, and if he uses that claim to try to eject Friday by force, then he is illegitimately aggressing against the person and property of the second homesteader.” p. 47.

<sup>20</sup> Accordingly, does NASA own the entire moon? Or all of Mars, since it landed the Viking probes on it? If it does, what, in practical terms, does this mean?

<sup>21</sup> Kinsella (2001) p. 29. (Italics in original) This statement is not justified, it is merely asserted. Why can one not labor upon unpossessed land? Such mixing of labor with unpossessed land is precisely how Rothbard describes the origin of ownership.

‘owning one’s labor’ (or one’s life or ideas). The right to use or profit from one’s labor is only a *consequence* of being in control of one’s body, just as the right to ‘free speech’ is only a consequence, or a derivative, of the right to private property....”<sup>22</sup> Thus the only way Kinsella can arrive to the position that “first possessor” is superior to “labor mixing” is by denying the concept of owning one’s own labor.

Perhaps, what is meant by “ownership” should be examined. Ownership indicates control and dominion. According to the principle of methodological individualism, *only* the individual owns his own labor. Only the individual controls his own body and makes decisions. Kinsella makes an illogical association between “owning one’s labor” and “the right to use or profit from one’s labor.” The equality should have been between “owning one’s labor” and “controlling one’s body.”<sup>23</sup>

Let us return to the question of whether Crusoe owns the island because he arrived first or because he mixed his labor with the island. If Crusoe could claim the island up to the extent by which he had mixed his labor, then there would be no open-ended question to the extent of his possessions. He could also hire others to make further claims into the unowned resources. The reality is that property rights are extended to the degree that they can be enforced. Kinsella claims (see footnote 17) that IP rights limit the freedom of another to use his own tangible property rights. True. *All* property rights draw lines and limit the freedom to use one’s own tangible property. Here is an example to illustrate the point. I can shoot my gun into an unowned parcel of land and not violate any rights. However, if someone were to move into that land, then I could no longer continue shooting. The establishment of owning that property circumscribes my freedoms to use my own tangible property. Notice that my new neighbors have not taken anything away from my property nor have they changed the physical characteristics of my gun, etc. Nevertheless, it can be argued that their living on that land gives them “rights in third parties’ *already owned* tangible property.”

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<sup>22</sup> Kinsella (2001) p. 31. (Italics in original)

<sup>23</sup> It is odd that Kinsella is arguing that possession stems from owning one’s body and not from owning one’s labor. So, if a person loses control of his body does he then lose the ability to possess? Not to be too crude about it, but under this system do epileptics have inconsistent rights? Do feeble-minded people lose their rights as they lose control of their bodies? What if I gain control over your body, then do you automatically lose your rights and cede them to me? Would such logic not lead to totalitarianism?

Kinsella argues that he can dance naked on his property not because he has a “right-to-dance-naked,” but because he owns the property. Contained within this example is the assumption that his action is not violating another’s property rights. Suppose that I contract with him and pay him money *not* to dance naked on his property. If he then were to dance naked, he would be violating the terms of the contract and the rights that I had purchased. Thus, property rights have two dimensions. Obviously, they allow for people to freely use that which they themselves own. However, property rights also restrict what people are allowed to do. In the context of multiple individuals, ownership of something does not give one complete freedom to use it. Its use is circumscribed within the context of everyone else’s rights.

Using one’s labor is how common property is converted into private property. The owner of a building can claim the right to have a “No Smoking Policy” because he owns the air inside the building. It is true that the air in the building is scarce, but it begs the question of “why is it scarce?” The air inside the building is scarce not because air is generally scarce. Air is an unowned, non-scarce good. The air inside the building is a private, scarce good, because labor was used to enclose the commons. Ultimately, it is the mixing of labor that transforms non-scarce resources into economic goods. If one wants to argue about the origin of the capital goods’ property rights, we could bypass this entire discussion by noting that the air in my lungs is owned by me because of my labor. I homesteaded that air by my labor. There are many examples where non-scarce resources are transformed into scarce goods—sand into microchips, etc. In each of them, labor is the source of the property right, not scarcity.

Since scarcity is clearly not the course of property rights, let us turn to the concept of IP and the mixing of labor. Those against IP rights are correct to ask, “To mix one’s labor with what?” On the surface, ideas are amorphous, intangible and are simply not things with which one can mix labor. However, even IP rights such as today’s copyright laws—which Kinsella (justly) argues are unfair and arbitrary—do not extend so far to say that that one is entitled to the idea itself or to “ideal objects.” As Kinsella points out, “The copyright system gives A the right in the very *pattern* of words in the book; therefore, by implication, A has a right to *every* tangible instantiation or embodiment of

the book....”<sup>24</sup> The labor is mixed with whatever medium (or media) the creator uses. The author of a book “homesteads” that particular pattern of words.<sup>25</sup>

Kinsella states correctly that “The function of property rights is to prevent interpersonal conflict over scarce resources, by allocating exclusive ownership of resources to specified individuals (owners). To perform this function, property rights must be both *visible* and *just*.”<sup>26</sup> A copyright serves precisely this function. Copyrighted material is registered and has a stamp that places third parties on notice.<sup>27</sup> Since the copyrighted material is registered, verifying its existence is conceptually no different than conducting a title search for a piece of land. Of course, what is registered are the specific patterns of words and not the idea itself.<sup>28</sup> When Menger, Jevons and Walras each discovered the idea of the Law of Diminishing Marginal Returns, they did not own the idea, nor could they claim to. However, what they did copyright were their respective books.

The copyright protects the specific pattern of words, not the idea itself. Kinsella is making an overstatement when he equates IP rights with the ownership of ideas. It seems a straw man is created. He states that “By widening the scope of IP...the absurdity and injustice...becomes even more pronounced.”<sup>29</sup> But that is just it, he has widened the scope to the point of making it absurd. Any concept can have its scope so widened as to make it absurd.<sup>30</sup>

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<sup>24</sup> Kinsella (2001) p. 8. (Italics in original)

<sup>25</sup> There has been a long debate over whether an infinite number of monkeys could reproduce Shakespeare’s *Hamlet*. Perhaps this famous question can be rephrased, “How likely is it that another human could reproduce *Hamlet*—without ever having read Shakespeare’s version?” The truth of the matter is that we are all unique individuals and each of us has a unique way of seeing the world and expressing ourselves. I think it is safe to say that no one could or will reproduce *Hamlet* from scratch. The unique patterns of words that create *Hamlet* are scarce, are the result of mixed labor, and (even under anarcho-capitalism) could have been protected under a system of property rights.

<sup>26</sup> Kinsella (2001) p. 20. (Italics in original)

<sup>27</sup> Kinsella (2001) argues “One function of property rights, after all, is to prevent conflict and to put third parties *on notice* as to the property’s boundaries. The borders of property must necessarily be objective and intersubjectively ascertainable; they must be *visible*. Only if borders are visible *can* they be respected and property rights serve their function of permitting conflict-avoidance.” p. 37. (Italics in original) I completely agree.

<sup>28</sup> Kinsella never really defines “information.” As a result, its conception is amorphous; and as such information is not owned, but a book, music, and a computer program are specific patterns, not just “information.”

<sup>29</sup> Kinsella (2001) p. 18.

<sup>30</sup> Anyone who has ever attended a Libertarian conference knows of the “widening-of-the-scope-leading-to-the-ridiculous” arguments. E.g., suppose that a guy owns land and another buys all the land around him...;

**“But Who is Harmed?” Digression:**

Several opponents of IP rights ask that if Green copies Brown’s book, “Who is harmed?” As noted above, the copying of the book does not diminish Brown’s use of the particular pattern of words. Brown still has his book. If Green sells his copies to others, it most likely will reduce the price of Brown’s book and reduce Brown’s income. However Brown is not entitled to any specific price or amount of revenue. He cannot claim a property right in the value of his book, so where is the harm?<sup>31</sup> How does this differ from simple market competition?

It differs fundamentally from market competition because Green aggresses against Brown’s right of property. Property rights restrict what others are able to do with their own property. Do IP rights restrict what a person may do with his own property? The answer is unambiguously, “Yes, *just like all other property rights.*” The opponents of IP rights may argue that Green is not harming anyone and is certainly not violating the non-aggression axiom. However, if there is an IP right, then copying the book infringes on the right.

The idea that a victim has to show an actual physical harm is preposterous. When Crusoe arrived on the island, he was able to claim property rights over as much as he could mix his own labor (or that of the people he could hire) with the island’s resources. His rights to property were not dependent upon his physically being present to protect them. If we were to accept the claim that physical harm must be demonstrated in order to show a rights violation, then one could ask why anyone should get upset if squatters were to occupy his own house when he was away. As long as they did not break anything, then what would be the harm? Or what if someone else uses my toothbrush? Where is the harm? More seriously, suppose that someone attempts murder. If the murder attempt failed and there was no physical harm, could one seriously argue that no crime had been

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suppose a guy builds a big shade that blocks the sun from getting to another’s property...; what if one company owned the entire world...; etc. Besides, who actually widens the scope to this degree? Which IP advocates actually argue that the first person to think of an idea can claim it and force all other people to not think of it? Can they all be counted on one hand?

<sup>31</sup> It is odd that Kinsella makes the claim that “...the natural rights IP approach implies that something is property if it can hold *value.*” p. 31. (Italics in original) It is odd because only *scarce goods* have an economic price. Non-scarce, non-economic goods do not command market prices. If any system “implies that something is property if it can hold *value,*” it would be Kinsella’s.

committed? What of mere threats of violence, the use of trickery (fraud) to gain property, and so forth, are these not crimes? If the source of all property rights were to stem from scarcity and scarcity were tied only to tangible things, then none of these above examples could rightfully be called crimes.

Committing an illegal act is not a simple matter of causing physical damage. The illegality stems from the violation of a right. If there are IP rights, specifically copyright, then the copying of the book would violate those rights. It is an aggression against the author's property right. One may not like the fact that he is restricted in the use of his own property, it may not seem proper that the author exert a degree of control over another's property, but copyrights are fair, clearly definable, visible, just and have been shown to exist in an anarcho-capitalist setting.

### **The Return to Rothbard:**

At this point, a quick comparison between Rothbard's Natural Rights system and Kinsella's system based upon scarcity and first possession is in order. The system of Natural Rights has well defined limits of private property; the system based upon the first occupier does not. Rothbard's system does not have to limit the concept of scarcity to tangible objects that exhibit rivalrous consumption characteristics. Rothbard's system does not deny owning ones own labor, as Kinsella's must. Finally, Rothbard's system focuses crimes upon the violation of rights and not on determining whether there was physical damage.

We have also seen that when I breathe air into my lungs that labor is a necessary and sufficient condition for homesteading unowned resources. The proper establishment of rights is based upon mixing labor. Labor is necessary and sufficient to enclose and privatize any resource. Kinsella is quite correct when he shows that what is owned is not the idea, but it is the particular arrangement of words, of musical notes, or of 1's and 0's, that is owned. There have been many books written on "Liberty." However, each one expresses the idea differently. The idea of liberty is not "ownable," but the particular pattern of words can be.

Finally, when the issue of trading is examined more closely we see that what is actually traded are the titles to property rights, not necessarily the physical goods

themselves. When land is purchased, it is the title to that land that is transferred. When I provide a service, I am trading the title of a specific and delimited service. And what are contracts? They need not be tangible manifestations. What of professional athletes' contracts for services, are they not property? Kinsella's position that only tangible objects can be owned muddles the nature of titles, contracts and derivative assets. It is unclear under Kinsella's system if one can own only tangible items or if it is possible to own things that represent tangible items. Is it possible to have corporations or mutual funds under this system? There is no such ambiguity under Rothbard's system.

### **Further Thoughts:**

Ideas are amorphous and intangible, however when ideas are instantiated into a book, a computer program or a musical song they take on a degree of concreteness. Nevertheless, these IP goods are not like normal goods. In fact IP goods are akin to what economists have traditionally labeled "public" goods. Public goods are those that have two defining characteristics: 1) non-rivalrous consumption and 2) high costs to exclude. A book seems to meet this definition: if I Green reads Brown's book, he is not taking away the ability of anyone else to also "consume" the book; and there are very high costs for Brown to stop Green from copying the book, especially when considering digital formats. In main stream economic circles, it has been argued that public goods can only be produced by the government. Austrian economists have devoted a lot of time to showing ways to enclose and privatize public goods (e.g., national defense, air, oceans, etc.). Why is it that the discipline of Austrian economics that has had such a strong tradition now argues for the "unenclosability" of IP goods?

And as mentioned above, property rights are limited in reality to the degree that they can be enforced. However, on the theoretical level, there are no such boundaries. I do not have to be at my house to protect it. I can use the division of labor and hire others to help protect my property. A security company protects my house from becoming a common good. When I encrypt software that I have created, I am taking steps to prevent my work from becoming a common good. When I register a copyright, with a private copyright service, I am simply extending the method by which I can protect my property rights and prevent my work from becoming a common good. Copyrights are a

mechanism by which we attempt to enforce property rights. Such mechanisms are not perfect and they can be abused, but ambiguity and misuse are not grounds for the dismissal of all IP rights. There is a natural tendency to enclose the commons through the establishment of property rights.

Kinsella and others may argue that we would then have to pay the descendents of Aristotle, etc. whenever a book is published. If those descendents can be determined, then perhaps we should, but Rothbard points out that property can become unowned if the original owner's descendents are lost in time. If this is the case, then specific instantiations could be copyrighted. For example, there could be the Mises Institute version of *Human Action* and the Yale University Press version.

Kinsella et al. may also argue that the original inventors of the house or of English should be paid, but here there is a confusion between owning an idea (of shelter or of a language) and that of owning a particular pattern of thoughts and words. So then the opponents of IP rights can argue that one can copy an entire book and make one subtle change and then not be caught under copyright. Here we should return to the example of Crusoe on the island. The reality is that Crusoe could claim the island to the extent to which he could make use of, protect, establish and exert his rights over it. I claim that my rights over my house exist even when I am not home. I do not have to personally be there for my rights to be sustained; I can enlist help. Why can I not do this with regards to my IP creation? Suppose I were to write a computer program, encrypt it, and then hide the source code. How would this any different from enclosing any other form of public goods? Suppose I were to record a song or write a book and then enlist private security agencies to stop others from infringing upon what I claim to be my IP rights. How would this be substantively any different from the prevention of trespassers? If Green were to copy Brown's book and only change one word on page 47, then Brown, through the use of his private security company should be able to take Green to a private adjudicator and press charges on infringement of the copyright. How different would something have to be before it is no longer a copyright infringement? There is no objective standard that separates legality and illegality; it might depend upon the medium. Mises once said, "It is impossible to draw a sharp line between those who are bald and those who are not. It

is impossible to define precisely the concept of baldness.”<sup>32</sup> Unfortunately, life is messy and sometimes bright lines just cannot be established no matter how much we might like them to be.

Rothbard has attempted to provide a solution using the concept of conditional ownership. Rothbard argues that when a book is sold by an author, he can hold back the right to copy it. He is reserving the right. Kinsella points out that there is a problem when third parties are considered. In the example, he posits that there are two books, one with a copyright and one without. He asks, “How could one tell the difference between them? How could one see the rights-tendrils connected to the latter but not to the former? How can third parties be expected to respect an amorphous, invisible, mystical, spooky, possibly unknown and unknowable property border?”<sup>33</sup> The answer to these questions is that copyrighted material is registered and has a stamp. Suppose I walk through the woods and I want to homestead this property. I cannot just assume that since I do not see anyone that it is unowned. I am under obligation to conduct a title search for the property. When someone picks up a book or hears a song, that person knows that the good is a created good. Since it was created one would naturally assume that another has ownership rights over it. However, that person could *also* conduct a form of title search—a copyright search—on the material to see if it were truly copyright protected. If the third party were to copy the book and later find out that the work had been copyrighted, then it would be conceptually no different from someone squatting illegally on owned property.

Rothbard’s analysis may not have all the answers in a ready made format, but the path that he asks us to take will lead us to the libertarian solution. Rights are designed to reduce conflict and without IP rights some may perceive the copiers of another work as parasites and things could turn nasty. Austrian economists have been at the vanguard on issues such as privatizing the commons, creating private companies to provide public goods, and creating property rights to solve problems of externalities. There most certainly is room for IP rights in Austrian economics. It is up to us to apply the same techniques that we have successfully used in the past.

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<sup>32</sup> Mises (1980) p. 129.

<sup>33</sup> Kinsella (2001) p. 37.

## References:

Böhm-Bawerk, Eugen von. 1962 [1881]. “Whether Legal Rights and Relationships are Economic Goods,” reprinted in *Shorter Classics of Eugen von Böhm-Bawerk*, Libertarian Press: South Holland, IL.

Kinsella, N. Stephan. 2001. “Against Intellectual Property Rights,” *Journal of Libertarian Studies*, vol. 15, no. 2, pp. 1-53.

Mises, Ludwig von. 1966 [1963]. *Human Action: A Treatise on Economics*, 3<sup>rd</sup> revised edition, Contemporary Books, Inc.: Chicago, IL.

\_\_\_\_\_. 1980 [1951]. “Profit and Loss,” reprinted in *Planning for Freedom*, 4<sup>th</sup> enlarged edition, Libertarian Press: South Holland, IL.

Rothbard, Murray N. 1993. *Man, Economy, and State: A Treatise on Economic Principles*, revised edition, Ludwig von Mises Institute: Auburn, AL.

\_\_\_\_\_. 1998 [1982]. *The Ethics of Liberty*, 2<sup>nd</sup> edition, New York University Press: New York, NY.

\_\_\_\_\_. 1997 [1974]. “Justice and Property Rights,” reprinted in *The Logic of Action One: Method, Money, and the Austrian School*, Edward Elgar: Cheltenham, UK, pp. 274-93.

Wieser, Friedrich von. 1967 [1927]. *Social Economics*, Augustus M. Kelley Publishers: New York, NY.