

A Critique of Ayn Rand's Theory of Intellectual Property Rights

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Intellectual property rights are of special interest to Objectivism both theoretically and practically. Theoretically, Objectivism places an extraordinary emphasis on the moral worth of productive intellectual work. Since wealth and flourishing depend on the creative activity of individual thinkers, Objectivism lauds such activity as one of the cardinal virtues of a philosophy for living on earth.

The practical emphasis that Objectivism has always placed on intellectual property is evident in the vigor with which Ayn Rand and her Estate have defended her copyrighted works, or anything resembling them. In May 2005, Leonard Peikoff's attorneys sent a threatening letter to a graphic artist in Michigan for producing and selling T-shirts, tote bags, and other items marked with "Rand," "Shrug," "WWJGDITC? What Would John Galt Do In This Context?" and even the name "Kant" in a circle with a slash through it (Paul 2005). The Estate has even trademarked Ayn Rand's name.

Rand explained her theory of intellectual property rights in a short essay called "Patents and Copyrights" ([1964a] 1967) in which she contended that these are both natural rights: "[t]he government does not 'grant' a patent or a copyright in the sense of a gift, privilege, or favor," she argued; it simply recognizes these as pre-political rights, morally belonging to the creator of the work (131). Since then, Objectivist scholars Eric Daniels and Adam Mossoff have made similar arguments (Daniels 2005; Mossoff 2003; 2005; Kieff, et al. 2006). Unfortunately, this argument is flawed, and Rand and her successors have failed to address the most important objections to any natural-rights interpretation of intellectual property. I contend in this article that, properly understood, patents and copyrights are govern-

ment-created monopolies—expedients by which the state seeks to remedy what are perceived as market failures—but that as “rights,” they are purely “positivistic,” and not natural or pre-political rights. Moreover, I contend that the positivistic interpretation of intellectual property is valid from an Objectivist perspective and that a natural-rights interpretation conflicts with Objectivist values.

Unfortunately, critics of Rand’s theory of intellectual property have often been attacked by writings in the Objectivist community for lacking respect. Before critiquing Rand’s theory of intellectual property, therefore, I must insist that in no way do I mean the following as a denigration of the moral glory of intellectual productivity, let alone of property rights in general. Nor do I assert that patents and copyrights are necessarily *bad* things; although I contend that they are not natural rights, they might be justified on prudential grounds. My only claim is that they are not *natural* or pre-political rights that derive from the moral quality of the creative enterprise. I do not hold that *all* property rights are positivistic creations of the state, or that any individual or collective has a moral right to the product of an individual creator’s mind. Not long ago, an Ayn Rand Institute press release denounced critics of intellectual property rights as “Marxists” (Peikoff 2002). Some might be, but I am not: my criticism of the notion that intellectual property rights are natural rights springs from two concerns. The first is simply respect for the truth: if Rand’s theory of intellectual property is wrong, that is sufficient reason to debunk it. Second, there are instances in which intellectual property rights infringe on the genuine natural rights of entrepreneurs to engage in legitimate and praiseworthy uses of their liberty. Being monopoly grants, copyrights and patents have the potential—as Rand herself recognized—to stifle the very creativity that Objectivism praises.

I. The Difference between Intellectual Property and Other Kinds of Property

In the case of tangible things, property rights consist of the right to use a piece of property and the right to exclude others from using it (Mossoff 2003, 390). Every piece of tangible property is unique, in the sense that it cannot be possessed both by the rightful owner and by a thief at the same time. Thus it is said to be “exclusive”: the fact

that a person or group owns an item necessarily and inherently excludes another from doing so. All matter can be conceived in this way, including even things generally considered to be “common property,” such as the atmosphere: each individual molecule of air could conceivably be possessed exclusively by a private owner, even though as a practical matter it would be difficult. Intellectual abstractions, by contrast, are not matter, and therefore are not naturally exclusive. Two people can “possess,” use, enjoy, and dispose simultaneously of the same experience, song, poetic phrase, or process. The economist’s term for this is “non-rivalrous in consumption,” but I shall use the term “non-exclusive,” to emphasize the fundamental distinction between intellectual property—which, even when “taken away,” still remains in the possession of its original owner—and tangible property, which by its nature cannot be both taken away and retained at the same time.

This distinction is *absolutely essential* to understanding the nature of intellectual property. If one child takes away another’s toy, the first child no longer has the toy: he has been what lawyers call “disseised” —deprived of that absolute right of ownership and possession, which is called the “fee.” Intellectual property, by contrast, does not have this characteristic: *one cannot be disseised of intellectual property*. If another person whistles a musical tune I have written, I still “possess” that tune, in every sense in which I ever did, and I can still do with it what I please. Thomas Jefferson put this point in a memorable phrase: “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me” (Jefferson [1813] 1984). Or, as Rand noted in a different context, an idea “can be shared with unlimited numbers of men, making all the sharers richer at no one’s sacrifice or loss” (Rand 1957, 1064).

Tangible property rights are easy to conceptualize: their exclusivity is given by their nature. Property rights in tangible objects include both the right to *use* and the right to *exclude others from using*, because these are two inseparable features of matter. The child who owns the toy has the right to use it and the right to prevent others from using it, because the toy, being a physical object, cannot simultaneously be used by him and used by others against his will. Thus, violations of the right to use include also a violation of the right to exclude others:

when the toy is stolen, the child loses both his right to use and his right to exclude.

But because intellectual property is not naturally exclusive, these two aspects of ownership are separated: use *can* continue while exclusivity does not. Imagine that Adam devises a clever new method of sharpening his pencils. Bob, a coworker, happens to observe Adam sharpening his pencils at his desk. Thinking it a clever idea, he returns to his desk and begins to sharpen his pencils the same way. It is extremely difficult to imagine that Adam has been harmed by this “theft” of his “intellectual property.” Adam has not lost his use-right to his pencil sharpening method: he has not been dispossessed. Failing to distinguish between the use-right and the exclusion-right claimed by Adam is a potentially dangerous error, and one that underlies most Objectivist accounts of intellectual property.¹

The fact that intellectual property is not exclusive deflates any hasty analogy between intellectual property and tangible property. George Reisman (1996, 388), for example, contends that a patent on an invention, book, or song is justified “on the same basis that a farmer’s crop or a corporation’s product belongs to him or it—namely, the right of having created it.” But crops and the tangible products of corporations are naturally exclusive. If a thief or the government takes these objects away, the farmer or the corporation no longer has them. A very different circumstance is presented where Corporation A, which has created a product, faces competition from Corporation B, which *imitates* the product, or independently invents it, and then goes into competition against Corporation A. In such a case, Corporation A still possesses every tangible object it once possessed: it has been forcibly deprived of nothing. It may lose market share, but it has no *right* to its market share (Kieff et al. 2006, 104), so it has not been dispossessed. Reisman’s analogy is flawed because while the farmer has indeed created *that particular* crop, and thus has the moral right to exclusive possession of *it*, he cannot thereby expand his power to include a veto power over *other* crops, produced by other farmers, even if they learn from or copy his methods; he cannot own the very *concept* of a crop, or of a farming method (Palmer 1990). A producer has a right to the *things* he produces, but where others can “illuminate themselves without darkening him,” he has no right to initiate force to forbid *imitation*.

Tom G. Palmer's argument against the legitimacy of intellectual property is indispensable reading on this subject. His argument that "a work of art enjoys its peculiar kind of objectivity only through a multitude of presentations and interpretations that provide the manifold within which it can appear as the same" (847) raises an epistemological point particularly important to Objectivists. According to Objectivist epistemology, a concept is a relationship between the perceived world around us and the mind that interprets that world (Rand 1990, 54). Thus the content of *Hamlet* is not some sort of Platonic form, existing in a perfect sense independent of the minds that perceive it. It is instead an integration of a large number of perceptual concretes. For a person to claim to *own Hamlet*, as opposed to a particular physical copy of *Hamlet*, would therefore mean owning the mental integrations—the relationship between the observers and the concrete observed—apart from both the observers and the concrete. While one can "own" certain relationships in other contexts—as when one "owns" a business' "good-will"—to own an ideal object such as *Hamlet* would seem to be regarding a concept as metaphysical instead of epistemological.

Rand's contention, therefore, that a patent or copyright protects "not the physical object as such, but the *idea* which it embodies" ([1964a] 1967, 130) is troublesome for three reasons. First, it treats a concept like a percept. *Atlas Shrugged* is not merely the paper and ink arranged in a particular order; it is the whole abstract complex that exists in the minds that encounter and interpret the text. The books and words are merely the percepts that help make up the complex of concepts of *Atlas Shrugged*. Just as it is impossible to own *only* the "good-will" of a business without also owning the business itself or some contractual relationship to the business, so it does not seem possible to own just the idea of *Atlas Shrugged*.

Second, concepts subsume an indefinitely large number of percepts, "including *all* the characteristics of those existents, observed and not-yet-observed, known and unknown" (Rand 1990, 65). It is precisely the claim to ownership of "the idea" embodied by a concrete object that gives rise to the potential danger of intellectual property: namely, that such ownership can infringe on legitimate creative enterprises by others. The open-ended nature of concepts means that a person who claims ownership of the character of John Galt might

lay absurd claims to ownership over T-shirts and tote bags with John Galt's name or initials on them. This is the very reason that Rand acknowledged that owning an "idea" would represent "a static claim on a dynamic process of production" ([1964a] 1967, 132). In an extreme form, this presents the problem of "owning the genre" that I discuss below.

Third, if the right to own an idea derives from the mental effort required on the part of the artist, it is not clear why a reader does not acquire at least some right to the idea from the mental effort required to form the concept. Concept formation requires an effort of integration and differentiation that is not automatic, and a reader goes through at least some effort in imagining a character and a plot, and thus *creating* the necessary concepts in his own mind. While an artist undoubtedly expends great effort in creating a particular work of art, a reader expends at least some effort as well. It is unclear why this honest effort does not entitle him to at least some ownership of the owned "idea," particularly since the idea in question actually exists in the *reader's* mind, not the author's.²

According to Rand, "[b]y forbidding an unauthorized reproduction of the object, the law declares, in effect, that the physical labor of copying is not the source of the object's value, that that value is created by the originator of the idea" (130). This statement raises two important points. First, Rand's language—that "the law declares" the nature of the right in question—reflects the radically different nature of tangible and intellectual property. Tangible property is not "declared" by law, but is recognized as a pre-political moral right; intellectual property, by contrast, can only exist when combined with official coercion. Second, although Rand is correct that (part of) the value of an object arises from the thoughtful effort behind it, that fact can at most establish the creator's right to *use* his creation: Adam is entitled to sharpen his pencils in the way he has figured out. But it does not establish a *right to exclude others* from copying that creation (assuming those others refrain from the initiation of force against him) since their copying does no positive harm to him. No matter how ingenious Adam's new method, and no matter how much devotion and energy Adam put into his pencil-sharpening method, he can have no right to initiate force against Bob to stop him from learning from or copying that method.

Intriguingly, Rand’s essay “The Property Status of Airwaves” seems to recognize this fact, and to criticize others who confuse naturally exclusive property with non-exclusive intangibles. Broadcast frequencies, she contends, should be privately owned because “[j]ust as two trains cannot travel on the same section of track at the same time, so two broadcasts cannot use the same frequency at the same time in the same area without ‘jamming’ each other. There is no difference in principle between the ownership of land and the ownership of airwaves” ([1964b] 1967, 122). But this analogy would *not* apply to intellectual property, which *can*, so to speak, run on the same section of track at the same time. In rejecting Justice Felix Frankfurter’s argument for collective ownership, Rand points out that “[t]he number of broadcasting frequencies *is* limited; so is the number of concert halls; so is the amount of oil or wheat or diamonds; so is the acreage of land on the surface of the globe. There is no material element or value that exists in *unlimited* quantity” (123). Diamonds, oil, and wheat, being tangible objects (‘material elements’), are naturally exclusive, and their possession in fee by one person will by definition exclude others from ownership or use of those things. But an unlimited number of people *can* use an intangible intellectual entity, such as the English language, or a popular song, or a method of sharpening pencils, without in any way diminishing another’s use and enjoyment. So while there is “no difference in principle between the ownership of land and the ownership of airways” (122), there *is* a difference in principle between the ownership of land and the ownership of a process, expression, or invention.

II. Justifying the Prohibition of Imitation or of Independent Creation

Intellectual property systems work by implementing a *substitute* for exclusivity that tangible property naturally possesses. As Mossoff (2005, 39) candidly puts it, “[t]he right to exclude in intellectual property entitlements exists by legal fiat. It is solely a creation of the law with no natural counterpart in the actual facts of how people interact in the world.” Of the four intellectual property tools—contract, patent, copyright, and secrecy—the first three use the coercive power of law to substitute for this natural exclusivity: government legally proscribes one person from lighting his taper at another’s.

(The fourth, secrecy, substitutes concealment for exclusivity.) Which method is more effective is beyond the scope of this paper, but it is worthwhile to note that contract and secrecy lack an important element present in patent and copyright: protection against third parties. A contract whereby a party promises not to disclose a protected work to someone else is valid only between the parties that make it—but not against any other person. Bob might agree by contract not to copy Adam’s pencil-sharpening method, but if Bob breaches that contract, and teaches the method to Conrad, Conrad is not in violation of the contract, and Adam cannot sue him. Contract law alone cannot empower Adam to stop Conrad from using the method or teaching it to others. Also, if Adam tries to keep his method secret, but fails and is overseen by Conrad, Conrad may adopt the method or teach it to others with impunity. Copyright and patent laws do reach third parties like Conrad, and are therefore preferred to secrecy or contract by most of those interested in protecting intellectual works.

Since intellectual property is not naturally exclusive, any theory that claims intellectual property as a natural right must find some moral justification for using coercion as a substitute for exclusivity. In other words, the producer must establish a moral right to forbid imitation. Without such a justification, the use of coercion to forbid imitation would be an initiation of force, and thus violate a basic principle of politics. Since force may only be justifiably used against those who initiate (or are about to initiate) its use, the question of forbidding imitation comes down to whether imitation is an initiation of force. The answer to this is clearly no. Force is “coercion exercised by *physical* gency, such as, among other examples, by punching a man in the face, incarcerating him, shooting him, or seizing his property” (Peikoff 1991, 310). But while he has copied Adam’s pencil-sharpening method, Bob has not initiated physical coercion of any sort against Adam—nor has he defrauded him³ or deprived him of anything that he possessed. Adam can go on sharpening his pencils that way indefinitely. Given the absence of force or fraud, Adam is no more justified in using coercion to stop Bob than Bob is in stopping Adam.

One argument that might be advanced for allowing government to substitute coercion for exclusivity is that an entrepreneur has the

right to expect a return on his investment. In many cases involving so-called “regulatory takings,” the Supreme Court has declared that government may not adopt a law that deprives an owner of the opportunity to realize a reasonably expected return on his labor. Quoting the famous English lawyer, Sir Edward Coke, the Court has noted that “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation. ‘[F]or what is the land but the profits thereof[?]’” (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 [1992]). If a person has the right to anticipated profits from his discovery, then he would, indeed, have a natural moral right to forbid others from interfering with those profits, and therefore a right to use force to stop imitation by others from disrupting his business prospects.

Mossoff (2005, 41) advances this argument when he grants that exclusivity in intellectual property is artificially created by government fiat, but contends that this is morally justified by the creator’s right to use and benefit from his creation:

Property is the right to acquire, use, and dispose of the things that one has created through one’s labor. It is this concept of property that precipitated the virtual truism in American society that every person has a right to enjoy the fruits of one’s labors. It is also this concept of property—which focuses on the substantive relationship between a person and the thing that he has labored upon or created—that explains and justifies the protection of intellectual property rights, regardless whether these rights exist in tangible books or computer code. A person’s right to control the disposition of his creation, and thereby enjoy the fruits—the profit—of his labors, is central to the legal definition and protection of property entitlements.

Elsewhere Mossoff explicitly disavows intellectual property as a natural right (Kieff et al. 2006, 105), but contends that the legal regime substitutes coercion for natural exclusivity on the basis of the inventor’s moral entitlement to dispose of his or her own creation (108).

This argument commits a fallacy by conflating the use-right with

the exclusion-right. A use-right is justified by hard work and ingenuity, and in the case of tangible property, these considerations also justify the right to exclude, because it cannot be violated without also violating the use-right.⁴ But a person's right to forbid imitation by others does not follow from his right to dispose of the things he has created by his own labor, because imitation does not deprive him of his possession. If Tom writes a poem that is copied down and enjoyed later by Betty, Tom has not been deprived of his right to enjoy the poem he has created. The poem may be a work of genius, and Tom may deserve praise for its creation, but that does not entitle him to forbid Betty from enjoying it or passing it along to others, since he has not been dispossessed. Mossoff's reference to "the substantive relationship between a person and the thing that he has labored upon or created" simply begs the question. It does not answer why a creator has the right to forbid imitation that does not initiate force, and that deprives him of nothing but anticipated future profits.

It cannot be contended that the moral virtue of creativity entitles the creator to forbid imitation unless it can be shown that this imitation *takes* something from the creator to which he is entitled—that is, that he has a right to all the potential profits of his creation. Yet enforcing a right to an indefinite future profit is the very definition of monopoly: forbidding innocent parties from using their faculties as they have the right to do. Rand's defense of capitalism is based fundamentally on the right of individuals to pursue happiness without interference from others, and the fundamental element of a free economy is the recognition that competitors may enter the marketplace and attempt to lure away the clientele of those already in the market, even where doing so intrudes on the profit of the first entrepreneur's labors. As one court put it over five centuries ago, "[d]amage alone is not a cause of action. Thus, [where] an innkeeper or other victualler comes and dwells next to another [innkeeper] and thereby more of the customers resort to him than the other, it is a damage to the other, but no wrong, for he cannot compel men to buy victuals from him rather than from the other" (*Prior of Christchurch Canterbury v. Bendyshe*, 93 Selden Society 8, 9 [1503?]). Indeed, Objectivists recognize that one of the great elements of the free market is the fact that it "does not permit inefficiency or stagnation," due to the ability of newcomers to challenge established businesses

that fail to satisfy consumer needs (Branden 1967, 74). As Reisman (1996, 275) puts it, “[u]nder capitalism, whoever sees a profitable opportunity for action is free to act on his own initiative.” This “freedom of competition” leads people “to improve further as soon as anyone can think of any still better idea.” The evil behind coercive monopolies is precisely the fact that they “*abrogat[e] . . . laissez-faire and . . . introduc[e] the opposite principle—the principle of statism.*” A monopoly violates the individual’s right to earn a living for himself. The anti-monopoly tradition that began in seventeenth-century England and culminated in the American Constitution, represents a rejection of such coercive monopolies, and an embrace of the fact that each person has the right to use his faculties in a profitable way that does not impose force on another, even if that person goes into a business imitating another person’s idea. In a free society, existing business may not prevent a newcomer from entering the same field; this is how “[non-coercive] monopolies are destroyed by counter-inventions, if man’s ingenuity is left free” (Rand [30 September 1944] in Rand 1997, 263). Adam certainly has the right to use his pencil-sharpening method or to offer to teach it to others for a fee. But he has no right to forbid others from using it without his permission, or to prohibit them from competing against him, simply on the grounds that he wants to command higher prices from the general public (Kieff, et al. 2006, 104). A person might be inspired by Rand’s works to go into the business of writing novels with heroic characters and philosophical themes. Rand does not on that account have the right to forbid the newcomer from entering the business, so as to ensure that the reading public only buys Rand’s own novels!

Finally, the argument that the substitution of coercive force for exclusivity is justified by a creator’s expectation of a return on his labor suffers from fatal vagueness. At what point does that expectation come to an end? In the case of tangible property, it is relatively easy to determine the value that has been taken from the owner—either the value of the object itself or the value that the owner would have derived from it under fairly specific circumstances. If a person steals my hammer, the cost of a replacement can be easily assessed, and I may prove in a court of law the other consequential losses that the thief may be required to pay—such as the loss of a contracting job due to my not having the necessary tools. But demonstrating the

value of “stolen” intellectual property is virtually impossible. Consider again the market for novels. If a writer has the moral right to use coercion to ensure the highest possible financial return on his work, used bookstores would seem to be glaring violators of this right, since authors receive no royalties from the resale of a used book, and have no say over such resale.⁵ Indeed, if a creator’s “right to set the terms on which the embodiments of his ideas . . . may be used” (Daniels 2005, 72) includes an unlimited power to dictate the use of his writings, inventions, songs, or other ideas, this principle would prove far too much: it would permit writers to forbid not only the resale of books, but even the existence of libraries. Indeed, a writer could forbid his readers from reading their copies of his book more than once. After all, he would realize a far greater profit by using government coercion to force them to buy new copies each time they want to read it!

At bottom, the notion that a creator has the right to expect a certain rate of profit from his creation, and to use imitation-prohibiting laws to enforce that expectation, is the notion that “some men are entitled *by right* to the products of the work of others” (Rand [1963] 1967, 324).

In a remarkable article on the history of American attitudes toward monopolies, Eric Daniels (2005, 72) attempts to reconcile the freedom to compete through imitation with “the right to set the terms on which the embodiments of his ideas—his property—may be used.” Daniels discusses at length the important Supreme Court decision, *Charles River Bridge v. Warren Bridge* (36 U.S. 420 [1837]), in which the Court rejected the argument that innovators are naturally entitled to forbid imitation. The owners of a toll bridge over the Charles River brought suit to prevent the government from authorizing the construction of a new, competing bridge nearby. The new Warren Bridge was free to the public, which meant certain devastation to the Charles River Bridge’s expected income from tolls. Its owners contended that its corporate charter implied a right to be free from such competition, but the Court concluded that corporate charters would not be read so as to imply the existence of monopoly rights. Daniels praises this decision, noting that it sharply decreased government power to extend monopolistic power to private corporations: “[t]he doctrine held that a previous charter to conduct some business

could not prohibit a competing business from entering the market,” thus leading to a “release of entrepreneurial energy” (82–83). This was “the right practical decision,” because it “free[d] up markets for production and competition” (83).

But if the moral virtues of creativity, productivity, and innovation are sufficient to entitle a business to forbid imitation, nobody had a stronger case for such a prohibition than the owners of the Charles River Bridge. *They* had the idea of putting up the bridge in the first place. *They* had engaged in a campaign to obtain authorization for the bridge, arranged the necessary capital, organized the talents of engineers and workers, and they went through the trouble of constructing the bridge (Kutler 1971). The new bridge not only diminished their expected profits, but utterly destroyed them, and Justice Joseph Story, who dissented, had a good point when he contended that the decision would deter investment and innovation (36 U.S. at 608). If, as Mossoff (2005, 41) contends, “a person’s right to control the disposition of his creation, and thereby enjoy the fruits—the profit—of his labors, is central to the legal definition and protection of property entitlements,” then the opportunistic creators of the Warren Bridge, who simply saw a good idea and imitated it, would seem to have far less claim to the right to compete than the creators of the Charles River Bridge. Yet, as Daniels (2005, 83) rightly perceives, the *Charles River Bridge* decision was part of a historic “decline of . . . government-created monopolies [that] helped remove a considerable amount of government force from the economy. The practical result was that America experienced economic growth and a rejuvenation of antimonopoly thought.” In very large part, this economic growth took the form of imitation or the exploitation of ideas created by others.

Daniels tries to distinguish the *Charles River Bridge* case from the case of patents by contending that government monopolies are coercive and patents are not: “When the government enforces patent rights, it is acting to *prevent* and *protect against* the initiation of force” (72). But this contention is untenable. Patents do not prevent the theft of owned objects—which is forbidden by anti-larceny laws. They do not apply to the coercive theft of blueprints, for example—that is prevented by anti-burglary laws. Instead, patents prohibit others from *imitating* a creator’s work (or from selling a *similar* work

that has been independently discovered). Imitation is not an initiation of force. The Warren Bridge's owners did not initiate force against the owners of the Charles River Bridge, and Bill has not initiated force against anyone when he observes Adam's pencil-sharpening method, and copies the technique. In both cases, the imitator has seen a good idea and copied it. Yet under patent law, Adam would be authorized to prohibit imitation and to sue Bill. The initiation of force in this scenario is by Adam, not by Bill. And if the right to expect a return on one's investment is sufficient to authorize an inventor in forbidding commercial imitation, both Adam and the Charles River Bridge's proprietors would be justified in barring the entrepreneurial innovation that Daniels rightly recognizes as essential to a free economy.

III. Three Complications for Intellectual Property as a Natural Right

In addition to the main undertaking of justifying the right to forbid imitation, a theory of natural intellectual property must account for at least three⁶ serious complications: 1) the problem of the innocent simultaneous creator; 2) the extent, if any, of "fair use"; and 3) the cut-off point for derivative works (see further Yen 1990, 558–59). No Objectivist writer has adequately addressed these problems.

1. The Innocent Simultaneous Creator

The *innocent simultaneous creator* is the person who, unaware of another's work, and without copying any of that other's ideas, devises a thing that another also creates. But because the other person reaches the patent office first, he can forbid the first person from making or selling his thing. If intellectual property is a natural right, based on the moral worthiness of the creator's actions, why should the second person be forbidden from making or selling his thing? Even assuming that imitation is vicious in some way, the defender of intellectual property cannot justify punishing the innocent party whose creation is the product of just as much creative virtue as the other about whom he knew nothing.

My own mother has been an innocent simultaneous creator. Almost twenty years ago, she came up with the idea of making a paint brush with a handle that tapered to a flattened point, so that a person

could pry up a paint-can lid with the handle, rather than having to use a screwdriver. Unfortunately, her idea infringes on patents numbers 6,823,553 and D366,150. If my mother were to make and sell her paint brush—which she invented entirely by herself, without copying or even knowing of the existence of patents 6,823,553 or D366,150—she would be in violation of the law. Force would be initiated against her in the form of severe civil penalties. Yet she has done nothing that can be legitimately described as wrong. A more well-known case in which this occurred was the recent litigation against the makers of the BlackBerry handheld email device (Richman 2006). There was no question that the BlackBerry's inventors did not “steal” from, or initiate force against, the company NTP; yet it was forced to pay NTP over \$600 million because NTP owned a patent on a similar device already.

In her essay “Patents and Copyrights,” Rand ([1964a] 1967, 133) addresses the question of the innocent simultaneous creator in a highly unsatisfying paragraph:

The fact that a man *might* have been first, does not alter the fact that he *wasn't*. Since the issue is one of commercial rights, the loser in a case of that kind has to accept the fact that in seeking to trade with others he must face the possibility of a competitor winning the race, which is true of all types of competition.

But this is *not* at all like “all types of competition.” In the free market, the entrepreneur who wants to compete against Standard Oil may do so, despite the fact that Standard was there first. Only if the person seeks to actually dispossess Standard of its property, or trespass on it, will the law intervene. Otherwise, he is free to open his own oil company if he chooses. But my mother cannot produce her paintbrush at all, nor may the BlackBerry's manufacturers produce their device, even though no dispossess occurred in either case; others were merely “there first.”⁷ This first-in-time rule is not imposed by nature, or by the market's “commercial rights”; it is purely a creation of patent law. Rand's argument seems to be that the innocent simultaneous creator must simply live with the fact that his freedom is being taken away for the benefit of another—or, to put it another way, that

he must accept being sacrificed for the good of others. This is untenable. No other Objectivist writer on the subject of intellectual property has addressed the problem of the innocent simultaneous creator, and this is probably because it cannot be solved on the premise that intellectual property is a natural right (Palmer 1990, 829–30).

2. Fair Use and Time Limits

Fair use and time limits are two ways in which the intellectual property rights cut off a creator's power to forbid imitation. Such limits are entirely justified, but they cannot be justified on the premise that intellectual property is a natural right. Government, after all, cannot morally put a time limit on natural rights, since government is not the creator of these rights. This is why property owners have the right to leave their property to heirs by will (Branden 1967, 92–94). And it would be an injustice for the government simply to declare that all land titles shall expire in exactly 50 years, on the grounds that they limit future productivity (which in at least some cases they do). Natural rights are based on a person's right to himself and therefore to the fruits of his labor; they are not based on calculations of whether they advance social progress; thus they cannot be limited by the degree to which they serve such progress.⁸

Intellectual property, however, is different. As Rand recognizes, an indefinite legal prohibition on imitation “would become a cumulative lien on the productivity of unborn generations, which would ultimately paralyze them” (131). This is true; it is hard to imagine how much poorer the world would be if the families of Dostoyevsky, Hugo, or Nietzsche were able to forbid all imitation or quotation of their works. Time limits help ensure that intellectual property is not used to stifle creative works that draw on previous creations.

“Fair use” is another attempt to avert the problems that would arise from a strict application of intellectual property. Fair use is a common law concept (codified in 17 U.S.C. §107) whereby courts allow a person to do what would otherwise constitute infringement, because the person is engaged in a worthwhile enterprise, or because the activity does not really harm the owner of the copyright. Fair use can encompass the quotation of a book or a musical phrase in a new

composition, or the handing out of photocopies for class instruction, or writings that incorporate or quote from material without the author's consent. For example, Rand's long quotation from Victor Hugo in "The Comprachicos" ([1970] 1999) or her partial quotation from Nietzsche in *Atlas Shrugged* (Rand 1957, 1069; see Milgram 2007, 39 n. 28) are fair uses. If intellectual property were a natural right, it would be unjust for the state to permit such uses. The fair use doctrine is a sort of public easement across a piece of intellectual property, which allows the public at large to "trespass," as it were, for the good of society. But if intellectual property is a natural right, this rationale would hardly suffice, for it would be an initiation of force for the state to create a public easement over a person's property. Doing so in the name of "the public good"—at least in anything but an extraordinary emergency—would be inconsistent with Objectivism. And, again, no Objectivist writer on intellectual property appears to have addressed this subject.⁹

3. Derivative Works

Finally, *derivative work* is a concept that, like fair use, curtails a creator's alleged moral right to exclude imitation. But because a derivative work is both imitative and original, the concept creates a sliding scale that makes it very hard to draw boundaries from case to case. As a practical matter, this makes a prohibition against imitation extremely hard to justify, since such prohibitions will almost inevitably bar legitimate exercises of liberty—something that rules against the theft of tangible property will not do.

Some derivative works are virtually identical with the original, with only some small change, such as Marcel Duchamp's 1919 dadaist "L.H.O.O.Q." (a postcard of the "Mona Lisa" with a goatee drawn on it). Others are more creative, as in the case of the films *O Brother Where Art Thou?* and *Cold Mountain*, both of which derive from Homer's *Odyssey*. Drawing the boundary between imitation and originality too narrowly would make it easy for an imitator to make some basic change to the original and sell it that way, escaping prosecution by a silly technicality. But drawing it too broadly would allow a creator to occupy far too great a field, barring original works that merely partake of some minor similarity with the original. In the extreme case, a creator could stake out an entire range of potential

artistic endeavor and declare it off limits. Consider, for example, the Hollies' 1971 song "Long Cool Woman," a work that clearly falls within the genre of "swamp rock," a style of rock and roll music generally held to have been invented by John Fogerty, legendary singer and songwriter of the band Creedence Clearwater Revival. Many novice listeners mistake "Long Cool Woman" for a work by Fogerty. Allowing Fogerty too broad a right to forbid anyone from producing "swamp rock," including "Long Cool Woman"—which was written and produced through the originality and ingenuity of The Hollies—simply because it sounds, in some ineffable way, "like" his own work, would unjustly stifle the legitimately creative endeavors of other artists. To go even farther, it is sometimes claimed that Daniel Defoe's *Robinson Crusoe* was the first English novel; could he or his heirs have had the right to forbid the publication of all novels, on the theory that Defoe thought of it first? Can a person *own* a genre?

This might seem absurd, but the difference between a genre and a discrete work of art is not a difference in kind, but one of degree. As suggested by *Cold Mountain* and *O Brother Where Art Thou?*, there are a great many imitations, parodies, and "takes" on Homer's *Odyssey*—enough, arguably, to make it a genre in itself. An alleged "right" to forbid imitation lacks the boundaries that make tangible property rights or abstract contract rights readily enforceable. (Indeed, the vagueness is not unlike that faced by antitrust lawyers, who base much of their work on fundamentally arbitrary definitions of "relevant markets.") No natural boundary line exists to distinguish a particular work from a genre. Is the song "Bye Bye Blackbird" only a particular work or is it a genre? A great many artists have recorded the song since Gene Austin's 1926 original. Miles Davis' 1958 version, for example, differs so radically from the original that it is hard to believe that one could be "imitated," let alone "stolen" from the other. For Austin or his heirs to have forbidden Davis from performing the song would not only have been an artistic loss, but would have initiated force against Davis, whose performance of the song did not disservice Austin or his heirs.

Amy Peikoff (2007, 320) and others seem to resent the problem of derivative works, suggesting that there is something degrading about recognizing the fact that creators often rely on prior art. This seems to lead, in at least some cases, to the attitude that creators of

derivative works do not deserve protection from government interference in their endeavors. In some cases, no doubt, derivative works lack originality to such a degree that they do not deserve *artistic* respect—like the second-hander works of Peter Keating. But second-handers have legal rights, too. And in many other cases, the use of prior art as a point of departure for a new creation or a new twist on an old theme is perfectly justified and entirely praiseworthy.

In fact, a strong argument exists that most, if not all, creative acts are “derivative” in some way or another, since virtually no work truly springs fully formed from an artist’s head like Athena from the brow of Zeus. (Indeed, that very sentence relies on an allusion to Hesiod.) This does not detract from the virtue of creators of such works. Radically original as Howard Roark is, he still derives many of his ideas from those of Henry Cameron. As Rand noted, “[c]reation’ does not (and metaphysically cannot) mean the power to bring something into existence out of nothing. ‘Creation’ means the power to bring into existence an arrangement (or combination or integration) of natural elements that had not existed before. (*This is true of any human product, natural or esthetic: man’s imagination is nothing more than the ability to rearrange the things he has observed in reality*)” (Rand [1973] 1982, 25; emphasis added). This is no less true of the creation of abstractions than it is of the creation of physical objects. An artist who expresses himself by putting a new twist on an old idea is not necessarily any less of a creative genius than an artist who somehow devises a completely original idea. The works of Shakespeare are artistic masterpieces, but they usually rely on plots devised by others.

A derivative work *is* an original work, even if it spins off of another creation. And, again, it does not initiate force against the original creator. If John builds a table, and sells it to Richard, who admires its design so much that he builds a chair in the same style to match it, he has stolen nothing from John, and harmed John in no way. Allowing John to forbid Richard from selling the chair, on the grounds that John “had the idea first,” is unjustifiable by Objectivist standards, not only because it initiates force against Richard, but because Richard’s action was an original, creative, virtuous act, and deserves respect and protection. For Mossoff (2003, 425) to contend that “exclusive control of the copyright-holder . . . over the prepara-

tion of derivative works . . . represent[s] the fundamental right of a property-holder to control the way in which one's property may be used," is incorrect. Again, because intellectual property is not naturally exclusive, prohibitions on derivative works do not accomplish the same function that rules against theft accomplish in the world of tangible objects. Prohibitions on the theft of tangible objects flow clearly from the rule against initiation of force. Prohibitions on derivative works are themselves initiations of force against imitators—and innovators!—who have not deprived creators of anything except, possibly, the potential income that the creator would like others to pay him.

Conclusion

Objectivists rightly treasure originality and innovation, and are legitimately concerned with protecting the rights of creative thinkers. But Rand's position on the nature of intellectual property rights is unsupportable. Patents and copyrights are positivistic creations of the state, not natural rights justified by moral considerations. Being legal privileges, they might be justified by principles of political expediency and consent, but in at least three cases—the innocent simultaneous creator, fair use, and derivative works—intellectual property rights raise serious moral problems because they inculcate the state in initiating force against innocent parties. While intellectual property may be a good idea, it is not a natural right, and an Objectivist approach to intellectual property laws must find some way to address these three major shortcomings of the intellectual property regime.

Notes

1. See, e.g., Perkins (2006), who declares that "the essential basis of property is not scarcity—it is *production*." This is fallacious. Productivity certainly is the moral basis for the *use* right, and, with regard to matter, for the exclusion right as well. But it does not establish the exclusion right with regard to intangible property: it does not justify the producer in forbidding imitation. This is precisely the issue resolved in the *Charles River Bridge* case, as I discuss below.

2. That is, the author is asserting ownership rights against the reader: a claim to the ideas in the reader's mind. The author is not asserting ownership rights over the ideas in his own head, since he already "possesses" those.

3. Fraud qualifies as a type of force (Peikoff 1991, 319), because it deprives a person of property without actual consent. But fraud is not present in the case of imitating another's creation, since it does not deprive the creator of anything. A

person who writes his own book and sells it with a cover stating that the book is “*Atlas Shrugged* by Ayn Rand” has defrauded the buyer who believes that it is *Atlas Shrugged* and pays him \$10 for it, because the false pretenses vitiate the buyer’s consent. But a person who writes a book that imitates *Atlas Shrugged* and sells it with an honest cover, acknowledging that it is an imitation, has not deprived either his customer or Ayn Rand of anything.

4. The use-right and the exclusion-right are not always conjoined even in tangible property. Joint tenants, for example, possess a home entirely but have no right to exclude each other. They are morally entitled to use the property by their hard work and ingenuity (which translates into money that they use to buy the house). But they are not entitled to exclude each other. This analogy cannot be applied to intellectual property, of course, for several reasons, but it illustrates that the use-right and the exclusion-right are not inextricable.

5. Some countries have taken the rights of creators to such an extreme as to allow creators much more say over the uses of a work even long after the creation and sale of the original. For more on the strange complications of these laws, see Palmer 1990.

6. Kinsella (2001, 15–19) has pointed out another complication I do not address here: that, assuming intellectual property is justified on natural rights grounds, it would be unfair to provide protection only to inventors of useful devices and not to discoverers of natural phenomena or scientific laws, since discovery often takes as much creative work as invention. Yet Rand ([1964a] 1967, 130) endorses the difference in treatment between discovery (not a protected right) and invention (a protected right) on the grounds that a discoverer has not “*create[d]*” the scientific theory and that once the discoverer has chosen to make his discovery public, “he cannot demand that men continue to pursue or practice falsehoods except by his permission.” But a scientific formula, such as $E=mc^2$ is arguably a work of creation as much as of discovery. It certainly requires a great deal of mental effort, and before Einstein formulated that statement, it had not existed before. It is as much a work of creativity as a poem, which seeks to express a real-world phenomenon like love (Bronowski 1965, 1–24). And while it is true that an individual cannot demand that people continue in ignorance of a scientific discovery, it is unclear why the same argument would not also apply to artistic presentations such as songs or books. It is inconsistent to say that a scientist cannot demand that the public remain in ignorance of his discoveries except by his permission, but to say that a musician can demand that the public refrain from performing a song that he has played in public, or to say that an inventor can demand that the public refrain from making an imitation of a device that he has demonstrated in public.

7. Thus Perkins (2006) gets it precisely backwards when he argues that intellectual property rights impose no greater limits on liberty than does tort law: “my neighbor’s person and property rights are not violated when he is not allowed to spontaneously whack me in the head with his fully-owned two-by-four.” Yet, patent law allows NTP and other businesses to “whack” innocent simultaneous creators who have harmed nobody, but have instead engaged in the virtue of productivity with their own property, and by mere accident happen to arrive at the patent office too late.

8. It might be argued that the Rule Against Perpetuities or other legal rules that

forbid restraints on alienation do, in fact, cut off property rights for reasons of social utility. But it is unclear to what degree these rules accord with natural property rights. In fact, they are generally defended on purely utilitarian grounds that Objectivists may find troubling.

9. Perkins (2006), like Rand, acknowledges that indefinite intellectual property rights would stifle innovation, and concludes simply that “the scope of ‘fair use’” should be addressed by “look[ing] to politics, ethics, and the nature of man for the appropriate guiding principles to develop just implementations.” This does not address the objection I make.

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