CONTRA COPYRIGHT, AGAIN

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Retrospective

ERNEST HEMINGWAY ONCE WROTE, "If you are lucky enough to have lived in Paris as a young man, then wherever you go for the rest of your life, it stays with you, for Paris is a moveable feast." Los Angeles in the early '80s was like that for libertarians. It brimmed over with supper clubs, student groups, small magazines, debates and conferences. Given the concentration of high-quality scholars and activists in the area, the explosion of activity was inevitable. Although the new-born Libertarian Party was extremely active, the circles in which I ran were generally anti-political or apathetic about electoral politics. They included the cadre gathered around Robert LeFevre, a sprinkling of Objectivists (mostly admirers of Nathaniel Branden), a few Galambosians, and as many Rothbardians as I could meet. And, then, Carl Watner, George H. Smith and I established our own unique circle by creating *The Voluntaryist* newsletter and re-introducing the term Voluntaryist back into the libertarian mainstream. A libertarian used book store named Lysander's Books that I co-owned became the center of Voluntaryism.

One intellectual circle in particular exerted a profound influence on the development of my thinking on intellectual property: the anarcho-capitalists who banded around Samuel Konkin III (or, as he preferred, SEK3), many of whom lived in the same apartment complex as SEK3; the complex became

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known as the anarcho-village. (In truth, it was SEK3 and Victor Koman rather than the entire circle that exerted the influence.)

My first exposure to the theories that constitute intellectual property came from reading Ayn Rand,[1] but I gave the matter little thought. It was not until reading Lysander Spooner that I began to analyze the issue critically. Spooner advocated a rather extreme form of ownership in ideas. He once wrote, "So absolute is an author's right of dominion over his ideas that he may forbid their being communicated even by human voice if he so pleases."[2] I had adopted many of Spooner's ideas wholesale but I balked at his view of intellectual property. Although I did not then question the claim that ideas could be property, I was disturbed by how closely so much of Spooner's advocacy came to the Galambosian view at which so many of my companions laughed derisively. Galambos famously had a nickle jar into which he would deposit a coin every time he used a word that had been "invented" by someone else and to whom (in his opinion) he owned money for its use. I thought then (and now) that such ownership claims went against the free flow of knowledge required by a thriving society ... or a thriving individual, for that matter. In short, Spooner's approach to intellectual property *felt* wrong.

At that same time, I was also engaged in indexing Benjamin Tucker's 19th century periodical *Liberty* (1881–1908) and, eventually, I progressed into Tucker's discussion of intellectual property in which he fundamentally disagreed with the views of his mentor, Spooner. The pre-Stirnerite Tucker considered the issue to be his only deviation from Spooner. As I read the very active debate within *Liberty*, I began to reduce my commitment to intellectual property, to narrow it. For example, I abandoned altogether the belief that inventions could properly be patented. My belief in copyright, however, was more persistent despite the fact that Murray Rothbard—my idol and my friend—was anti-copyright. Frankly, Murray and I never discussed that subject.

But SEK3 and I did. Many people found SEK3 to be a bit annoying in how he argued ideas. There was a persistence and casual assurance about him that irritated some but which I found charming. SEK3 was always available and "up" for gab-sessions that lasted for hours. He had an uncanny ability to find the strand of thought in your argument which could be reduced to

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[1]See Ayn Rand, "Patents and Copyrights," in *Capitalism: The Unknown Ideal* (1970).

[2]Lysander Spooner, *The Law of Intellectual Property; Or an Essay on the Right of Authors and Inventors to a Perpetual Property in their Ideas* (1855), p. 125, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2243&Itemid=27.

absurdity. Some people bitterly resented this ability because they thought he was making them look foolish but it fascinated me and I found it compelling. Indeed, it had been a similar technique of arguing that had made me relinquish my belief in God at the age of sixteen. SEK3 now used the technique on me and, so, chipped away at my acceptance of copyright.[3] The last blow was dealt by the science-fiction writer and SEK3 cadre Victor Koman who asked me a pointed question at an otherwise forgettable party. Vic asked, "Do you really think you own what is in my mind?" As an anarchist who was then reading both Tucker and 19th century abolitionist tracts, one answer alone was possible: "No." And, yet, if I claimed ownership over an arrangement of words he had read, then I was answering "yes" because that arrangement now resided in Victor's mind. If I could compel him (as Spooner suggested) not to speak the words aloud, then I was making an ownership claim over another person's body.

At that moment—and, granted, it took several months of consideration to reach that moment—I abandoned all belief in intellectual property.

One of SEK3's cadre who never made the same leap was/is the science-fiction writer J. Neil Schulman. Shortly after my conversion experience, I was asked to debate J. Neil on the topic of copyright at a Westwood supper club that scrapped the dinner part of the evening in order to accommodate a longer program of debate, rebuttal, Q&A. (SEK3 may well have been the more logical choice but, as I said, he irritated some people.) The event was a rousing success in several ways. First, the large room was filled beyond capacity, with people choosing to stand for hours rather than leave. Brad (now my husband of over 20 years) attended as the representative of the Society for Libertarian Life. SLL offered 2 buttons: one pro- and one anti-copyright; as I remember, they sold out.

It was a long evening, mostly due to the fact that J. Neil went over his 20-minute time limit by about 30 minutes. Nevertheless, not a single person left and the Q&A was unusually lively. At first, I was disappointed because the questions were overwhelmingly directed toward J. Neil. But, then, I realized no one was arguing with me. Everyone was taking exception to his presentation on what he called "logorights." At that point, I relaxed until, finally, the moderator had to cut off questions because the gathering was going beyond the time for which the room had been rented. A group of us adjourned to a Great Earth restaurant and continued the discussion.

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[3]SEK3's views on IP are expressed in Samuel Edward Konkin III, "Copywrongs," *The Voluntaryist* (July 1986), http://www.lewrockwell.com/orig11/konkin1.1.1.html.

J. Neil immediately began to write up his side of the debate and later published it.[4] I followed suit. Since I always write out my presentations, this merely required some polishing to produce "Contra Copyright" which appeared in an early issue of *The Voluntaryist* newsletter. A still more polished revision appears below.

Contra Copyright

Copyright—the legal claim of ownership over a particular arrangement of symbols—is a complicated issue because the property being claimed is intangible. It has no mass, no shape, no color. For the property claimed is not the specific instance of an idea, not a specific book or pamphlet, but the idea itself and all present or possible instances of its expression.

The title of a recent book on intellectual property, *Who Owns What Is In Your Mind?*, concretizes a commonsense objection to all intellectual property: most people would loudly proclaim that NO ONE owns what is in their minds, that this realm is sacrosanct. And, yet, if the set of ideas in your mind begins "Howard Roark laughed" do you have the right to transfer it onto paper and publish a book entitled *The Fountainhead* under your own name? If not, why not? To say you *own* what is in your mind means you have the right to use and dispose of it as you see fit. If you cannot use and dispose of it, if Ayn Rand (assuming a still-living Rand) is the only one who can use and dispose of this specific arrangement of the alphabet, then she owns that sentence within your mind. And if she owns what is in your mind, you have violated her rights in writing or speaking it because you do not have permission to use her property.

I advocate a form of copyright—free market copyright. I view copyright as a useful social convention to be maintained and enforced through contract and other market (voluntary) mechanisms. This is in contradistinction to those who believe copyright can be derived from natural rights; in other words, ideas or patterns are property and their exclusive ownership does not require a contract anymore than preventing a man from stealing your wallet requires a prior contract.

Basically, the debate over copyright—or, more generally, intellectual property—comes down to two questions: What is property? What are the

[4]See J. Neil Schulman, "Informational Property—Logorights," *Journal of Social and Biological Structures*, 13 no. 2 (1990), pp. 93–117, http://jneilschulman.rationalreview.com/2009/12/classic-j-neil-informational-property-logorights/.

essential characteristics which make something ownable?: and, What is an idea?

Before going on to a discussion of theory, however. I want to address two implications that often lurk beneath criticism of free market copyright.

First: It is said that the marketplace cannot handle intellectual property issues. Those who contend that ten different people would publish Hamlet under their own names and, so, create cut-throated chaos, are using a form of the "market failure" argument which has been applied to everything from medical care to defense. Similarly, it is claimed, the market cannot regulate the publishing industry. The opposite is true. When I co-owned a used book store—a business which is virtually unregulated—I was astonished at how effectively the free market spontaneously set standards. It was not uncommon for stores in L.A. to know the specifics of a stolen book or a forged autograph the day after it had been spotted in New York.

Second, it is said that free market copyright would strip authors of valid protection or credit for their own work. When Benjamin Tucker—a 19th century libertarian opponent of copyright—was accused of stripping authors of protection, he replied: "It must not be inferred that I wish to deprive the authors of reasonable rewards for their labor. On the contrary, I wish to help them secure such, and I believe that there are Anarchistic methods of doing so."[5] Equally, those who oppose state-enforced copyright are not seeking to victim authors but to use free market mechanisms to offer whatever protection is just.

Returning to theory ... The issue of copyright hinges on the question: can ideas be property? Which leads to another question: what are the characteristics of property?

Tucker addressed this issue in fundamental terms. He asked why the concept of property had originated in the first place. If ideas are viewed as problem-solving devices, as answers to questions, then what about the nature of reality and the nature of man gave rise to the idea of property? In a brilliant analysis, Tucker concluded that property arose as a means of solving conflicts caused by scarcity. Since all goods are scarce, there is competition for their use. Since the same chair cannot be used in the same manner at the same time by two individuals, it was necessary to determine who should use

[5]For further discussion of Tucker's views on property and IP, see my article "Copyright and Patent in Benjamin Tucker's Periodical," *Mises Daily* (July 28, 2010), originally published in Wendy McElroy, ed., *The Debates of Liberty: An Overview of Individualist Anarchism, 1881–1908* (Lexington, 2003).

the chair. Property resolved this problem. The owner of the chair determined its use. "If it were possible," wrote Tucker,

> and if it had always been possible, for an unlimited number of individuals to use to an unlimited extent and in an unlimited number of places the same concrete things at the same time, there would never have been any such thing as the institution of property.[6]

Yet ideas defy scarcity. Since the same idea or pattern can be used by an unlimited number to an unlimited extent in unlimited locations, Tucker concluded that copyright ran counter to the very purpose of property itself, which was to ascertain the correct allocation of a scarce good.

Copyright contradicts not merely the purpose of property but also the essential characteristics of property, one such characteristic being transferability. Property has to be alienable: you must be able to dispossess yourself of it. The individualist anarchist, James L. Walker (writing under the pen name Tak Kak), commented, "The giver or seller parts with it [meaning property] in conveying it. This characteristic distinguishes property from skill and information."[7] When you buy the skill and information of a doctor who gives you a check up, for example, you don't acquire a form of title, as you would acquire title to a car from a car dealer, because the doctor is unable to alienate the information from himself. He cannot transfer it to you: he can only share it.

It was this point, transferability, that lead Thomas Jefferson to reject ideas as property. Jefferson drew an analogy between ideas and candles. Just as a man could light his taper from a candle without diminishing the original flame, so too could he acquire an idea without diminishing the original one. Jefferson wrote:

> If nature has made any one thing less susceptible than all others of exclusive property, it is ... an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it.[8]

When a poet reads or sells poetry without a contract, when he throws his ideas and patterns into the public realm, the listeners receive information, not property. For the publicized poems to be property they must be transferable, alienable. Yet, as the egoist J.B. Robinson said, "What is an idea? Is it made

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[6]"More on Copyright," *Liberty* 7 (December 27, 1890): 5.

[7]"Copyright.--IV," *Liberty* 8 (May 30, 1891): 3.

[8]Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html.

of wood, or iron, or stone? The idea is nothing objective, that is to say, the idea is not part of the product: it is part of the producer."[9]

In other words, if the poet claims ownership to the pattern of words in his listener's head, this reduces to a form of slavery since the ownership claim is over an aspect of the listener's body: namely, his mind, his knowledge. Such a claim is comparable to saying you own the blood in someone else's arm. Certainly, you could buy the blood—perhaps for a transfusion—but such a purchase would be contractual and not based on natural right.

Everyone owns the ideas within their own minds. If there is only one instance of a specific idea or arrangement of ideas—e.g. a writer who locks his novel in a desk drawer—then the idea is protected by natural right, by the author's to self-ownership. He has right to live in peace and silence and maintain a locked desk; no one can properly break into his desk and steal his property. When an author chooses to publicize his ideas without securing protection based on a listener's or reader's consent, however, he loses the protection afforded by his self-ownership. He loses what Tucker called "'the right of inviolability of person."

To restate this: I own my ideas because they are in my mind and you can get at them only through my consent or through using force. My ideas are like stacks of money locked inside a vault which you cannot acquire without breaking in and stealing. But, if I throw the vault open and scatter my money on the wind, the people who pick it up off the street are no more thieves than the people who pick up and use the words I throw into the public realm. And, yet, the poet might respond, no one is forced to absorb the poetry floating through the culture. They do so of their own free will. Therefore, says the poet, there is an implied contract or obligation on the part of the listener not to use it without permission.

Victor Yarros, Tucker's main opponent on copyright in the 19th Century movement, argued along these lines. He claimed, "All Mr. Tucker has the right to demand is that these things shall not be brought to his own private house and placed before his eyes."[10] Tucker responded,

> Some man comes along and parades in the streets and we are told that, in consequence of this act on his part, we must either give up our liberty to walk the streets or else our liberty to ideas ... Not so

[9]"A New Argument Against Copyright," *Liberty* 8 (May 16, 1891): 5.
[10]"The Right to Authorship," *Liberty* 7 (February 21, 1891): 4.

> fast my dear sir! ... Were you compelled to parade on the streets? And why do you ask us to protect you from the consequences?[11]

Moreover, the introduction of an implied contract between the poet and listener is a two-edged sword. To fall back on some sort of implied agreement implicitly admits that copyright is a matter of contract, not of natural law for one does not need to fall back on contract to protect natural rights. If a man steals your money, there is no need to appeal to an agreement—implied or otherwise—to justify a demand for restitution. Restitution occurs because it was *your* money. Only when you are dealing with those things to which you have no natural right must you appeal to contract.

Historically, copyright has been handled differently than patents. Many people accept copyrights while rejecting patents. The distinction is usually based on two points: (1) literature is considered pure, personal creation as opposed to inventions which rely on the discovery of relationships that already exist within within nature: and (2) independent creation of literature is considered to be impossible. Copyright is said to protect style or the pattern of expression rather than the ideas expressed. By contrast, most people agree that ideas themselves can be independently and even simultaneously created—for example, Walras, Jevons and Menger all separately originated the theory of marginal utility—but they do not agree that style can be independently or honestly duplicated.

The issue of duplication of style raises interesting questions. For one thing, it is not unknown for poetry, especially short poems, to closely resemble each other. Do these chance similarities constitute duplication? Do they violate copyright laws? If they don't, what prevents me from taking *Atlas Shrugged* and publishing it under my name after changing one word in each sentence? This would produce a similar pattern but not a duplicate one. If copyright would prevent me from doing this, then it is aimed not only at prohibiting exact duplications but at prohibiting similarities as well. And similarities are quite within the realm of honest possibility, especially when the guidelines of what constitute similarity are vague.

Many advocates of copyright would argue that honest similarities in nature are impossible or highly improbable. But laws should be based on principle, not upon probability. Tucker wrote:

> To discuss the degrees of probability is to shoot wide of the mark. Such questions as this are not to be decided by rule of thumb or by the law of chances, but in accordance with some general principle ... among the things not logically impossible. I know of few nearer the

[11]Commentary on "The Right to Authorship," *Liberty* 7 (February 21, 1891): 5.

> limit of possibility than that I should ever desire to publish in the middle of the desert of Sahara: nevertheless, this would scarcely justify any great political power in giving someone a right to stake out a claim comprising that entire region and forbid me to set up a printing press.[12]

In short, a question of right must be determined by a general theory of rights, not the likelihood of circumstances.

In regard to the ownership of a form of expression—of what is called "style"—Tucker believed that a particular combination of words belonged to no one; the method of expressing an idea was an idea in and itself and, therefore, "not appropriable." As long as you are not claiming ownership of a specific instance of a book, but of the abstracted style of every instance of this book, you are claiming ownership of an idea.

Examples of styles or patterns surround us everywhere. In chairs, shoes, hairstyles, gardens, clothes, wallpaper, the arrangement of furniture ... patterns are everywhere. And if it is out of respect for style that arrangements of words cannot be duplicated, then for that same reason, a shoemaker cannot duplicate shoes. Women cannot duplicate hairstyles or clothes for, after all, these items express style as much as a sonnet does. Yet it is only with the sonnet, with literature that the originators clamor for special, legal protection. If copyright were not the norm, if all of us had not grown up with it, we might consider it as absurd as a house owner claiming special, legal protection of the pattern of colors with which he had painted his home or the arrangement of rocks in his garden.

Indeed, to be consistent, the copyright advocate has to reduce his position to similar absurdity. For example, not merely writing but all of speech is a personal form of expression; speech is an arrangement of the alphabet in much the same manner as writing is. Therefore, by the advocate's own standards, a man should be entitled to legal protection for every sentence he utters so that no one thereafter can utter it without his consent. Lysander Spooner, a defender of copyright much quoted by libertarians, seemed to consider this possibility when he wrote, "So absolute is an author's right of dominion over his ideas that he may forbid their being communicated even by human voice if he so pleases."[13]

Think about that statement; it is frightening in its implications for the free flow of ideas and knowledge upon which human progress depends. I do not believe state-enforced copyright protects the just profits of an author. I

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[12]Commentary on Yarros, "More About Copyright," *Liberty*7 (Dec 27, 1890): 4, at 5.

[13] Spooner, *The Law of Intellectual Property*, p. 125.

agree with George Bernard Shaw who contended "copyright is the cry of men who are not satisfied with being paid for their work once but insist upon being paid twice, thrice and a dozen times over."[14] I believe free market copyright would temper the immense profits that can be made from writing, and that they should be tempered because such profits do not reflect just rewards so much as they do a state monopoly.

Moreover, I do not believe that the absence of state enforcement would destroy literature Most of the world's great authors—Shakespeare for example—wrote without copyright. As for the possible destruction of the publishing industry, Tucker—a publisher—explained:

> Why did two competing editions of the *Kreutzer Sonata* [a book he issued —WM] appear on the market before mine had had the field two months? Simply because money was pouring into my pockets with a rapiditv that nearly took my breath away. And after my rivals took the field if poured in faster than ever.[15]

As a writer I am eager to maximize my profits. I am not *so* eager. however, that I would claim ownership to what is in your mind. My attitude toward writers and lecturers who throw their products into the streets and, yet, claim legal protection as they do so is the same as that once uttered by Tucker: "You want your invention to yourself? Then keep it to yourself."[16]

The energy being expended in debating intellectual property would be better used in exploring methods by which the free market could protect the just rewards of intellectual products.

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[14]Quoted in Clarence Lee Swartz, *What is Mutualism?* (1927), http://www.panarchy.org/swartz/mutualism.5.html.

[15]Commentary on "The Reward of Authors," *Liberty* 7 (January 10, 1891): 6.

[16]"The Knot-Hole in the Fence," *Liberty* 7 (April 18, 1891): 6.