

IS INTELLECTUAL PROPERTY LEGITIMATE?

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I. PROPERTY RIGHTS: TANGIBLE AND INTANGIBLE

All libertarians support property rights, and agree that property rights include rights in tangible resources. These resources include immovables (realty), such as land and houses; and movable things such as chairs, clubs, cars, and clocks.¹ Libertarians are also unanimous in supporting the right of the individual over the unique scarce resource of his own body although it is unsettled whether we fully own our bodies in the same sense that we own external objects. Debate over this issue manifests itself in differences over the issue of inalienability and with respect to the law of contract.² In any event, libertarians are unanimous in holding that all *tangible* scarce resources whether homesteadable or created, whether immovable or movable, or our very bodies are subject to rightful control ownership, if you will by specified individuals.

As we move away from the tangible (corporeal) toward the intangible, matters, not surprisingly, become fuzzier. Most, though not all, libertarians oppose laws against blackmail; and many, though not most, oppose rights in reputations i.e. laws against defamation.³ More disputed still is the concept of intellectual property (called AIP law by lawyers). Are there natural individual rights to one's intellectual creations, such as inventions or writings? Should the legal system protect such rights? Below, I summarize intellectual property rights as they have been classically understood (a more detailed presentation is provided in Appendix I). I then survey various libertarian views on IP rights, and present what I consider to be the proper, libertarian view in this regard, critiquing and refining previous views as warranted.

¹Terms like realty, personalty, tangible, etc. are common-law terms; analogous civil-law terms are immovables, movables, and corporeals, respectively. See Kinsella (1994) for further differences between civil-law and common-law terminology. The term *things* is a broad civil-law concept that refers to all types of things, whether corporeal or incorporeal; and whether movable or immovable.

²I.e., can we sell or alienate our bodies in the same manner that we can alienate title to homesteaded property? See, e.g., Kinsella (1999; 1998-99), arguing against body-alienability; Block (forthcoming A), arguing for such alienability.

³For views in opposition to blackmail laws, see Block (forthcoming B; 1998; 1976, pp. 53-54); Rothbard (1998, pp. 124-126); Mack (1982); in favor, see Nozick (1974, pp. 85-86); Epstein (1983). For libertarian arguments against defamation (libel and slander) laws, see Block (1976, pp. 50-53); Rothbard (1998, pp. 126-128); in favor, see David Kelley in Kelley & Hentoff (1987).

Before continuing, let me address the hypocrisy charge which will inevitably be leveled against me. I practice IP law for a living; yet, I largely deny the legitimacy of IP rights. Is there not a contradiction, or at least hypocrisy, here? I do not think so, and do not much care in any event. First, let me simply note that even if I am hypocritical, the soundness of my arguments and reasoning is not affected thereby. Second, actually having experience in and knowledge of this field of law may actually be of benefit in this analysis. Too often libertarians are woefully ignorant of the actual types of laws they are critiquing and proposing.⁴ Third and this is not really germane to the present topic I do not happen to be one of those libertarians who wrings his hands in guilt over being forced to live in an imperfect society. To do so would be, in my view, to add insult to injury. It would be to penalize oneself further for the aggression carried out and supported by others. Moreover, much of a profession such as mine which involves acquiring patent and other IP rights for clients, and advising, defending, and representing them in related areas may be viewed as defensive in nature. Many patents, for example, are acquired by companies as a shield to be used against charges of patent infringement which may be hurled at them by others. Given the existence of patent law and the threat that patents pose to businessmen, it is neither irrational nor immoral to arm oneself with suitable weaponry. That said, let me move on to the substantive issues, and leave rhetoric, strategy, naive purism, and other irrelevant matters behind to the nattering nabobs.⁵

II. SUMMARY OF INTELLECTUAL PROPERTY (IP)

Intellectual property, or AIP, is an umbrella term that covers several types of legally-recognized property rights that arise due to some type of intellectual creativity, or that are otherwise related to ideas, to the intangible.⁶ IP rights are intangible rights⁷ to intangible things namely, *ideas*, either as expressed (copyrights) or as embodied in a practical implementation (patents). Tom Palmer (1990, p. 818) puts it this way: Intellectual property rights are rights in ideal objects, which are distinguished from the material substrata in which they are instantiated.⁸

The classical types of IP are copyrights, trademarks, patents, and trade secrets.⁹ Copyright is a right given to authors of original works, such as books, articles, movies, and computer programs.

⁴See, e.g., note 65, below.

⁵Not that I oppose rational negativism (pessimism).

⁶In some European countries, the term industrial property is used instead of intellectual property.

⁷*De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U.S. 209, 222, 13 S.Ct. 283, 285 (1893).

⁸As one commentator (Nance 1990, p. 757) noted, intellectual property may be defined as embracing rights to novel ideas as contained in tangible products of cognitive effort.

⁹A useful introduction to IP can be found in Miller & Davis (1990); see also <<http://prof.findlaw.com/patents/index.html>>. Hildreth (1998-current) contains a good introduction to patent law. More in-depth treatises with further information on IP law include Chisum (2000); Nimmer & Nimmer (2000); McCarthy (1996-present); Milgrim (2000). Useful brochures and pamphlets are available from the Copyright Office (202-707-9100 or 202-707-3000 <<http://lcweb.loc.gov/copyright/>>) and from the Patent and Trademark Office of the Department of Commerce (703-557-INFO <<http://www.uspto.gov>>). Other useful sites include: <http://www.nyipla.org/public/10_faq.html>; <<http://www.bustpatents.com/>> (Useful Web sites link); <http://www.buildfreedom.com/ft/intellectual_property.htm>;

Copyright gives the exclusive right to reproduce the work, prepare derivative works, or to perform or play the work publicly, *inter alia*. Copyrights protect only the *form* or *expression* of ideas, not the underlying ideas themselves. (Modern copyright law has superseded and largely preempted a common law copyright,⁴ which attached automatically from moment of work's creation, and essentially conferred only a right of *first* publication. Goldstein (1989, ' ' 15.4 et seq.))

A **patent** is a property right in inventions, i.e. devices or processes that perform a **useful** function. A new or improved mousetrap is an example of a type of device which may be patented. A patent effectively grants the inventor a limited monopoly on the manufacture, use, or sale of the invention. However, a patent actually only grants the right to *exclude* to the patentee (i.e., to prevent others from practicing the patented invention); it does not actually grant to the patentee the right to *use* the patented invention (for example, use of a patented invention might also infringe someone else's patent).¹⁰

The Supreme Court has identified three categories of subject matter that are unpatentable, namely **Laws of nature, natural phenomena, and abstract ideas.**¹¹ Reducing abstract ideas to some type of **practical application,** i.e., **A useful, concrete and tangible result,**¹² is patentable, however.

A **trade secret** is any information kept secret by a company, which gives it a competitive advantage so long as it is secret. An example would be the formula for Coca-Cola[®] brand cola. Trade secrets can include information that is not novel enough to be subject to patent protection, or not original enough to be protected by copyright (e.g., a database of seismic data or customer lists). Trade secret laws are used to prevent **misappropriations** of the trade secret, or to award damages for such misappropriations.¹³

Trademarks are used to *identify* the source of goods or services sold, and to distinguish them from goods or services of others. For example, the Coca-Cola[®] mark and design that appears on soft drink cans identifies these products as coming from that company, and distinguishes them from competitor colas such as Pepsi[®] brand cola. Trademark law primarily prevents competitors from **infringing** the trademark by using confusingly similar marks to identify their own goods and services. Related legal rights include extensions of trademark rights to include rights against trademark dilution and certain forms of cybersquatting, and various **unfair competition** claims.

¹⁰Suppose A invents and patents a better mousetrap having a Nitinol (memory metal) spring, for better snapping ability. Now suppose B invents and patents a mousetrap with a tungsten spring covered with non-stick coating, to improve the ability to remove mouse remains while still providing the Nitinol-driven snapping action. B has to have a mousetrap with a Nitinol spring in order to use his invention, but this would infringe A's patent. Similarly, A cannot add the non-stick coating to his own invention, without infringing B's improvement patent. In such situations, the two patentees may cross-license, so that A can practice B's improvement to the mousetrap; and so B can use his own invention.

¹¹*Diamond v. Diehr*, 450 U.S. 175, 185 (1981) <<http://laws.findlaw.com/US/450/175.html>>; see also 35 U.S.C. § 101 <<http://www4.law.cornell.edu/uscode/35/101.html>>.

¹²*In re Alappat*, 33 F.3d 1526, 1544, 31 USPQ2d 1545, 1557 (Fed. Cir. 1994) (in banc). See also *State Street Bank & Trust Co. v. Signature Financial Group*, 149 F.3d 1368 (Fed. Cir. 1998); <<http://www.ipo.org/97-1327.htm>>

¹³See the Uniform Trade Secrets Act (UTSA) <<http://nsi.org/Library/Espionage/usta.htm>>.

Other IP rights include recent legal innovations, such as the mask work protection available for semiconductor integrated circuit designs (ICs),¹⁴ the *sui generis* protection, similar to copyright, for boat hull designs,¹⁵ and the proposed *sui generis* right in databases, or collections of information.¹⁶

In America, copyrights and patents are governed almost exclusively by federal law, since the Constitution grants Congress the power to promote the progress of science and useful arts.¹⁷ Despite the federal source of patents and copyrights, various aspects touching thereon, such as *ownership* of patents, are based on state law, although these tend to be fairly uniform.¹⁸ Federal trademarks, by contrast, not being explicitly authorized in the Constitution, are based on the interstate commerce clause and thus only cover marks for goods and services in interstate commerce.¹⁹ State trademarks have not been preempted, but federal marks tend to be more important. Trade secrets are generally protected under state, not federal, law.²⁰

Further detail on the various types of IP in the modern American legal system are provided in Appendix I.

As noted above, IP rights, at least for patents and copyrights, may be considered rights in ideal objects. For example, consider a copyrighted book. The copyright holder has a right to the ideal object represented by the book, i.e. the pattern of words that define the book; and, therefore, by implication, he has a right to every tangible instantiation or embodiment of the book. i.e., a right to every physical version of the book. If *A* authors a book, he has a copyright in this work. If he sells a physical copy of the book to *B*, then *B* owns only that one physical copy of it. However, neither *B* nor a third party *C* is entitled to type the same words onto blank pages to create another physical copy of the book. Thus, even if *C* owns the material property of paper and printing press, he cannot use his own property to create another copy of *A*'s book. In this way, *A*'s ownership of ideal rights gives him some control over the tangible property of innumerable others.

III. LIBERTARIAN PERSPECTIVES ON IP

A. The Spectrum

¹⁴See 17 U.S.C. ' 901 *et seq.*

¹⁵See 17 U.S.C. ' 1301 *et seq.*

¹⁶See, e.g. H.R. 354 (introduced 1/19/1999), Collections of Information Antipiracy Act; available at <<http://thomas.loc.gov>>. See also Ginsburg (1997). Reference to other proposed changes to IP law can be found at <<http://dev.abanet.org/intelprop/currentleg.html>>.

¹⁷U.S. Const. art. I, ' 8; *Kewanee Oil Co. v. Bicron Corp.*, 415 U.S. 470, 479, 94 S.Ct. 1879, 1885 (1974).

¹⁸See van Slyke & Friedman (1990); Chisum (1997-present), ' 22.03; 17 U.S.C. ' ' 101, 201.

¹⁹U.S. Const. art. I, ' 8, clause 3; *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82 (1942).

²⁰*But see* Economic Espionage Act of 1996, 18 U.S.C. ' ' 1831-39.

Libertarian views on IP range from complete support of the fullest gamut of IP imaginable, to outright opposition to IP rights. Most of the debate concerns patent and copyright, because (as discussed below), trademark and trade secret are less problematic. Thus, opponents of IP tend to deny the legitimacy or desirability of patent and copyright laws, while proponents of IP advocate such laws. The bulk of this article focuses on the legitimacy, therefore, of patent and copyright. Trade secret and trademark are discussed in Part IV below.

Pro-IP arguments include both utilitarian and natural right type arguments, although libertarian advocates of IP seem to tend to the latter. For example, non-utilitarian, libertarian advocates of IP include, from more to less extreme, Galambos (1999), Schulman (1990), and Rand (1967).²¹ Among precursors to modern libertarians, Spooner and Spencer both advocated IP on moral or natural law grounds.²² According to the natural rights type argument, creations of the mind are entitled to protection just as tangible property is. This is because one has a natural law right to the fruit of one's labor. Just as one has a right to the crops one plants, so one has a right to the ideas one generates [patents] and the art one produces [copyrights].@ Palmer (1990, p. 819) Thus, this theory depends on the notions that one owns one's body and one's labor, and that one thus owns the fruits of that labor.

One prominent utilitarian (although not libertarian) advocate of IP is federal Judge Richard Posner (1992, ' 3.3, pp. 38-45). The anarchist-libertarian David Friedman (1994) analyzes, and appears to endorse, IP, on utilitarian, law & economics grounds.²³ The utilitarian argument presupposes that a goal of the law or policy is to maximize wealth or utility. The idea is that more innovation leads to more wealth; and, even further, that creativity and innovation in society is maximized by granting copyright and patent monopolies so as to encourage authors and inventors to produce more such wealth. See Palmer (1990, pp. 820-821).

²¹As well as other Randians or Objectivists such as Reisman (1996, pp. 388-389), Kelley (1995), and Franck (1995b, 1995a, 1991). It is difficult to find published discussion of Galambos's idea, primarily due to the apparent nuttiness and lunacy of his views and supporters (see, e.g. Tuccille (1971, pp. 69-71)). Some scattered references to and discussions of Galambos's theories may be found, however. See, e.g., Friedman (1998, note 52); <www.tuspc.com/>; <<http://www.economic.net/articles/ar0001.html>>.

²²Spooner (1971); Spencer (1978, Part IV, ch. 13, p. 121). See also McElroy (forthcoming); Palmer (1990, pp. 818, 825).

²³Earlier utilitarian advocates of IP include John Stuart Mill and Jeremy Bentham (Plant 1974, p. 44); (Meiners & Staaf 1990, p. 911). Other advocates of IP include Mackaay (1990).

Opponents of IP include Rothbard (1962, pp. 652-60; 1998, pp. 123-124), McElroy (1985; forthcoming), Palmer (1989, 1990), Lepage (Mackaay 1990, p. 869), Bouckaert (1990), and yours truly (Kinsella 1998; 1995).²⁴ Benjamin Tucker also vigorously opposed IP in a debate in the 19th century individualist-anarchist periodical *Liberty* (McElroy forthcoming).²⁵ Mises seemed to be agnostic on the issue, merely drawing the economic implications from the presence or absence of such laws (Mises 1966, ch. XXIII, ' 6, pp. 661-662). Most of the libertarian opponents of IP support only *contractual* arrangements to protect ideas which are today copyrightable or patentable.

B. Utilitarian Defenses of IP

There are several problems with justifying any law or right on utilitarian grounds. First, let us suppose that utilitarianism is a coherent approach, and that wealth or utility is maximized by adopting certain legal rules. Even then, this does not show that these rules are justified. For example, one could argue that overall utility is enhanced by redistributing half of the wealth of the richest one percent of society (Bill Gates et al.) to the poorest ten percent. However, the redistribution is still naked theft and wholly illegitimate.

Or suppose that public, savage, swift punishment of crime does deter further crime. If an innocent man is suspected and widely believed to be guilty of a crime, and the authorities cannot find the actual perpetrator, then publicly executing the innocent man may actually save many more lives by the deterrence effect. Thus, utilitarianism would have to endorse such a clearly unjust action. Utilitarianism, therefore, leads to unjust results. It is therefore inappropriate to use as a proxy for determining what the rules of justice should be. In the field of IP, in particular, utilitarians hold that the *end* of encouraging more innovation and creativity justifies the *immoral means* of restricting the freedom of individuals to use their own physical property as they see fit. Yet even if overall wealth is increased due to IP laws, it does not follow that this desirable result justifies the unethical violation of some individuals' rights to use their own property as they see fit.

Second, utilitarianism is not coherent, as Austrians well know. It necessarily involves making illegitimate interpersonal utility comparisons, for example when the *costs* of IP laws are subtracted from the *benefits* to determine whether or not such laws are a net benefit.²⁶

Finally, even if we set aside the problems of interpersonal utility comparisons and the justice of redistribution and employ utilitarian measurement techniques, it is not at all clear that IP laws lead to an increase or decrease in overall wealth.²⁷ For example, it is debatable whether copyrights and

²⁴Hayek (1989, p. 6) also appears to be opposed to patents (Meiners & Staaf 1990, p. 911).

²⁵Also strongly opposed to IP was the nineteenth century Jacksonian editorialist William Leggett (Palmer 1990, 818, 828-829).

²⁶On the defects of utilitarianism and interpersonal utility comparisons, see Rothbard (1997c, esp. pp. 90-99; 1997d); de Jasay (1997, pp. 81-82, 92-98, 144, 149-151). On scientism and empiricism, see Rothbard (1997e); Hoppe (1989c). On epistemological dualism, see Mises (1962; 1981); Hoppe (1995; 1989c).

²⁷See Palmer (1989, pp. 300-302; 1990, pp. 820-821, 850-851) for a useful discussion of evidence in this regard; also Bouckaert (1990, pp. 812-813).

patents really are necessary to encourage the production of creative works and inventions. Econometric studies one way or the other are controversial and do not conclusively show net gains in wealth. Maybe there would even be *more* innovation if there were no patent laws; perhaps more money for R&D would be available if it were not being spent on patents and lawsuits; perhaps companies would have an even greater incentive to innovate if they could not rely on a near 20-year monopoly.

Further, as noted above, patents can be obtained only for practical applications of ideas, but not for more abstract or theoretical ideas.²⁸ Of course, this skews research and development away from theoretical R&D (Plant 1974, p. 43). It is not clear that society is better off with more practical invention and less theoretical R&D. Additionally, many inventions are patented for defensive reasons, and much overhead is spent on patent lawyers' salaries and PTO fees, that would not otherwise have to be spent if there were no patents. In the absence of patent laws, for example, companies would not spend money obtaining or defending ridiculous patents such as those listed in Appendix II.

To advocate IP means to advocate the use of force against the person and property of others. We must remember that when we advocate certain laws and rights, and inquire into their legitimacy, we are inquiring into the legitimacy and ethics of the use of *force*. To ask whether a law should be enacted or exist, is to ask: Is it proper to use force against certain people in certain circumstances? It is no wonder, then, that this question is not really addressed by analysis of wealth maximization. Talk about increasing the size of the pie is methodologically flawed, there is no evidence that the pie size is increased, and in any event simply does not justify the use of force against the otherwise-legitimate property of others. For these reasons, utilitarian defenses of IP are not persuasive.

C. Some Problems with Natural Law

As noted above, the non-utilitarian, libertarian IP advocates argue that certain mental ideas are *created* by a person, and thus are his property. Rand (1967, p. 130) advocated patents and copyrights as the legal implementation of the base of all property rights: a man's right to the product of his mind.²⁹ For Rand, IP rights are, in a sense, the reward for productive work. It is only fair that a creator reap the benefits of others' using his creation. For this reason, in part, she opposes perpetual patent and copyright, because future, unborn heirs of the original creator are not themselves responsible for the creation of their ancestors' work.

One problem with this approach is that it almost invariably protects only *some* kinds of creations, unless every single useful idea one comes up with is subject to ownership (more on this below). The distinction between the protectable and the unprotectable is always arbitrary. For example, philosophical or mathematical or scientific truths cannot be protected: commerce and social intercourse would grind to a halt were every new phrase, philosophical truth, and the like considered the exclusive property right of its creator. For this reason, patents can be obtained only for practical applications of ideas, but not for more abstract or theoretical ideas.²⁹ Rand (1967, p. 130) agrees,

²⁸See notes 11-12 and accompanying text, in Part II, above.

²⁹See notes 11-12 and accompanying text, in Part II, above.

and attempts to distinguish between *discovery* and *invention*. She argues that a scientific or philosophical discovery, which identifies a law of nature, a principle or a fact of reality not previously known is not *created* by the discoverer.

But the distinction between creation and discovery is not rigorous or clear-cut.³⁰ Nor is it clear why such a distinction, even if objective, is ethically relevant in defining property rights. No one creates *matter*; they just manipulate and grapple with it according to causal physical laws. In this sense, no one really creates *anything*. They merely rearrange matter into new arrangements and patterns. An engineer who invents a new mousetrap has rearranged previously-existing parts to provide a function not previously performed. Others who learn of this new arrangement can now also make an improved mousetrap. Yet the mousetrap merely follows laws of nature. The inventor did not invent the matter out of which the mousetrap is made, nor the *facts* and laws that are exploited to permit the mousetrap to function.

Similarly, Einstein's discovery of the relation $E=mc^2$, once known by others, allows them to manipulate matter in a more efficient way. Without Einstein's, or the inventor's, efforts, others would have been *ignorant* of certain causal laws, of ways matter can be manipulated and used. Both the inventor and the theoretical scientist engage in creative mental effort to produce useful new ideas. As a real-world example, in one recent case (*In re Trovato*) the inventor of a new way to calculate a number representing the shortest path between two points, an extremely useful technique, was denied patent protection because this was *merely* a mathematical algorithm.³¹ It is arbitrary and unjustified to reward more practical inventors and entertainment providers, such as the engineer, and to leave more theoretical science and math researchers and philosophers unrewarded.

Moreover, adopting a limited term for IP rights, as opposed to a perpetual right, also requires arbitrary rules. For example, patents last for 20 years from the filing date, while copyrights last, in the case of individual authors, for 70 years past the author's death.

Thus, one problem with the natural law approach to validating IP is that it necessarily involves arbitrary distinctions, such as what classes of creations deserve protection, and the length of the term of the protection.

Of course, one way to avoid this difficulty is to claim that basically *everything* is protectable by IP, for all eternity. Spooner,³² for example, advocated perpetual rights for patent and copyright. Schulman (1990) advocates a much broader concept of creations or ideas protectable by IP. He argues, as best I can tell, for property rights in any *logos* that one creates, i.e. in the *material*

³⁰Plant (1974, p. 49-50) is correct in stating that *A[t]he task of distinguishing a scientific discovery from its practical application, which may be patentable . . . is often baffling to the most subtle lawyer*

³¹Recent case law has expanded even further the types of mathematical and computer algorithms and business methods that can be protected by patent. *See, e.g., State Street Bank & Trust Co. v. Signature Financial Group*, 149 F.3d 1368 (Fed. Cir. 1998); <<http://www.ipo.org/97-1327.htm>>. However, no matter where the line is drawn between unpatentable *laws of nature* and *abstract ideas* and patentable *practical applications*, patent law still necessarily makes a distinction between the two. See the discussion of patentable subject matter in Part II, above.

³²Spooner (1971); McElroy (forthcoming); Palmer (1990, pp. 818, 825).

identity of created things; the order or pattern of information imposed upon or observed in material substances.

The most radical (and absurd) of all IP proponents seems to be Andrew Galambos (1999), whose ideas, to the extent I understand them, border on the absurd. Galambos³³ believed that man has property rights in his own life (primordial property) and in all non-procreative derivatives of his life. Since the first derivatives of man's life are his thoughts and ideas, thoughts and ideas are primary property. Action is based on primary property (ideas). Actions are owned too, which is referred to as liberty. Secondary derivatives, such as land, televisions, and other tangible goods, are produced by ideas and action. Thus, property rights in tangible items are relegated to lowly secondary status, as compared with the primary status of property rights in ideas. (Even Rand (1967, p. 133) elevated patents over rights to tangible goods, in stating that patents are the heart and core of property rights.)

Galambos reportedly took his own ideas to absurd lengths, claiming a property right in his own ideas and requiring his students not to repeat them (Friedman 1998, n. 52); dropping a nickel in a fund box every time he used the word liberty, as a royalty to the descendants of Thomas Paine, the alleged inventor of the word liberty (Tuccille 1971, p. 70); and changing his original name from Joseph Andrew Galambos (Jr., presumably) to Andrew Joseph Galambos, to avoid infringing his identically-named father's rights to the name.³⁴

Yet by widening the scope of IP to avoid making arbitrary distinctions, the absurdity and injustice caused by IP becomes even more pronounced (as the example of Galambos demonstrates). Such unbounded ideal rights would pose a serious threat to real property, for example, and would threaten to overwhelm them. But as even Ayn Rand noted, men are not ghosts; we have a spiritual element, but also a physical one (Binswanger, ed. 1986, pp. 326-327, 467). Any system that elevates rights in ideas to such an extreme that it overrides rights in tangible objects is clearly not a suitable ethical system for living, breathing human beings.

A deeper problem for the natural law position lies in its neglect of the crucial role of scarcity in property rights, as discussed in Part IV below.

IV. INTELLECTUAL PROPERTY AND PROPERTY RIGHTS

A. The Libertarian Approach: Property and Scarcity

³³Friedman (1998, note 52); <www.tuspc.com/>; <<http://www.economic.net/articles/ar0001.html>>.

³⁴Of course, I suppose that a Galambosian having the same dilemma would be unable to change his name to avoid the problem, because this rights-respecting technique was Galambos's inalienable, absolute idea!

Let us take a step back and look afresh at the idea of property rights. Libertarians unanimously agree that property rights include rights in tangible goods. Why? What is it about tangible goods that makes them subjects for property rights? I submit that it is their *scarcity*—the fact that there can be *conflict* over these goods by multiple human actors. In order to live, humans must control their environment, and things in it. Yet because of the fact of scarcity, sometimes there can be conflict over the use of resources. Indeed, it is the possibility of conflict over a resource that makes it scarce, and that gives rise to a need for ethical rules in the use of such resources. In short, the fundamental social and ethical function of property rights is to prevent conflict over scarce resources.³⁵

As Hoppe (1989a, p. 235 n. 9) notes:

[O]nly because scarcity exists is there even a problem of formulating moral laws; insofar as goods are superabundant (≠free-goods) no conflict over the use of goods is possible and no action-coordination is needed. Hence, it follows that *any* ethic, correctly conceived, must be formulated as a theory of property, i.e., a theory of the assignment of rights of exclusive control over scarce means. Because only then does it become possible to avoid otherwise inescapable and unresolvable conflict.

Others who recognize the importance of scarcity include Plant (1974, pp. 35-36); Hume (1957); Palmer (1989, pp. 276-266 & n. 50) (distinguishing between *Astatic* and *Adynamic* scarcity); Palmer (1989, p. 279-280; 1990, pp. 860-861, 864-865); Rothbard (1997b); and Tucker (McElroy forthcoming). Even Rand (1967, p. 131) acknowledged that *Intellectual property cannot be consumed*.

The state of nature, then, contains natural property, which is economically scarce, meaning that my use of Blackacre *conflicts* with your use of Blackacre. Use of such property is *exclusive*, since my use excludes yours, and vice-versa. So that scarce property and resources can be used without potential users eternally warring over these tracts, ownership is allocated to specific, objectively determinable (intersubjectively ascertainable) individuals. So that such ownership allocation is objective, ethical, and non-arbitrary, it is first occupier of such property that is its owner. However, as Palmer (1990, p. 838) argues, *Occupancy*, not labor, is the act by which external things become property.³⁶ By focusing on first occupancy as the key to appropriation and homesteading, instead of labor, there is no need to overemphasize *creation* as the fount of property rights, as Randians and others do (more on this in Part IV.B, below).

Thus, the libertarian approach does not require the homesteader to be the *creator* of property in order to appropriate it. Instead, it recognizes the potential ethical problem of conflict over scarce resources, and holds that property rights must be recognized in homesteaders or their contractual

³⁵Economically, private property rights, along with money prices arising from exchanges of such property, permits *economic calculation*. See Kinsella (forthcoming 1999).

³⁶Citing Hegel (1967, pp. 45-46).

transferees in order to avoid this problem. The Lockean A mixing of labor@ is merely an indicia for occupancy.³⁷

Were we in a Garden of Eden where land and other goods were infinitely abundant, there would be no scarcity and thus no need for property rules. For example, your taking my lawnmower would not really deprive me of it, if I could conjure up another in the blink of an eye. Lawnmower-taking in these circumstances would not be A theft@. Thus, the notion of and need for property rights is simply not applicable to things of infinite abundance.

Like the magically-reproducible lawnmower, ideas (as implemented in inventions or creative works, for example) are also not scarce, at least not in the same way as tangible or physical property. For example, if I invent a new technique for growing bananas, it does not take my technique from me if you also grow bananas in this way. Your use does not exclude mine. We can both use my technique to grow bananas; there is no economic scarcity and no possibility of conflict over the use of a scarce resource, and thus no need for exclusivity.

³⁷See also, on the proper approach to homesteading, Hoppe (1989a, pp. 141-144; 1993, pp. 191-93); Herbener (1997, p.105) (A Once the item is owned by the first-user, others no longer have the option of being its first-user.@); de Jasay=s (1997, p. 172-179). On ethical justifications of such a property rights scheme, see Hoppe (1989a, ch. 7; 1993); Rothbard (1998; 1997b); Kinsella (1997; 1996).

Similarly, if you copy a book I have written, the original (tangible) book is still there. Thus, books are not scarce in the same sense as is a piece of land or a car. As Thomas Jefferson (1906), himself an inventor and the United States' first Patent Examiner, wrote, "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."³⁸ Thus, since use of another's idea does not deprive him of its use, no conflict over its use is possible, which undermines the natural-law justification for property rights in IP.

In fact, IP rights *create* scarcity where none existed before. As Arnold Plant (1974, p. 36) noted:

It is a peculiarity of property rights in patents (and copyrights) that they do not arise out of the scarcity of the objects which become appropriated. They are not a *consequence* of scarcity. They are the deliberate creation of statute law, and, whereas in general the institution of private property makes for the preservation of scarce goods, tending . . . to lead us to make the most of them, property rights in patents and copyrights make possible the *creation* of a scarcity of the products appropriated which could not otherwise be maintained.

Bouckaert (1990, pp. 797-799) also argues that natural scarcity is what gives rise to the need for property rules. As he (1990, p. 793) notes:

Natural scarcity is that which follows from the relationship between man and nature. Scarcity is natural when it is possible to conceive of it before any human, institutional, contractual arrangement. Artificial scarcity, on the other hand, is the outcome of such arrangements. Artificial scarcity can hardly serve as a justification for the legal framework that causes that scarcity. Such an argument would be completely circular. On the contrary, artificial scarcity itself needs a justification.

³⁸Due to the fact that ideas are not scarce, Jefferson recognized that patent and copyright are not natural rights and can only be justified, if at all, on utilitarian grounds of promoting useful inventions and literary works (and even then, they must be created by statute, since they are not natural rights) (Palmer 1989, p. 278 n. 53). Yet this does not mean Jefferson supported patents, even on utilitarian grounds. Notes the patent historian Walterscheid (1998): "Nonetheless, throughout his life, [Jefferson] retained a healthy skepticism about the value of the patents system."

Thus, only naturally scarce entities over which physical control is possible are candidates for protection by real (property) rights (Bouckaert 1990, p. 799; also 803). Otherwise, as is the case with ideal objects, only personal rights (i.e. contract) can be used to protect such things (more on this in Part IV.C, below).³⁹

Thus, patent and copyright are clearly unjustifiable monopolies granted by government legislation. It is, therefore, not surprising that, as Palmer (1989, p. 264) notes, monopoly privilege and censorship lie at the historical root of patent and copyright.

B. Creation vs. Scarcity

Some inconsistencies and problems with natural law theories of IP were pointed out in Part III.C, above. This section discusses further problems with such arguments, in light of the preceding discussion of the crucial role of scarcity.

³⁹It could also be argued that ideal objects deserve legal protection as property because they are public goods, because of externalities which arise if IP is not legally protected. The concept of public goods is not, however, coherent or justifiable (Palmer 1989, pp. 279-280, 283-287; Hoppe 1989b). As Palmer (1989, p. 284-285) points out:

the cost of producing any service or good includes not only labor, capital marketing, and other cost components, but also fencing (or exclusion) costs as well. Movie theaters, for example, invest in exclusion devices like ticket windows, walls, and ushers, all designed to exclude noncontributors from enjoyment of service. Alternatively, of course, movie owners could set up projectors and screens in public parks and then attempt to prevent passers-by from watching, or they could ask government to force all noncontributors to wear special glasses which prevent them from enjoying the movie. Drive-ins, faced with the prospect of free riders peering over the walls, installed considerable expense individual speakers for each car, thus rendering the publicly available visual part of the movie of little interest. . . . The costs of exclusion are involved in the production of virtually every good imaginable. There is no compelling justification for singling out some goods and insisting that the state underwrite their production costs through some sort of state-sanctioned collective action, simply because of a decision to make the good available on a nonexclusive basis.

There is, therefore, no way to show that ideas are clearly public goods. Moreover, even if ideas were public goods, this does not justify treating them as property rights, for the same reasons that even wealth-increasing measures are not necessarily justified, as discussed in Part III.B above.

As noted before, some libertarian IP advocates, such as Rand, hold that *creation* is the fountainhead of property.⁴⁰ I believe this confuses the nature and reasons for property rights, which lies in the undeniable fact of scarcity. Given scarcity and the correspondent possibility of conflict in the use of resources, conflicts are avoided and peace and cooperation are achieved by allocating property rights to such resources. However, the rules allocating property rights cannot be biased or arbitrary, if they are to serve as objective rules that can be agreed to by participants in discourse so as to prevent conflict (Hoppe 1989a, ch. 7). For this reason, unowned resources come to be owned by the first occupier (Hoppe 1989, p. 142; de Jasay 1997, pp. 172-179; Herbener 1997, p.105). As Palmer (1990, p. 838) notes, such occupancy or taking of possession can take three forms: (1) by directly grasping it physically, (2) by forming [creating] it, and (3) by merely marking it as ours.

Thus, *when* there is a scarce resource, we identify its owner by determining who its first occupier is. In the case of created goods (i.e. sculptures), it is usually obvious that the creator of the good is also the first occupier by virtue of the gathering of raw materials and the act of creation. For similar reasons, the mixing of labor with property is relevant because it indicates that the user has possessed the property (for property must be possessed in order to be labored upon) and marks the property, or stamps it with the mark of ownership, by the labor's *transformation* of the property. In other words, creation and labor mixing indicate when one has occupied and thus homesteaded unowned scarce resources. But it is incorrect to believe, as Objectivists do, that creation by itself is enough to confer ownership. Creation is only relevant once we already have a scarce resource whose owner needs to be identified; in such cases, the creator is (usually) the first occupier.

By focusing on creation and labor, rather than first occupancy of scarce resources, as the touchstone of property rights, IP advocates are led to place undue stress on the importance of rewarding the labor of the creator.⁴¹ As noted above, for Rand, IP rights are, in a sense, the reward for productive work, i.e. *labor*. Rand and other natural law IP proponents seem to adopt an almost utilitarian rationale, that the person who invests time and effort must be rewarded or benefit from this effort (e.g., Rand opposes perpetual patent and copyright, because distant descendants deserve no reward because they did not create their ancestors' work).

Basically, then, the natural law IP approach implies that something is property if it can hold *value*. But as Hoppe (1989a, pp 139-141; 237 n. 17) has trenchantly shown, one cannot have a property right in the *value* of one's property, but only in its physical integrity.

Thus, because ideas are not scarce resources in the sense that physical conflict over their use is possible, they are not the proper subject of property rights designed to avoid such conflicts.

⁴⁰See Rand (1967); also Kelley (1995); Franck (1995a; 1995b).

⁴¹Even otherwise sound thinkers sometimes place undue stress on the importance of labor. Rothbard, e.g., implies that an individual owns his own person and therefore *his own labor* (Rothbard 1997b, p. 284, emphasis added; also 1998, p. 49). A man certainly has exclusive rights to control his own body; whether this counts as full ownership for alienation purposes is debatable. But it is misleading metaphor to speak of *owning one's labor* (or one's life or ideas). This is only a *consequence* of being in control of one's body (just as rights to *free speech* are only consequences, or derivative, of the right to private property, as Rothbard (1998, ch. 15) acknowledged).

C. IP as Contract

1. The Limits of Contract

The law, then, should protect individual rights to one's body and to legitimately acquired scarce resource (property). Opponents of IP rights typically argue that the only legitimate IP rights are those that result from private contracts between property owners.⁴² For example, *A* authors a book and sells it to numerous purchasers *B*, with a contractual condition that each buyer *B* is obligated not to make or sell a copy of the text of the book. Under all theories of contract, *B* becomes liable to *A* at least for damages if he violates these provisions.⁴³

But we must recognize that it is difficult, if not impossible, to recreate by private contract the same type of protection afforded by modern IP rights. Patent and copyright are good against everyone in the legal jurisdiction, regardless of their consent to a contract. They are real rights that bind everyone, in the same way that my title to a parcel of land binds *everyone* to respect my property. A contract, by contrast, binds only parties to the contract. It is like private law between the parties.⁴⁴ It does not bind third parties not in privity with the original parties.⁴⁵

Thus, if the book purchaser *B* tells his friends of the plot of the purchased novel, or somehow leaks the text to others, these others are third parties not bound, in general, by the original obligation. If I learn how to add a new carburetor to my car engine to double efficiency, or if I learn of a poem or movie plot someone else has come up with, why should I now be made worse off by having to pretend I am ignorant of these things? I have not obligated myself by contract to the creator. I do not deny that contractual obligations can be implicit or tacit, but there is not even an implicit contract in such situations.

Then what other objection can there be to my using this knowledge? It cannot be said as a general matter that I have stolen the information, as there are many legitimate ways for individuals to acquire information. It cannot be said that my use of the carburetor, or writing a novel using the plot, physically interferes with *A*'s use of his own tangible property. It does not even prevent *A* from using the carburetor idea to improve his own car or others', or from knowing, using, and selling stories based on the plot.

⁴²E.g., Tucker (McElroy forthcoming); Palmer (1989, pp. 280, 291-295; 1990, p. 821 n. 8, 851-855, 864); Bouckaert (1990, pp. 804-805); Halliday (1997); Hammer (1995-96).

⁴³See, e.g., Kinsella (1999); Rothbard (1998, ch. 19); Evers (1997); Barnett (1986).

⁴⁴Under the international law principle *pacta sunt servanda* (contracts are to be observed), contracts between sovereigns (states, in the international law context) create a law of the agreement between the parties. See Comeaux & Kinsella (1997, chs. 2, 5).

⁴⁵See *Black's Law Dictionary* (1990, p. 1199) (defining privity of contract). See also, in the IP context, Bouckaert (1990, pp. 795, 805).

At most, my use of the idea will diminish A 's value in (monopolistically exploiting) the idea, but, as we have seen, one cannot have right to the value of one's property, but only in its physical integrity (Hoppe 1989a, pp 139-141; 237 n. 17).

Thus, the use of contract only gets us so far. A book publisher may be able to prevent his purchasers from copying his book, but he cannot prevent third parties from publishing and selling it, unless some contract prevents them.

2. Contract vs. Reserved Rights

Shifting from contractual approaches to protecting ideas, knowhow, confidential and proprietary information, discoveries, artistic creations, and the like, some argue that the practice of reserving rights can provide a sort of private version of IP.

Property rights in tangible property are seen as a divisible bundle of rights, e.g. the landowner can sell the mineral estate to an oil company, while retaining rights to the surface, except for an easement (servitude) granting passage to a neighbor and a life estate (usufruct) granting use of the surface estate to his mother. Drawing on the bundle of rights notion, the reservation of rights approach holds that IP can be privately generated by creatively reserving rights to reproduce tangible items sold to purchasers.

Rothbard (1998, p. 123) argues, for example, that one can grant only conditional ownership (of knowledge, no less) to another, while retaining the ownership over to disseminate the knowledge of the invention. Or, Brown, the inventor of an improved mousetrap, can stamp it copyright and thus sell the right to each sold mousetrap *minus* the right to reproduce it. Like the real rights accompanying statutory IP, such reservations bind everyone, not just those who have contracted with the original seller. Thus, third parties who become aware of or who purchase the restricted item, or otherwise come into possession of it, also cannot reproduce it not because they have entered into a contract with Brown, but because no one can acquire a *greater* property title in something than has already been given away or sold (Rothbard 1998, p. 123).

But surely something is amiss here. The bundle of rights notion is being stretched in fantastic ways. Suppose that A writes a novel, and sells a first copy, unrestricted (i.e. without a reservation of rights), to B ; and a second copy, reserving the right to copy, to C . The two books, $book_A$ and $book_B$, appear to third parties to be otherwise identical. Yet they are not: one is incomplete; the other somehow contains more mystical rights-essence within its covers. Suppose B and C leave these books on a park bench, where they are discovered by D . According to Rothbard, $book_B$ is missing the right to copy, much like an electronic game that comes without the batteries. It is as if there is an invisible, mystical tendril of reproduction-ownership stretching from $book_B$ back to its true owner A , wherever he may be. Thus even if D finds and homesteads the abandoned $book_B$, this book simply does not contain within itself the right to permit the owner to copy it. It is being continually siphoned away by the rights wormhole connected to A . Thus if D homesteads it, he still homesteads no more than he acquires (that is, a book without a right to copy built in), and thus, he does not have the right to copy $book_B$.

Is such a view really tenable? One function of property rights, after all, is to prevent conflict and to put third parties *on notice* as to one's boundaries. The borders of property must necessarily be objective and intersubjectively ascertainable; they must be *visible*. Only if borders are visible *can* they be respected and property rights serve their function of permitting conflict-avoidance. Only if these borders are both visible and objectively just can they be expected to be adopted and followed. But think of the two books, book_A and book_B. How could one tell the difference?

As Palmer (1990, p. 853) states, in this regard:

The separation and retention of the right to copy from the bundle of rights that we call property is problematic. Could one reserve the right, for example, to remember something? Suppose that I wrote a book and offered it to you to read, but I had retained one right: the right to remember it. Would I be justified in taking you to court if I could prove that you had remembered the name of the lead character in the book?⁴⁶

The proponent of this theory says more than that the immediate buyer *B* is bound not to reproduce the book; for this result could be obtained by pointing to the implicit *contract* between seller *A* and buyer *B*. Let us say, though, that a third party *C* finds the abandoned book. *C* therefore *learns* the information in the book. Alternatively, imagine third party *D*, who never has possession of or sees the book; he merely learns of the information in the book (e.g., its plot or other information) from gossip, graffiti, illegal emails transmitted to his in-box. Neither *C* nor *D* has a contract with *A*. But both now have certain knowledge in their heads. Even if the book somehow does not contain within it a right to reproduce, how can this prevent *C* and *D* from using knowledge that they have?

Rothbard (1998, p. 123) unsuccessfully attempts to address this objection:

A common objection runs as follows: all right, it would be criminal for *Green* [the buyer] to produce and sell the Brown mousetrap; but suppose that someone else, *Black*, who had not made a contract with *Brown*, happens to see *Green's* mousetrap

⁴⁶Palmer (1990, p. 853 n. 138) also quotes the following illuminating passages. Hegel (1967, p. 55) argued:

The substance of an author's or an inventor's right cannot in the first instance be found in the supposition that when he disposes of a single copy of his work, he arbitrarily makes it a condition that the power to produce facsimiles as things, a power which thereupon passes into another's possession, should not become the property of the other but should remain his own. The first question is whether such a separation between ownership of the thing and the power to produce facsimiles which is given with the thing is compatible with the concept of property, or whether it does not cancel the complete and free ownership on which there originally depends the option of the single producer of intellectual work to reserve to himself the power to reproduce, or to part with this power as a thing of value, or to attach no value to it at all and surrender it together with the single exemplar of his work.

And, as Kant noted:

Those who regard the publication of a book as the exercise of the rights of property in respect of a single copy *C*it may have come to the possessor as a [manuscript] of the author, or as a work printed by some prior publisher *C*and who yet would, by the reservation of certain rights . . . , go on to restrict the exercise of property rights, maintaining the illegality of reproduction *C*will never attain their end. For the rights of an author regarding his own thoughts remain to him notwithstanding the reprint; and as there cannot be a distinct permission given to the purchaser of a book for, and a limitation of, its use as property, how much less is a mere presumption sufficient for such a weight of obligation?

and then goes ahead and produces and sells the replica? Why should *he* be prosecuted? The answer is that . . . no one can acquire a *greater* property title in something than has already been given away or sold. Green did not own the total property right in his mousetrap, in accordance with his contract with Brown—but only all rights *except* to sell . . . a replica. But therefore Black's title in the mousetrap, the ownership of the ideas in Black's head, can be no greater than Green's, and therefore he too would be a violator of Brown's property even though he himself had not made the actual contract.

The problem with this reasoning lies in the last sentence. Ideas in one's head are not owned; this fiction is causing trouble here (much as self-ownership does in the alienability debate). If Black *somehow* comes into possession of the ideas implicit in items invented by Brown, it is *irrelevant* that the mousetrap may not have had a right to copy built into it. For Black does not need such permission to use his own property as he sees fit.

We do not have to have a right-to-copy as part of the bundle of rights, in order to have a right to impose a known pattern or form on an object we own. Rather, we have a right to do *anything at all* with and on our own property, provided *only* that we do not invade others' property borders. If I own a 100-acre compound, I can prance around naked on it, not because the land is imbued with some right-to-prance-naked, but because I own the land and it does not (necessarily) violate others' property rights for me to use my property in this fashion.

Similarly, I am entitled to do what I want with my own property—my car, my blank book or word processor screens—including improving my car's carburetor or printing words on my pages with my ink. That is, *unless* I have contractually obligated myself to someone else to restrict my actions with respect to my use of this knowledge. I do not have to first find in my property a right-to-use-in-a-certain-way; for *all* ways of using it, except those that cause invasions of others' property borders, are already encompassed within the general *right to use* my property.

Consider the following analogy. Farmer Jed discovers black gold on his land. No one for miles around realizes there's oil under them thar hills. Jed plans to buy his neighbors' property for a song; and they'll sell it cheap, too, for they know nothing of the oil. In the middle of the night, his nosy neighbor Cooter, suspicious at Jed's recent good spirits, sneaks onto Jed's land and discovers the truth. The next morning, at Floyd's barbershop, Cooter spills his guts to Clem and the boys; one of them promptly runs to a pay phone and gives a tip to his nephew who is a reporter at the *Wall Street Journal*. Thus, soon, it is common knowledge that there is oil in the vicinity. All of the neighbors now demand exorbitant prices for their land.

Let us grant that Cooter can be prosecuted for trespass and harms flowing therefrom. Can Jed's neighbors be prevented from acting on their knowledge? That is, may they be forced to somehow *pretend* that they do not know about the oil, and sell their land to Jed for what they would have sold it for in ignorance? Of course they may not be forced. They own their land, and are entitled to use it as they see fit. The owner of a stolen watch may have to return it, but information is not owned, and so long as the acquirer of knowledge does not obtain the knowledge illicitly or in violation of a contract, he is free to act upon that knowledge. Note, however, that, according to the *Reservation of rights* view, the neighbors would not be permitted to act upon their knowledge,

because they obtained it ultimately from trespasser Cooter, who had no title to this knowledge, and thus they themselves could not have obtained a greater title to this knowledge. Note also that others, such as geological surveyors preparing maps showing where oil deposits are, cannot include this knowledge in their maps. They must feign ignorance until given permission by Jed. This imposed ignorance is correlated with the unnatural scarcity imposed by IP. There is clearly no warrant for the view that reserved rights can somehow prohibit third parties from using knowledge they acquire.

It is simply not legitimate to restrict the use to which an owner of property can put it, unless that owner has contractually obligated himself or has otherwise acquired the information by a violation of the information-holder's rights. Talk of reserving the right to copy is merely a way to avoid the contractual notion that only parties to a contract are bound thereby.⁴⁷

Therefore, as a general matter, purchasers of things can be bound by contract with the seller to not copy or even re-sell the thing. However, once third parties become aware of the ideas underlying the invention or literary work, their use of this knowledge does not, in general, violate any recognizable property rights of the seller.

Given this view of scarcity, property, and contract, let us examine the legitimacy of common forms of IP.

3. Copyright & Patent

As should be apparent, copyright and patent seek to prevent owners of property from using their own property as they see fit. For example, they are prohibited, under patent law, from practicing patented methods on their own property; or from shaping their own property into patented devices, even if they independently invent the method or device. Under copyright, third parties who have not contracted with the author are prevented from copying or profiting from the author's original work. Clearly, sellers of novel devices or literary works can contract with buyers to prevent these buyers from reproducing, or even re-selling, the item. These contractual webs can be elaborate; a novel writer can license his story to a movie studio on the condition that the studio require all movie theaters to require all customers to agree not to reproduce the plot of the movie.

Yet once third parties who are not bound by any contract acquire this information, they are free to use it as they see fit. The reserved rights approach does not change this. Thus, it would probably be difficult to maintain anything similar to our present patent and copyright laws solely using contract.

4. Trade Secrets

Trade secrets are easier to justify. Palmer (1989, pp. 280, 292-293; 1990, pp. 854-855) argues that they emerge from common law type rights, and are thus legitimate. Trade secret law allows damages to be obtained for, or an injunction to issue to prevent, acts of misappropriation of a trade secret. Suppose employee A of company X has access to trade secrets of X, such as its secret formula for a soft-drink. He is subject to an employment agreement obligating him to maintain this

⁴⁷Of course, in anarcho-capitalism, it is difficult to predict what extensive contractual regimes, networks, and institutions will arise. Various enclaves or communities may well require their customers, patrons or citizens to agree to abide by certain IP-like rules. On anarcho-capitalism, see, e.g., Hoppe (1998-1999).

formula as secret. He then jumps to X's competitor Y. Now in this case, so long as the secret formula has not yet been made secret, X can get a court order to stop A from revealing the secret to Y. If A has already revealed the secret to his new employer, X can also get an injunction to stop Y from using or publicizing the formula, so long as it can be shown that Y acquired the trade secret when Y knew that the trade secret was acquired by improper means.

Clearly the injunction and damages against A are proper, because A is in violation of his contract with X. More questionable is the injunction against Y, because Y had no contract with X. However, in the context in which such situations usually arise, where the competitor wants the trade secret and *knows* the defecting employee is in breach of a contract, an argument could be made that the competitor is acting in concert with the employee to violate the (contractual) rights of the trade secret holder. Thus, just as the driver of the getaway car in a bank robbery, or the mafia boss who gives an assassination order, are properly held liable for the acts of aggression committed by others they conspire with, in narrowly defined cases a third party can be prevented from using a trade secret obtained from the trade secret thief.

5. Trademarks

Palmer (1989, p. 280) also argues that trademark law is legitimate. Suppose some Lachmannian changes the names on his his failing hamburger chains from LachmannianBurgers to RothbardBurgers. I, as a consumer, am hungry for a RothbardBurger. I see a fake RothbardBurger joint and buy a burger. Under current law, Rothbard, the Aowner@of the RothbardBurgers trademark, can prevent the Lachmannian from using the mark RothbardBurgers to sell burgers, because it is Aconfusingly similar@to his own trademark. I.e., it is likely to mislead consumers as to the true source of the goods purchased.

In my view, it is the consumers whose rights are violated. I thought I was buying a RothbardBurger but instead I got a crummy Lachmannian burger instead. I should have a right to sue the Lachmannian for fraud and breach of contract breach. However, it is difficult to see how this act of fraud perpetrated by the Lachmannian on *me*, violates *Rothbard's* rights. Thus, it would appear that, under libertarianism, trademark law should give only *consumers*, not trademark *users*, the right to sue trademark pirates.

Moreover, more novel extensions of trademark such as rights against trademark dilution and certain forms of cybersquatting cannot be justified. As a trademark holder does not have a right to his mark, he does not have a right that the mark not be diluted. As for the law against cybersquatting, this law is simply based on an economically ignorant, fallacious opposition to scalping and arbitrage. There is, of course, nothing wrong with being the first to acquire a domain name and thereafter selling it to the highest bidder.

V. CONCLUSION

A system of property rights in Aideal objects@necessarily requires violation of other individual property rights, e.g. to use one's own tangible property as one sees fit.⁴⁸ IP, at least in the form of patent and copyright, cannot be justified. It is not surprising that IP attorneys seem to take for granted the legitimacy of IP; after all, it pays the bills. Others, less biased, and more concerned with liberty and rights, should not do so. Instead, we should re-assert the primacy of individual rights over our bodies and homesteaded, *scarce* resources.

⁴⁸See Palmer (1989, p. 281; 1990, p. 831, 862, 864-865).

APPENDIX I: INTELLECTUAL PROPERTY RIGHTS

As described above, the four basic types of IP are copyrights, trademarks and service marks, patents, and trade secrets, omitting recent and novel developments such as IC mask works. Each is briefly discussed in turn below.

A. Copyrights

1. Description

A copyright is a right given to authors of original works, which gives them the exclusive right to reproduce the work, prepare derivative works, or to perform or play the work publicly. While patents protect the *substance* of ideas, copyrights protect only the form in which ideas are fixed.

2. How Copyrights are Obtained

While a copyright may be registered to obtain some extra legal advantages, a copyright need not be registered to exist. Rather, a copyright comes into existence automatically the moment the work is fixed in a tangible medium of expression, and lasts for the life of the author plus 70 years, or a total of 95 years in certain cases where the employer owns the copyright. (Recent legislation has lengthened these terms by 20 years.)⁴⁹

The author is presumed to be the owner of the copyright, absent agreement or assignment to the contrary, although the presumption changes in work-for-hire situations. A work made for hire is a work prepared by an employee within the scope of his or her employment; or certain specially commissioned works if there is an express written agreement providing that the work is a work made for hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered not only to be the owner of the copyright to the work, but also the *author* of the work.⁵⁰ In a non-work-for-hire situation, where the author assigns the copyright to another, the assignee owns the copyright but is not the author.

3. Applications

⁴⁹See H.R. 2589, the Sonny Bono Copyright Term Extension Act/Fairness in Music Licensing Act of 1998.

⁵⁰17 U.S.C. ' ' 101, 201.

Copyright has a variety of typical applications such as copyrights on books, articles, manuals, and software programs. (Software may also be protected, in some cases, by patents or as trade secrets, as discussed below.) Copyright may also be used to protect aspects of databases and maps. However, copyright protection for databases, or compilations of facts, as well as the factual content of maps, was severely limited by the U.S. Supreme Court in 1991, in *Feist Publications, Inc. v. Rural Telephone Serv. Comp., Inc.*⁵¹ In *Feist*, the Supreme Court rejected the creatively-named “sweat-of-the-brow” doctrine, thereby casting a shadow on the copyrightability of many items like maps and databases previously protectable by copyright. Under the sweat-of-the-brow doctrine, even works exhibiting minimal creativity, like maps and other so-called compilations or collections of facts (essentially, databases), were entitled to a copyright as the reward for the intense labor involved in compiling such facts, which are undeniably useful to the public. In *Feist*, however, the Court squarely rejected this doctrine, holding only creativity, not intense labor, can render factual compilations copyrightable.

In particular, *Feist* held that a factual compilation is copyrightable only if it features an original selection or arrangement of facts. Originality requires a compiler to make at least minimally creative, independent choices regarding the selection and arrangement of facts. In the *Feist* decision, this rule was used to hold that an alphabetical listing of surnames in a white pages telephone directory is not protectable, since such a listing is devoid of even the slightest trace of creativity, and thus lacks the requisite originality. Although such phonebooks are extremely useful lists of facts that require immense labor to produce, their production lacks the creativity necessary to imbue them with copyrightability.

Accordingly, under current law, collections of facts such as the databases and maps produced by innovative or time-consuming techniques, are not provided with very much protection under copyright law. This may change, however, if the proposed *sui generis* right in databases, or collections of information, is adopted.⁵² In the meantime, due to the lack of copyright protection in such information, it is often maintained as a trade secret.

B. Trademarks

1. Description

A trademark (or service mark, for services) is a word, phrase, symbol, or design that *identifies* the source of goods or services sold and distinguishes them from goods or services of others. A good example is the Coca-Cola mark and design that appears on soft drink cans to identify products as coming from that company, and which distinguishes them from competitor colas such as Pepsi brand cola. Trademark rights prevent competitors from infringing the trademark, i.e. from using confusingly similar marks to identify their own goods and services. Related legal rights include

⁵¹499 U.S. 340, 111 S.Ct. 1282 (1991).

⁵²See note 16, *supra*.

extensions of trademark rights to include rights against trademark dilution⁵³ and certain forms of cybersquatting,⁵⁴ and various unfair competition claims.

2. How Trademarks are Obtained

⁵³15 U.S.C. ' ' 1125(c), 1127.

⁵⁴Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113 (1999); H.R.3194, S.1948; available at <<http://thomas.loc.gov>>; to be codified at 15 U.S.C. ' 1125(d).

Unlike copyrights and patents, trademark rights can last indefinitely if the owner continues to use the mark. The term of a federal trademark registration is 10 years, with 10-year renewal terms being available.⁵⁵

Trademarks generally *arise* under state law, but may be registered federally if used in interstate commerce. State common-law trademark rights are obtained by use of the mark, and wider protection is available within some states by filing a state trademark application to obtain a state trademark registration. Even broader protection on the national level is available by filing a federal trademark application to obtain a federal trademark registration, if the mark is used, or intended to be used, in interstate commerce.

3. Applications

Trademarks and service marks are of course important in protecting the names and marks of companies and their services and product lines.

C. Trade Secrets

1. Description

A trade secret consists of any confidential formula, device, or other information that may give a company an advantage over competitors.⁵⁶ Trade secrets can, therefore, include secret information and processes. Indeed, the classic example is the formula for Coca-Cola⁷ brand cola. Trade secrets are protected under state law, although recent federal law has been enacted aimed at preventing theft of trade secrets.⁵⁷ An owner of a trade secret may seek a court injunction against, or damages for, actual or threatened misappropriation of the trade secret.

Misappropriation includes:

⁵⁵15 U.S.C. § 1501 *et seq.*; 37 C.F.R. Part 2.

⁵⁶*See, e.g., Restatement (Third) Unfair Competition*, §§ 39-45 (ALI 1995) <<http://execpc.com/~mhalign/unfair.html>>; Uniform Trade Secrets Act (UTSA) <<http://nsi.org/Library/Espionage/usta.htm>>; <<http://www.rmarkhalligan.com/index2.html>>.

⁵⁷Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-39.

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (ii) disclosure or use of a trade secret of another without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret; or (B) at the time of disclosure or use knew or had reason to know that his knowledge of the trade secret was (I) derived from or through a person who has utilized improper means to acquire it; (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.⁵⁸

Thus, to subject an actor to liability... the [trade secret] owner need not prove that the actor knew that its possession of the trade secret was wrongful, it is sufficient if the actor had reason to know. Thus, if a reasonable person in the position of the actor would have inferred that he or she was in wrongful possession of another's trade secret, the actor is subject to liability for any subsequent use or disclosure.⁵⁹

2. How Trade Secrets are Obtained

A trade secret is obtained by maintaining the subject thereof as secret. It theoretically may last indefinitely, although disclosure, reverse-engineering, or independent invention may destroy the trade secret. One disadvantage of relying on trade secret protection is that a competitor who independently invents the subject of another's trade secret can obtain a patent on the device or process and actually prevent the original inventor (the trade secret holder) from using the invention.

3. Applications

Trade secrets can protect secret information and processes, e.g. compilations of data and maps not protectable by copyright. They can also be used to protect software source code that is not disclosed and not otherwise protectable by patent.

D. Patents

1. Description

a. Patent Term

A patent is a property right granted by the U.S. government to an inventor (or his assignee) to exclude others from making, using, or selling an invention fulfilling certain requirements.⁶⁰ Until

⁵⁸UTSA, § 1.

⁵⁹Restatement (3d) Unfair Competition, § 40, comment d.

⁶⁰35 U.S.C. § 1 *et seq.*; 37 C.F.R. Part 1.

recently, in America a patent term was 17 years from the date of issuance of the patent. Effective June 8, 1995, however, pursuant to the GATT treaty,⁶¹ issued patents last from the date of issuance until 20 years from the original filing date of the patent application.⁶² Thus, a patent filed on day one and issued two years later has an 18-year term.

⁶¹General Agreement on Tariffs and Trade (GATT), Pub. L. No. 103-465, 108 Stat. 4809 (1994).

⁶²35 U.S.C. § 154(a)(2).

One of the reasons for this change in patent term was to address the problem of so-called submarine patents. Under the previous system, a patent could conceivably issue several decades after being filed, during which time its existence is secret. During this time, others might independently invent the technology and begin to employ it on a wide scale, only to have the patent suddenly and unexpectedly issue (emerge like a submarine), covering a very basic technology that may be widely used in an entire, mature industry.⁶³ Under the current system, the patent can last for no more than 20 years from the initial filing date, with some exceptions,⁶⁴ so that the longer the applicant takes to have his patent issued, the shorter the length of his patent term when the patent ultimately issues.

Many libertarians are ignorant of IP law and often confuse, for example, copyrights, trademarks, and patents, and wrongly claim that in the U.S. system the inventor who is first to file at the patent office has priority over later-filers. However, unlike most of the rest of the world, which has a first-to-file system for priority, the U.S. system is actually a first-to-invent system.⁶⁵

b. Exclusion and Improvement Patents

A patent effectively grants the inventor a limited monopoly on the manufacture, use, or sale of the invention. However, since the patent actually only grants the right to *exclude* to the patentee, it does not actually grant to the patentee the right to *use* the patented invention. For example, suppose the Deep Well Co. invents a new drill bit and obtains a patent therefor, claiming elements A, B, and C. Competitor Reliable Well Co. then becomes aware of the drill bit, and comes up with an improvement, which involves adding a special perforated molybdenum steel collar D to Deep Well's drill bit. Reliable Well then obtains a patent for the improvement, claiming elements A, B, C, and D.

In this case, Reliable can exclude anyone (including Deep Well) from using a drill bit containing these four elements in the United States. However, since use of a drill bit having elements A, B, C, and D necessarily involves using a drill bit also having elements A, B, and C, use of the improved drill bit would infringe Deep Well's patent. However, were Deep Well to add a perforated molybdenum steel collar to its own drill bit, it would infringe Reliable Well's collar. The solution in such cases is often for the two parties to cross-license their respective patents to one another, or for one to purchase or exclusively license the other's patent.

c. Disclosure: The Bargain

⁶³See, e.g., Gabriel P. Katona, *The Myth of Submarine Patents*, <<http://www.heckel.org/congress/104cong/articles104/katona1.htm>>; U.S. Pat. No. 5,283,641, issued 42 years after the initial filing, to Jerome Lemelson.

⁶⁴35 U.S.C. ' 154(b), 155.

⁶⁵Rand (1976, p. 133) mistakenly assumes that the first to file has priority (and then she is at pains to defend such a system). She also confusingly attacks the strict antitrust scrutiny given to patent holders. Actually, however, since a patent is a government-granted monopoly, it is not unjust to use an anti-monopoly law to limit the ability of a patent owner to extend this monopoly beyond the bounds intended by the patent statute. The problem with antitrust laws is in their application to normal, peaceful business dealings, not to limit actually *real* i.e., government-granted monopolies. A similar point might be made with regard to Bill Gates, whose fortune has largely been built based on the government-granted monopoly inherent in copyright. Moreover, as Bill Gates is no libertarian, and doubtlessly does not oppose the legitimacy of antitrust laws, one can hardly wring one's hands in pity over his having to lie in the very bed he helped to make.

One of the stated reasons for having patent protection for inventions is to promote the progress of science. If an inventor can receive a legal monopoly over an invention, he can obtain monopoly profits and thus have an extra economic incentive to attempt to invent. These inventions generally inure to the public benefit during the term of the patent (when sold to the public by the inventor or licensees) and also after the patent has expired and the invention enters the public domain.

The patent is considered to be a bargain whereby the public and inventor both benefit. To fulfill his side of the bargain, the inventor is under a strict duty to make a complete disclosure of the invention in the patent application. Thus, the patent benefits the public by being published as soon as it issues, thereby disseminating information about new ideas and discoveries that might otherwise be kept secret by companies. Even during the period of the patent term, therefore, the inventor's innovations are made public knowledge and may be used for further innovations, discoveries, and research.

d. Types of Patents

There are three types of patents: utility patents, design patents, and plant patents. Utility patents are the standard type of patent, typically referred to simply as a patent, that covers inventions such as new device, new chemical compositions, or new processes or innovative ways of doing useful things. Design patents cover new, original, and ornamental designs for an article of manufacture.⁶⁶ Plant patents are granted to one who invents or discovers and asexually reproduces any distinct and new variety of plant.⁶⁷ For most individuals and companies, the standard (utility) patent will be most frequently used and of most significance.

2. How Patents are Obtained

A patent is obtained by preparing a patent application and filing it with the U.S. Patent and Trademark Office (PTO). The patent attorney typically drafts a patent application after reviewing an invention disclosure prepared by the inventor and after discussing the invention with the inventor.

⁶⁶35 U.S.C. § 171.

⁶⁷35 U.S.C. § 161.

After the application is filed with the PTO, it is categorized by the PTO according to its technical subject matter and examined by a PTO employee called, appropriately enough, an Examiner who works in an art unit appropriate to the invention. These employees are typically non-lawyers with technical degrees such as engineering or chemistry. Patent lawyers are practicing attorneys, of course,⁶⁸ and almost always have at least one engineering or technical degree, and often have master's degrees or Ph.Ds in a technical field.

The patent application contains a description of the invention and any drawings necessary to explain the invention, and concludes with a set of one or more *claims*. The claims define and stake out the legal boundaries of the invention for which protection is sought; the claims capture the novel aspects of the device or process invented. The claims are thus analogous to the physical boundaries, or metes and bounds, of real property.

As an example, suppose no one had ever invented a three-legged chair before, also having a back and footrests. In this case, the patent application would describe the prior art (e.g., four-legged chairs), and would describe problems with this prior art. The application would then describe, with text and drawings, various embodiments of the new invention, typically along with descriptions of how it is better than the prior art. At the end of the application, one or more single-sentence claims, following very precise and sometimes arcane rules of grammar, stake out exactly what invention the inventor claims protection on. (For example, a hole cannot be claimed directly, for a hole does not have independent existence. Rather, it has to be claimed indirectly, viz: A truss member having a hole defined in the center thereof.) The three-legged chair might be claimed as follows:

1. A chair, comprising:
 - a rigid seat member having a back portion and a bottom side;
 - a back member attached to and extending upward from the back portion of the rigid seat member;
 - exactly three legs extending downward from the bottom side of the rigid seat member; and
 - a footrest member fixed between two of the three legs.

If the Examiner initially rejects the patent application's claims, the applicant, through the patent attorney, can attempt to overcome the rejection, either by modifying the patent's claims or text to satisfy the Examiner's concerns, or by arguing legally or techno-factually (or even grammatically) with the Examiner to convince him that the rejection was erroneous.

This process of filing an application and going back and forth with the PTO in an attempt to obtain a patent is, strangely enough, referred to as *patent prosecution*. It usually takes at least a year, and typically about two years or even longer in some cases, from the date of filing the application to the date of issuance of a patent.

⁶⁸Although there are different systems in non-American countries, most of which do not require an undergraduate degree to enter law school. Therefore many of these countries have patent specialists with either a law degree or technical degree, or some hybrid, but not both.

Unlike copyright registration papers and some trademark applications, which are sometimes filed by lay individuals, the preparation of a patent application is a complex task which normally requires the attention of a patent attorney or agent.⁶⁹

A valid patent may not be obtained if the invention has been in public use or on sale in the U.S. for more than one year prior to the filing of the patent application. If the invention has been already made public in this manner, but for less than a year, a U.S. patent is not barred, but most foreign patent rights may have been lost, as most other countries have a so-called *absolute novelty* requirement, rather than a one-year publication grace period as in the U.S.

In addition to other formal requirements, the invention must be novel, have utility, and must be nonobvious over the prior art. Usually, inventions can be shown to have utility, or usefulness, although some applications, such as those for perpetual motion machines, are rejected for lack of utility. Most of the time, however, an applicant will not bother filing an application unless the invention has utility.

Novelty means the invention must be *new*; i.e., it must not have already been invented, or anticipated, by a prior invention or by prior existing knowledge. The non-obviousness test is often the most difficult to overcome. (Non-obviousness is sometimes referred to as the *inventive step* requirement in other countries.) Under this test, an invention is not patentable over what was already known in the prior art, if it would have been obvious at the time the invention was made, to a person having ordinary skill in the art, to make such changes in the prior art so as to arrive at the claimed invention. Thus, even if an invention is novel, it might still not be nonobvious, because it could be that someone skilled in that type of technology could have relatively easily invented it if he had tried; it would have been obvious.

3. Applications

A variety of both low- and high-technology inventions may be patented as new devices or apparatuses, methods or processes, or computer software-implemented algorithms. Along with trade secrets, patents can constitute a valuable portion of a company's technology-related assets.

⁶⁹Indeed, as the U.S. Supreme Court has noted, [t]he specification and claims of a patent . . . constitute one of the most difficult legal instruments to draw with accuracy . . . @ *Topliff v. Topliff*, 145 U.S. 156, 171, 12 S.Ct. 825 (1892). For a counter-example of successful patent prosecution by a layman, see the discussion of the spectacularly successful inventor Jerome Lemelson, in Wysocki (1997).

APPENDIX II: PATENTS AND COPYRIGHTS: SOME QUESTIONABLE EXAMPLES

Some exemplary U.S. patents:

- **A**Christmas Tree Stand Watering System,@U.S. Pat. No. 4,993,176, Feb. 19, 1991 (Christmas tree watering stand shaped like Santa Claus);
- **A**Initiation Apparatus,@ U.S. Pat. No. 819,814, May 8, 1906 (**A**harmless@ way of initiating a candidate into a fraternity by shocking his with electrodes);
- **A**Method of Exercising a Cat,@U.S. Pat. No. 5,443,036, Aug. 22, 1995 (shining a laser light onto the floor to fascinate a cat and cause it to chase the light);⁷⁰
- **A**Pat on the Back Apparatus,@U.S. Pat. No. 4,608,967, Sep. 2, 1986 (apparatus with simulated human hand to pat the user on the back);
- **A**Hyper-Light-Speed Antenna,@U.S. Pat. No. 6,025,810, Feb. 15, 2000 (poking hole in another **A**dimension@to transmit RF waves at faster-than-light speed; incidentally accelerating plant growth);⁷¹
- **A**Force-Sensitive, Sound-Playing Condom,@U.S. Pat. No. 5,163,447, Nov. 17, 1992 (self-explanatory; for example, it could play **A**Dixie@);⁷²

⁷⁰Claim 1 reads:

1. A method of inducing aerobic exercise in an unrestrained cat comprising the steps of:

- (a) directing an intense coherent beam of invisible light produced by a hand-held laser apparatus to produce a bright highly-focused pattern of light at the intersection of the beam and an opaque surface, said pattern being of visual interest to a cat; and
- (b) selectively redirecting said beam out of the cat's immediate reach to induce said cat to run and chase said beam and pattern of light around an exercise area.

⁷¹Claim 13 reads:

13. An improved antenna comprising:

a heat source;

at least one magnetic field source in close proximity with said heat source;

an electromagnetic injection point formed in close proximity to said magnetic field source;

at least one accelerator in close proximity with said heat source; and

an electromagnetic signal inserter placed at said electromagnetic injection point whereby a communication signal may be generated through said signal inserter, thereby sending the signal at a speed faster than light.

⁷²Claim 1 reads:

1. A force-sensitive sound-playing condom, comprising:

a condom body, and

force-sensitive sound-playing means for emitting a predetermined sound, said force-sensitive sound-playing means being attached to said condom body,

said condom being donnable upon an erect penis without activating said force-sensitive sound-playing means,

said force-sensitive sound-playing means being designed to emit said predetermined sound in response to a predetermined external force created during the act of sexual intercourse.

- **A Method and System for Placing a Purchase Order via a Communications Network,** U.S. Pat. No. 5,960,411, Sep. 28, 1999 (purchasing item on web by single mouse-click) (Amazon.com's One-click patent);⁷³
- **A Financial Certificates, System and Process,** U.S. Pat. No. 6,017,063, Jan. 25, 2000 (inflation indexed gift certificate or mutual fund share);⁷⁴

⁷³Claim 1 reads:

1. A method of placing an order for an item comprising:
under control of a client system,
displaying information identifying the item; and
in response to only a single action being performed, sending a request to order the item along with an identifier of a purchaser of the item to a server system;
under control of a single-action ordering component of the server system,
receiving the request;
retrieving additional information previously stored for the purchaser identified by the identifier in the received request; and
generating an order to purchase the requested item for the purchaser identified by the identifier in the received request using the retrieved additional information; and
fulfilling the generated order to complete purchase of the item
whereby the item is ordered without using a shopping cart ordering model.

⁷⁴The Abstract provides:

A financial and/or a commercial enterprise, such as a mutual funds operator and/or a general merchandise/product sales establishment, prices its various financial and/or commercial goods in certain basic pricing units and sells uniquely coded certificates denominated in such pricing units; which pricing units are of such nature as to be substantially unaffected by inflation. Then, at any later time the holder of such a certificate is entitled to exchange this certificate for financial and/or commercial goods equivalent in total pricing units to the denomination specified on the certificate, regardless of any intervening changes in dollar pricing of the various items of financial and/or commercial goods. Since the purchaser of a certificate helps pay for the inventory of financial and/or commercial goods underlying the certificates, each holder of such a certificate periodically receives an interest payment in the form of a pre-established probabilistic chance to win additional certificates.

Claim 1 reads:

1. A process comprising:
a first step whereby, at an initial point in time and at a first location, an individual obtains a value certificate in exchange for an initial amount of dollar funds; the value certificate entitling the owner thereof to receive, at a subsequent point in time and at a second location, in exchange for his value certificate, either a pre-defined amount of dollar funds or a pre-defined amount of goods and/or services from among a pre-defined selection of goods and/or services; the pre-defined amount of goods and/or services being defined as that amount of goods and/or services that could be purchased from the pre-defined selection of goods and/or services by the initial amount of dollar funds at the initial point in time; the pre-defined amount of dollar funds being equal to the amount of dollar funds required, at the subsequent point in time, to purchase the pre-defined amount of goods and/or services from among the pre-defined selection of goods and/or services; and
a second step whereby, at the subsequent point in time and at the second location, the owner of the value certificate does in fact exchange the value certificate either for the predefined amount of dollar funds or for the pre-defined amount of goods and/or services from the pre-defined selection of goods and/or services.

- AMethod and System for Measuring Leadership Effectiveness,@ U.S. Pat. No. 6,007,340, Dec. 28, 1999⁷⁵ (assigned to Electronic Data Systems Corporation).⁷⁶

Copyright law, while it has not led to as many clearly absurd applications, has also been extended greatly by the courts. Originally intended to cover literary works, the concept has been stretched so that authored Aworks@ covers computer programs, even machine language and object code, which is more analogous to a machine part, like a cam, than to a literary work.⁷⁷

⁷⁵Claim 1 reads:

1. A method for evaluating leadership effectiveness, comprising the steps of:
gathering target information quantifying at least one domain selected from the group consisting of having personal convictions, being visionary, building emotional bonds, being inspirational, being team oriented, being a risk taker, and having a drive to excel;
comparing the target information with a standard, the standard including standard values of the domain; and
identifying non-standard responses of the target.

⁷⁶See also AWacky Patent of the Month@ site: <<http://colitz.com/site/wacky.htm>>; IBM's AGallery of Obscure Patents@ page: <<http://www.patents.ibm.com/gallery>>; Greg Aharonian's ABustpatents@ website <<http://www.bustpatents.com/>>.

⁷⁷CONTU (1979); *Apple Computer, Inc. v. Franklin Computer Corporation*, 714 F.2d 1240 (3d Cir. 1983); *NEC Corp. and NEC Electronics, Inc. v. Intel Corp.*, 1989 Copr.L.Dec. & 26,379, 1989 WL 67434 (N.D. Cal. 1989).
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