# A Libertarian Critique of Intellectual Property

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# A Libertarian Critique of Intellectual Property

IP

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# Introduction

Butler Shaffer knows how to make people question their fundamental assumptions. He sometimes asks his students at Southwestern Law School, where for many years he has been professor of law, to vote between two candidates.

Candidate A is identified as "a well-known critic of government, this man has been involved in tax protest movements, and has openly advocated secession, armed rebellion against the existing national government, and even the overthrow of that government. He is a known member of a militia group that was

involved in a shoot-out with law enforcement authorities. He opposes gun control efforts of the present national government, as well as restrictions on open immigration into this country. He is a businessman who has earned his fortune from such businesses as alcohol, tobacco, retailing, and smuggling."

Candidate B is described thusly: "A decorated army war veteran, this man is an avowed nonsmoker and dedicated public health advocate. His public health interests include the fostering of medical research and his dedication to eliminating cancer. He opposes the use of animals in conducting such research. He has supported restrictions on the use of asbestos, pesticides, and radiation, and favors government-determined occupational health and safety standards, as well as the promotion of such foods as whole-grain bread and soybeans. He is an advocate of government gun-control measures. An ardent opponent of

tobacco, he has supported increased restrictions on both the use of and advertising for tobacco products. Such advertising restrictions include: (1) not allowing tobacco use to be portrayed as harmless or a sign of masculinity; (2) not allowing such advertising to be directed to women; (3) not drawing attention to the low nicotine content of tobacco products; and, (4) limitations as to where such advertisements may be made. This man is a champion of environmental and conservationist programs, and believes in the importance of sending troops into foreign countries in order to maintain order therein."[1]

How do the students vote? "Over the years, the voting results have given Candidate B about 75 percent of the vote, while Candidate A gets the remaining 25 percent. After completing the exercise

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[1]Butler Shaffer, "The Hitler Test" http://archive.lewrockwell.com/shaffer/shaffer52.html

and tabulating the results, I [Shaffer] inform the students that Candidate A is a composite of the American "founding fathers" (e.g., Sam Adams, John Hancock, Thomas Jefferson, George Washington, etc.). Candidate B, on the other hand, is Adolf Hitler." As one can readily imagine, the students react with shock.

Why do the students vote this way? The program of Candidate B "sounds good" to them, but they did not ask themselves a key question, and it is this question that Shaffer wishes by his experiment to bring to their attention.

That question is this: How did Candidate B intend to bring his program into effect? The answer in this case is quite clear: by using the force and violence of the State. That led to disaster, and this Shaffer maintains, is necessarily the case.

In his great book *Boundaries of Order*, Shaffer argues that people can best solve their problems and progress through peaceful social cooperation. To cooperate peacefully, they need to delimit property rights. As Shaffer puts it, "If we are to have the resilience to make life-enhancing responses to the world—to assess risks and other costs, and to settle upon an efficacious course of action—we must enjoy the autonomy to act upon our portion of the world without interference from others, a liberty to be found only in a system of privately owned property."[2]

Shaffer takes great pains to show how people can resolve whatever problems arise from their mutual interaction through setting the appropriate boundaries of their property rights. In settling their disputes

[2]Butler Shaffer, *Boundaries of Order*, chrome://epubreader/content/reader.xul?id=19

on an individual basis, they manifest their respect for one another:

> Private property, as a system of social order, reflects the extent to which we are willing to acknowledge one another's autonomy and to limit the range of our own activities. Private property is the operating principle that makes real Immanuel Kant's admonition: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."[3]

Unfortunately, there is another way that people can choose to act. They can decide to solve their problem collectively, through resort to the State. Shaffer leaves us in no doubt what he thinks of this:

> The twentieth century demonstrated to thoughtful men and women the totally inhumane nature of any system premised on political collectivism. A sign on a church in the former East Berlin

[3]Ibid.

> that read "nothing grows from the top down," succinctly identified the anti-life nature of all forms of institutionally-directed, collective control over people. Collectivism is the ultimate expression of the pyramidal model of the universe. It is the epitome of power-based thinking (i.e., that it is appropriate for some people to exercise coercive authority over the lives and property of others).[4]

In "A Libertarian Critique of Intellectual Property," Shaffer applies his philosophy of individualism to a topic that has aroused a great deal of discussion among libertarians: are patents, copyrights, and the like legitimate? The results are illuminating.

Intellectual Property is a difficult topic, and a lesser author could easily get bogged down in legal technicalities. Not so Shaffer. As always, he penetrates to the fundamentals. He asks:

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[4]Ibid.

> Are the origins of IP interests to be found in the informal processes by which men and women accord to each other a respect for the inviolability of their lives—along with claims to external resources (e.g., land, food, water, etc.) necessary to sustain their lives? Or, are they to be established by formally enacted rules generated by political systems?[5]

Shaffer answers that IP has historically arisen, not through negotiation among individuals, but by the imposition of the State. Nor is this an accident. IP protection, he argues, could not have arisen through voluntary agreement. He succinctly explains why not:

> We enter into an agreement, one that is binding only upon you and me. But when the state—with its monopolistic powers—acts for the benefit of a few, all are legally bound by the rules whether they agree with them or not. If

[5]See p. 18 in this book.

> copyrights, patents, or trademark protections are not recognized among free people—unless specifically contracted for between two parties—by what reasoning can the state create and enforce such interests upon persons who have not agreed to be so bound?[6]

Defenders of IP claim that without it, the progress of knowledge and invention would be blocked, but Shaffer dissents:

> The notion that the anticipation of monopolistic rewards such as patents and copyrights is essential to the creative process, is negated by much of human history. I am unaware of any copyrights having been issued to writers such as Aeschylus, Homer, Shakespeare, Dante, or Milton; or composers such as Beethoven, Bach, Mozart, Wagner, or Tchaikovsky; or artists such as Van Gogh, Michelangelo, Da Vinci, Rembrandt, or Renoir. Were Leonardo's or Gutenberg's inventions, or the Egyptian

[6]See p. 21 in this book.

> pyramids, or the Roman aqueducts, rewarded by state-issued patents?[7]

Appealing to Paul Feyerabend and Arthur Koestler, Shaffer argues that the creative process works best in the absence of imposed uniformities and limits."No more than can spontaneity be commanded, can the creative process be constrained by boundaries and barriers that protect the creative outcomes of others."

Shaffer writes with genuine philosophical depth, and "A Libertarian Critique of Intellectual Property" is an indispensable contribution to libertarian theory.

David Gordon
Los Angeles, California
November 5, 2013

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[7]See p. 27 in this book.

# A Libertarian Critique of Intellectual Property

FROM A LIBERTARIAN PERSPECTIVE, premised upon respect for private property and the rejection of coercion, a discussion of what is called "intellectual property"—e.g., copyrights, patents, trademarks—must focus on the same questions that attend more general inquiries into property ownership. How do such interests come into existence? How is decision-making exercised? And how are interests transferred or lost? I have addressed these property questions in my book, *Boundaries of*

*Order: Private Property as a Social System.*[1] Ignorance of property principles has been a primary contributor to the social conflict, loss of individual liberty, and the resulting destructiveness that characterizes modern societies. Intellectual property (hereafter "IP") has become a popular setting in which such confusion finds expression.

Are the origins of IP interests to be found in the informal processes by which men and women accord to each other a respect for the inviolability of their lives—along with claims to external resources (e.g., land, food, water, etc.) necessary to sustain their lives? Or, are they to be established by formally enacted rules generated by political systems? In a world grounded in institutional structuring, it is often difficult to find people willing

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[1]*Boundaries of Order: Private Property as a Social System* (Auburn, Ala.: Mises Institute, 2009).

to consider the possibility that property interests could derive from any source other than an acknowledged legal authority. There is an apparent acceptance of Jeremy Bentham's decree that "property is entirely the creature of law."[2] Because all life—of whatever species—is dependent upon property principles, Bentham's proposition would have to embrace the odd notion that the dictates of formal law *preceded life itself*!

I shall not pursue that topic here—having addressed it more thoroughly in my *Boundaries of Order.* I do raise the question of whether, from a libertarian viewpoint, any philosophically defensible ownership claims could be *created* by political systems? Whether a *pre-existing*

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[2]Jeremy Bentham, "Principles of the Civil Code," (1802) in John Bowring, ed., *The Works of Jeremy Bentham* (New York: Russell & Russell, 1962), vol. 1, p. 308.

property claim might properly be protected or defended by a state system, can be left to a debate between *anarchist* and *minarchist* adherents. The question upon which I focus is this: in the same way that respect for individual property claims can arise informally among men and women, is there evidence for such claims to IP being so recognized? If the answer should prove to be "no," can a libertarian philosophy be reconciled with the idea of *any* property interests (IP or otherwise) being created by the state?

There is a generally-accepted definition of "government" as *an entity that enjoys a legal monopoly on the use of violence within a given territory.* It is the distinction between "violent" and "peaceful" conduct—the contrast between the "coercively mandated" and the "voluntarily contracted"—that is at the core of libertarian thought. Franz Oppenheimer characterized these "fundamentally opposed

means" as the "political" versus the "economic" means of acquiring sustenance.[3] If the state enjoys the lawful authority to use violence to accomplish the ends of those who desire to use such powers to advance their interests, how can a libertarian philosophy defend the products of such coercive undertakings?

Through "economic means," individuals create rights in one another through *contract*, an agreement by two or more persons to exchange claims to ownership. You are willing to purchase my claim to my automobile for your $10,000, and I am willing to sell my claim to you for that amount. We enter into an agreement, one that is binding only upon you and me. But when the state—with its monopolistic powers—acts

[3]Franz Oppenheimer, *The State: Its History and Development Viewed Sociologically*, trans. by John M. Gitterman (New York: B.W. Huebsch, 1922), p. 24; reprinted New York: Free Life Editions, 1975.

for the benefit of a few, *all* are legally bound by the rules whether they agree with them or not. If copyrights, patents, or trademark protections are not recognized among free people—unless specifically contracted for between two parties—by what reasoning can the state create and enforce such interests upon persons who have not agreed to be so bound? Nor can the inclusion of a copyright notice in a book be defended, under contract principles, as such provides no evidence that the buyer had agreed to respect the presumed property claim prior to his purchase.

Among men and women of libertarian sentiments, one would expect to find a presumption of opposition to the idea that a monopolist of legal violence could create property interests that others would be bound in principle to respect. I would go even further and assert that only human beings—"persons"—should be respected as property owners; that treating

corporations, political institutions, and other abstractions as artificial "persons" represents a source of conflict we ought to reject. So considered, the state becomes seen for what it is: an organizational tool of violence that is able to accomplish its purposes only through the willingness of its victims to accord it legitimacy. Such a practice allows lifeless fictions to transcend—and thus demean—the importance of individual human beings.

If IP claims can only be created by coercive political systems, could such interests be defended under libertarian principles? In a stateless society, would IP be recognized alongside claims to real estate and chattels as property interests worthy of respect? At the early common law—and until 1977 in America—a limited copyright principle existed. A person who had written a book or a poem, placed it in her desk drawer, and it was later removed by another and published

without her consent, maintained a common law copyright to her work. If, however, the *author* had the work published—which meant, as the word implies, made "public"—she lost such a copyright, the act of publication being treated as an abandonment of control over her claim of ownership. The question arose, of course, as to what constituted a "publication" of the work: sending a copy to a publisher to review would not.

In order to extend copyright protection to authors and publishers beyond the common law limits, Congress enacted copyright statutes. Such legislation was grounded in Article I, Section 8 of the Constitution, which provides, among other powers, "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This constitutional authority created, in a legal monopolist

of violence, the power to create in others monopoly property interests that did not otherwise exist, and would be enforced through the coercive powers of the state. Our legal system has long understood monopolies to be creatures of the state,[4] a status that provided the recipient protection from would-be competitors. The incompatibility of such an interest with libertarian principles should be apparent.

The common law system got it right: because the essence of ownership is found in the capacity to control some resource in furtherance of one's purposes, such a claim is lost once a product has been released to the public. The situation is similar to

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[4]A dictionary definition informs us as to the meaning of a "Legal monopoly: The exclusive right granted by government to business to provide utility services that are, in turn, regulated by the government." *Black's Law Dictionary* (St. Paul, Minn.: West Publishing, 9th ed., 2004), p. 1098.

that of a person owning oxygen that is contained in a tank, but loses a claim to any quantity that might be released—by a leaky valve—into the air.

It is argued that patents and copyrights are of great value to inventors and authors who might otherwise be disinclined to invest their efforts and resources to create what others could readily copy. The argument has been extended to suggest that others—including society as a whole—benefit from so rewarding such productive endeavors. The contention has also been made on behalf of government research and development funding that makes it more beneficial to corporate interests who would otherwise have to fund their own efforts in such diverse fields as medicine, aeronautics, space exploration, military weaponry, and other scientific or social research. There is nothing remarkable in the proposition that people prefer having the costs of

their undertakings paid for by others; nor in the idea that people are capable of creating and organizing their own resources to accomplish, in a free market, ends that they value.

The notion that the anticipation of monopolistic rewards such as patents and copyrights is essential to the creative process, is negated by much of human history. I am unaware of any copyrights having been issued to writers such as Aeschylus, Homer, Shakespeare, Dante, or Milton; or composers such as Beethoven, Bach, Mozart, Wagner, or Tchaikovsky; or artists such as Van Gogh, Michelangelo, Da Vinci, Rembrandt, or Renoir. Were Leonardo's or Gutenberg's inventions, or the Egyptian pyramids, or the Roman aqueducts, rewarded by state-issued patents?

Civilization, itself, has developed from the works of many prolific individuals, most of whom conferred upon the rest

of humanity their discoveries, inventions, writings, or artistic creations, without expectations of enjoying a monopoly status as either their purpose or consequence. Indeed, such works have come to define the very content of Western culture.

True to their coercive and looting nature, governments have gone so far as to take from the "public domain" words that belong to no one, and conferred a monopoly copyright upon various institutional interests. The word "Olympics," for instance, has been in common usage since at least the eighth century B.C. By political fiat, the International Olympic Committee now enjoys ownership of that word as a state-protected trademark.

But is the premise upon which IP has long been defended—i.e., its importance in making possible creations that benefit mankind—at all valid? Is the creative process *encouraged* or *hindered* by this

system of state-conferred monopolies? Creativity—like learning in general—is fostered by cross-fertilization and synthesis. We ought to have learned from fundamental principles of biology that reproduction through single-cell division produces little genetic variation. When the life process developed sexual reproduction, the resulting genetic diversity allowed for the proliferation of numerous species as well as intra-special traits that enhanced adaptive capabilities.

Patents and copyrights inhibit the creative process by discouraging the exchange of information relating to a particular line of research or exploration. If one scientist has been issued a patent for his invention of a widget, another scientist would likely be discouraged from continuing his own work on a similar product, or from making modifications or variations on the patented item. The interplay in which individual insights and proposals are communicated

to one another in a group, and then subjected to collaborative processes of brainstorming, are far more productive of creative ends than is the work of individuals in isolation. Likewise, the cross-fertilization of ideas, techniques, and other influences, among communities of artists and scientists, have greatly enhanced the creative process. On the other hand, when driven by the rewards of patents, scientists and inventors are known to maintain secrecy in their laboratories and research, lest a competitor gain insights that might advance their own work. The proposition that *knowledge* and *ideas* can be made the exclusive property of one who discovers or expresses what was previously unknown, is contrary to the nature of the intelligent mind, whose content is assembled from a mixture of the experiences of others and oneself. Even the *language* with which one formulates and communicates his or her understanding to others, has been provided by predecessors.

While ego gratification in being the first to make a discovery plays a major role in this hesitancy to share what one has learned, the fear that a patent or copyright awarded to another might foreclose continuing developmental work adds to the pressures for secrecy. It has been said that Nikola Tesla did most of his creative work wholly within his mind, dreaming up inventions and procedures and playing them out in ways that allowed him to find and correct defects in his thought creations.[5] Thomas Edison, on the other hand, would pick up on the ideas of others, invent something as a result, and then rush to the Patent Office. The problem was not that Edison was able to synthesize the ideas of others with his own: such is the nature of the creative process. The problem was the Patent Office!

[5]Margaret Cheney, *Tesla: Man Out of Time* (New York: Touchstone, 1981), pp. 32–35.

While Tesla patented much of his work, he was so driven by the urge of discovery that he often failed to patent work which, as a consequence, "went into the common pool of knowledge" that benefitted mankind.[6] How much of this "common pool of knowledge" (i.e., "public domain") finds its origins in the eagerness of so many of our distant ancestors to discover or invent things whose use might prove beneficial to others; and to do so with no apparent motivation beyond the joy found in the creative act itself? Far earlier than the evolution of Western Civilization, many observant and inventive of our ancestors employed their individual intelligence to make sense of their world, and to find means for enhancing their survival.

Undoubtedly the greatest invention in human history was *language*. It has made

[6]Ibid., pp. 88, 225.

possible not only our social relationships; as well as our ability to express the aesthetic, spiritual, commercial, scientific, philosophical, and engineering qualities that make our species unique; but has been the condition precedent for all of our other creations. Language is the essential tool by which the human mind can organize and communicate experiences and understanding, not only to *others*, but to *ourselves*. Its spontaneous, vibrant character is reflected in words that come and go into common usage, without any authority directing the process. Even letters of the alphabet have no assurance of immortality.[7] But who, amongst our earliest ancestors, were granted copyrights for this work? As each of our forebears contributed to the creation of what, like our biological characteristics, continues to evolve, and as the influences of many

[7]See, e.g., mentalfloss.com/article/31904/12-letters-didnt-make-alphabet

languages helped to synthesize our own, I am unaware of any coercive machinery that was in place to give individual participants a protected monopoly in the use of their contributions. I suspect that, had any such restraints been available and enforced, we would never have realized the richness and vibrancy of the self-generated language we now enjoy.

One can regress millennia before the first patent or copyright laws were enacted and discover the origins of numerous *tools* (e.g., hammers, needles, knives, axes); *transportation* systems (e.g., the wheel, boats, wagons, sails); plants that were cultivated and/or transformed into *foods* (e.g., maize, wheat, potatoes, chocolate, beans, tomatoes); plant and/or animal sources for *clothing* (e.g., cotton, wool, hides, silk); and *housing*. Nor can we overlook the discovery of substances (e.g., minerals, herbs, plants) that our ancestors found useful for dealing with injuries, sicknesses,

and maintaining health; substances that many modern men and women continue to find beneficial alternatives to institutionalized medicine, and are even used to produce the medicines that pharmaceutical firms now insist on patenting. Musical instruments (e.g., flutes [going back more than 40,000 years], drums, stringed instruments) provided sound, while the creation of pigments added colors to artistic expressions of early humans. The invention of *paper*, *ink, hunting tools,* and *rope,* as well as the discovery of physical laws helped our forebears address the many pragmatic concerns in their lives. The ancient Greek, Hero of Alexandria (10–70 AD), invented a workable steam engine—centuries before Robert Fulton patented his—a vending machine, and a device for using wind to power machines.

All of these early inventions and creations were accomplished, as far as is known, without a violence-backed monopoly to prevent

others from copying them. How many painters, sculptors, inventors, writers, and philosophers, produced their works out of no greater motivation than a deep inner sense of being that insisted on expressing itself by creative means? What anticipation of material rewards drove our prehistoric ancestors to make their handprints on the walls of ancient caves in Spain and France? Might they have had no other purpose than to reach their hands 40,000 years into the future to express to us that most fundamental spiritual need for transcendence: "I was here"?

The origins of that cornucopia from which we all continue to draw sustenance are to be found within those creative and cooperative qualities against which political systems war. Those who produce the goods and services that are so beneficial to life might prefer to have a monopoly in what they have created. But the rest of us ought to reject such privileged practices.

Life is hindered, not enhanced, by the coercive restriction of options by which people peaceably pursue their self-interests.

If we truly believe that the creative process requires the state to grant to inventors and discoverers an immunity from having their works adopted by others, will we insist that modern producers either compensate the descendants of earlier creators for their preliminary work or, in the alternative, abandon their claims to rewards for their "originality"? Should General Motors, Chrysler, Harley-Davidson, and Schwinn Bicycle Company be required to pay royalties to the offspring (if one can identify them) of the inventor of the wheel? Do Simon & Schuster, Random House, and numerous university presses now rightfully owe the heirs of Johann Gutenberg for the use of his invention that made possible their businesses? Should symphony orchestras be obligated to pay

royalties to the descendants of the composers whose music they perform?

On first impression, such proposals may appear absurd and unworkable. But such a response ignores the premises upon which modern IP laws operate: if the "progress of science and the useful arts" is dependent upon "authors and inventors" being granted "exclusive right" to their works, how did our ancestral "authors and inventors" manage *their* creations without the anticipation of such rewards? Were there even informal understandings among men and women of integrity that original works by one person were not to be copied?

There is no collection of paintings that so dominates art museums in Florence, Italy, as that of the "Madonna and child." Room after room in the Uffizi Gallery and the Pitti Palace repeats this theme by both great, and relatively unknown, painters. As best I can tell,

the artist Duccio created the first of such paintings, later followed by Botticelli, Leonardo, Michelangelo, and Raphael, not a second-rater in the bunch. Given the spirit of IP protectionism, should an asterisk be placed alongside the names of each of these subsequent painters to indicate their lack of respect for the original and exclusive claims of their predecessor? Have their works demeaned the contributions of Western Civilization to the artistic and spiritual betterment of mankind? Would our culture have been better off had these men not made these paintings?

What, too, of the patent claims being advanced in the genetic modification of plants? Because such claims might give agri-business giants—such as Monsanto—monopolistic powers over the production of foods, this area may attract the greatest amount of critical attention. That the political system would give the IOC ownership of the word "Olympics" may

have no more day-to-day significance for members of the general public than would the awarding of a patent to the inventor of a hinge for a laptop computer. But for patents to be issued to corporations involved in food production—particularly when federal, state, and local governments are trying to regulate home gardening—raises concerns that affect the immediate survival of people.

The proposition that business firms are entitled to patent protection when they have produced variations in the genetic structure of plants (GMOs) conveniently ignores the fact that the pre-existing plants had, themselves, arisen from modifications or adaptations provided by our ancient ancestors. Are a few privileged descendants of those whose earlier efforts produced, for the benefit of all mankind, an improved means for sustaining life, to be granted an inviolable claim arising from their tinkering with what has been

handed down to them in common with the rest of mankind?

It is one thing for the seller of seeds to insist upon a property interest in the bags of seeds it has produced and continues to own until such time as it exchanges its ownership claim with a buyer. Until the claim is transferred, the seller continues to exercise the control that is essential to ownership, a control that is then transferred to the buyer. But, analogizing to common law copyrights, the subsequent sale of its seeds would seem to constitute a "publication" of the content of these seeds and, with it, the loss of control. The metaphor of such claims being "tossed to the winds" finds literal expression in efforts by firms such as Monsanto to prosecute patent claims against farmers whose lands were unwanted recipients of Monsanto seeds blown onto them from other farms. The social implications of GMO patents may prove to be the Achilles-heel in the

entire field of IP. As asked earlier, to the extent IP interests arise only by way of grants from the state, how can such claims be defended on the basis of libertarian principles grounded in individual liberty and respect for private property?

There are many other costs associated with IP that rarely get attention in cost-benefit analyses of the topic. One has to do with the fact that the patenting process, as with government regulation generally, is an expensive and time-consuming undertaking that tends to increase industrial concentration. Large firms can more readily incur the costs of both acquiring and defending a patent than can an individual or a small firm, nor is there any assurance that, once either course of action is undertaken, a successful outcome will be assured. Thus, individuals with inventive products may be more inclined to sell their creations to larger firms. With regard to many potential products, various governmental agencies

(e.g., the EPA, FDA, OSHA) may have their own expensive testing and approval requirements before new products can be marketed, a practice that, once again, favors the larger and more established firms.

Increased concentration also contributes to the debilitating and destructive influences associated with organizational size. In addressing what he calls "*the size theory of social misery*," Leopold Kohr observes that "[w]herever something is wrong, something is too big,"[8] a dynamic as applicable to social systems as in the rest of nature. The transformation of individuals into "overconcentrated social units" contributes to the problems associated with mass size.[9] One sees this

[8]Leopold Kohr, *The Breakdown of Nations* (New York: E.P. Dutton, 1978), pp. 34, xviii; emphasis in original.

[9]Ibid., p. xviii.

tendency within business organizations, with increased bureaucratization, ossification, and reduced resiliency to competition often accompanying increased size.[10] Nor do the expected benefits of economies of scale for larger firms overcome the tendencies for the decline of earnings and rates of return on investments, as well as the maintenance of market shares following mergers.[11] The current political mantra, "too

[10]Gabriel Kolko, *The Triumph of Conservatism* (Glencoe, Ill.: The Free Press, 1963).

[11]See, e.g., *Arthur Dewing, Corporate Promotions and Reorganizations* (Cambridge, Mass.: Harvard University Press, 1930), pp. 546–547; Kolko, ibid., pp. 37, 46; *Temporary National Economic Committee, Competition and Monopoly in American Industry*, Monograph no. 21 (Washington, D.C.: Government Printing Office, 1940), p. 311; Milt Gillespie and Aileen Lee, "Building Hospital Market Power Through Horizontal Integration—Is It Working?", in *The McKinsey Quarterly* 1996, no. 4: 205–11; Simon Brady and Caren Chester-Marsh, "The Madness of Mergers," *Euromoney*, September 1991: 66–81;

big to fail," is a product of the dysfunctional nature of size when an organization faces energized competition to which it must adapt if it is to survive.

Walter Adams has provided a good overview of the impact of government regulation in fostering increased size.

> In this era of big government, concentration is often the result of unwise, manmade, discriminatory, privilege-creating governmental action. Defense contracts, R and D support, patent policy, tax privileges, stockpiling arrangements, tariffs and quotas, subsidies, etc., have far from a neutral effect on our industrial structure. In all these institutional arrangements, government plays a crucial, if not decisive, role.[12]

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Rudi Vander Vennet, "The Effect of Mergers and Acquisitions on the Efficiency and Profitability of EC Credit Institutions," *Journal of Banking and Finance* 20, no. 9 (November, 1996): 1531–1558.

[12]Walter Adams, "The Military-Industrial Complex

A common response of business firms to their own reduction of competitive resiliency occasioned by increased organizational size has been to call upon the state to create and enforce standardized business practices and products, as well as to restrict entry into industries and professions.[13] The

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and the New Industrial State," *American Economic Review* 65 (May 1968), reprinted in *Superconcentration/Supercorporation*, ed. Ralph Andreano (Andover, Mass.: Warner Modular Publications, 1973), R337–2.

[13]See, e.g., Kolko, *Triumph of Conservatism*; Gabriel Kolko, *Railroads and Regulation, 1877–1916* (Princeton: Princeton University Press, 1965); James Weinstein, *The Corporate Ideal in the Liberal State, 1900–1918* (Boston: Beacon Press, 1968); Ron Radosh and Murray Rothbard, eds., *A New History of Leviathan* (New York: E.P. Dutton, 1972); James Gilbert, *Designing the Industrial State* (Chicago: Quadrangle Books, 1972); Robert Wiebe, *The Search for Order, 1877–1920* (New York: Hill and Wang, 1967); and my book, *In Restraint of Trade: The Business Campaign Against Competition, 1918–1938* (Auburn, Ala.: Mises Institute, 2008),

state's creation of patent and copyright interests doesn't, by itself, prevent innovation by others, but it does erect hurdles that often discourage research (e.g., the fear of defending a patent infringement suit, the possibility that the Patent Office might reject a subsequent application in the same product line as the previously patented creation, or the concern that one firm's patent for preliminary research results might inhibit another firm from pursuing subsequent research). The "traditional enemies of innovation," one observer has stated, are "inertia and vested interest,"[14] factors contributed to by the government practice of providing some inventors protection from competitors.

When the coercive powers of the state are invoked to benefit some and to restrain

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originally published: Lewisburg, Penn.: Bucknell University Press, 1997).

[14]Cheney, *Tesla: Man Out of Time*, p. 241.

others, the creative processes will always suffer and, as a consequence, so will the vibrancy of a civilization. The tendency of such behavior is to restrain the liberty of individuals to act within parameters suitable to established interests. To so constrain creativity would be akin to forcing painters to confine their work to within the boundaries of paint-by-the-numbers kits. Creative behavior depends upon synthesis and cross-fertilization, processes facilitated by what Arthur Koestler referred to as "creative anarchy."[15] The science philosopher, Paul Feyerabend, was even more forceful in his insistence upon unfettered liberty in fostering understanding. He noted that "*[s]cience is an essentially anarchistic enterprise,*" and that "*theoretical anarchism is more humanitarian and more likely to encourage progress than its law-and-order alternatives.*" He went on

[15]Arthur Koestler, *The Act of Creation* (London: Arkana, 1989), p. 229.

"there is only one principle that can be defended under *all* circumstances and in *all* stages of human development. It is the principle: *anything goes*."[16] He then added that the "*[p]roliferation of theories is beneficial for science, while uniformity impairs its critical power. Uniformity also endangers the free development of the individual.*"[17]

As experimentation with and the resulting production of genetically uniform crops continues, intelligent minds would do well to recall such lessons from history as provided by the Irish potato famine, the destruction of Ceylonese coffee plantations, and more recent damage to American corn and grape crops. Plants that were faithful copies of their own genetic organization (i.e., clones)

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[16]Paul Feyerabend, *Against Method* (London: Verso, rev. ed., 1988), p. 9; emphasis in original.

[17]Ibid., pp. 19, 24; emphasis in original.

might have enjoyed short-term benefits, but lacked a sufficient diversity to allow them to respond effectively to blights, diseases, and other conditions to which they were unaccustomed. Perhaps a million or more deaths in Ireland have been directly or indirectly attributed to the potato crop's genetic lack of resiliency.

The threats to human survival implicit in the structured uniformity of systems upon which life depends are enhanced by the uncertainties inherent in complexity. The study of chaos informs us that complex systems are subject to too many variable, interconnected factors to permit predictions of outcomes. As Koestler and Feyerabend have reminded us, creativity is a process that depends upon individuals being free to experiment, and to find connections between or among the numerous—and often unseen—factors that make up our complex world. No more than can spontaneity be commanded, can

the creative process be constrained by boundaries and barriers that protect the creative outcomes of others.

The adverse consequences of fostering uniformity and standardization go beyond the short-term disadvantages experienced by creative individuals. Such practices are the outgrowth of thinking that values the stabilizing of systems that have proven productive in the past. Herein are found the origins of institutionalized organizations, with the state using its coercive powers to stabilize the positions of established interests, whether by regulating and restricting the forces of change, or by the use of various subsidies. In an effort to foster equilibrium, uniformity and standardization have become politically-generated values. A shift in thinking occurs, wherein the emphasis on innovation, creativity, and the constant need for resiliency, gives way to the protection of past accomplishments,

a process abetted by lawsuits grounded in patent and copyright infringements.

As we assess the nature of IP, and of its tendencies to inhibit—rather than foster—creativity, we should pay attention to historians who have written of how structured thinking and behavior contribute to the decline of civilizations. Arnold Toynbee identified how "differentiation and diversity" associated with a *creative* culture becomes increasingly influenced by "a tendency toward standardization and uniformity" during its decline.[18] Carroll Quigley has written that when the "instruments of expansion" (i.e., systems that foster invention, saving, and investment) become institutionalized and structured, they lose their capacities for adaptation that would otherwise

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[18]Arnold J. Toynbee, *A Study of History* (New York: Oxford University Press, 1958), p. 555.

foster creative growth.[19] In the words of Will and Ariel Durant, whether a given civilization continues to expand or disintegrate will depend upon "the presence or absence of initiative and of creative individuals with clarity of mind and energy of will ... capable of effective responses to new situations."[20] Jacob Burckhardt's observation that "the essence of history is change"[21] warns of the dangers of placing fences around creative men and women.

The pragmatic arguments offered herein are intended to reinforce my case against IP. The essence of my views is found in the title of this article, upon

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[19]Carroll Quigley, *The Evolution of Civilizations* (Indianapolis, Ind.: Liberty Press, 1979), pp. 101ff.

[20]Will and Ariel Durant, *The Lessons of History* (New York: Simon & Schuster, 1968), p. 91.

[21]Jacob Burckhardt, *Force and Freedom: Reflections on History*, James H. Nichols, ed. (New York: Pantheon Books, 1964), p. 103.

which I rest my case. Can one, consistent with a libertarian philosophy, respect any "property" interest that is both *created* and *enforced* by the state, a system defined by its monopoly on the use of violence? I regard the proposition as indefensible as would be the question of a libertarian defense of war.

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