

## Intellectual “Property” Versus Real Property

Contributed by Sheldon Richman  
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Sheldon Richman: Intellectual “Property” Versus Real Property : What Are Copyrights and What Do They Mean for Liberty? (2009.) Published with the permission of the author. Intellectual “property” is a sleeper issue. It seems uncontroversial: Someone invents or writes something and therefore owns it. What could be plainer? But intellectual property contains the power to destroy liberty. Intellectual property isn’t merely about rock bands preventing kids from sharing MP3s over the Internet. (See “Weird Al” Yankovic’s musical commentary, “Don’t Download This Song,”) It’s about crusty incumbent firms trying to preserve market share by stifling competition, domestically and in the developing world. The crux of the issue is this: Do intellectual property laws protect legitimately ownable things? One’s view of the laws will proceed from one’s answer to that question, and that’s what I will concentrate on here. I leave for another time the issue of incentives.

Sheldon Richman: Intellectual “Property” Versus Real Property : What Are Copyrights and What Do They Mean for Liberty? (2009.) Intellectual “property” is a sleeper issue. It seems uncontroversial: Someone invents or writes something and therefore owns it. What could be plainer? But intellectual property contains the power to destroy liberty. Intellectual property isn’t merely about rock bands preventing kids from sharing MP3s over the Internet. (See “Weird Al” Yankovic’s musical commentary, “Don’t Download This Song,”) It’s about crusty incumbent firms trying to preserve market share by stifling competition, domestically and in the developing world. The crux of the issue is this: Do intellectual property laws protect legitimately ownable things? One’s view of the laws will proceed from one’s answer to that question, and that’s what I will concentrate on here. I leave for another time the issue of incentives. I do so because the justice of a claim must be decided before we consider the specific incentives and disincentives that flow from our decision. (No, this does not make me a “nonconsequentialist.” Consequences figure in our basic conception of justice.) Suffice it to say that the existence of disincentive effects from the abolition of intellectual property cannot furnish proof that it is legitimate. That question must be decided on its own terms. (On incentives and many other related issues, see Michele Boldrin and David Levine’s *Against Intellectual Monopoly*. The authors, along with Alessandro Nuvolari, contributed Freeman articles on intellectual property.) What does intellectual property refer to? What exactly is owned? It is not ideas per se that are owned, according to the law. But what is owned seems problematic. Stephan Kinsella points out that “Copyright gives [the creators of original works] the exclusive right to reproduce the work, prepare derivative works, or to perform or present the work publicly.” However, “Copyrights protect only the form or expression of ideas, not the underlying ideas themselves.” Patents, Kinsella continues, grant exclusive use in “devices or processes that perform a ‘useful’ function.” A patent effectively grants the inventor a limited monopoly on the manufacture, use, or sale of the invention. However, a patent actually only grants to the patentee the right to exclude (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. Importantly, “laws of nature, natural phenomena, and abstract ideas” cannot be patented. But, Kinsella notes, “Reducing abstract ideas to some type of ‘practical application,’ i.e., ‘a useful, concrete and tangible result,’ is patentable.” Note that in both cases ideas are said not to be the object of intellectual property. And yet, ultimately, it is ideas that are at issue. For what is a “form or expression of ideas” if not an idea? And what is a “practical application” of an idea if not an idea? When someone holds a copyright to a novel, she does not own all copies of the book in the world. And when someone holds the patent to the widget, he does not own every widget in the world. There’s no escaping that intellectual property is about ideas. There is another way to look at intellectual property, but it is even harder to square with traditional property rights. When one acquires a copyright or a patent, what one really acquires is the power to stop other people from doing certain things with what is indisputably their own property. One can say that a copyright holder doesn’t actually own anything but the legal authority to stop other people from using their own equipment to copy a book or CD they purchased. And one who holds a patent on the widget actually only has permission to call on the state to stop others from manufacturing and selling widgets in factories they own. Intellectual property is a peculiar form of property, indeed. Tangible Versus Intangible There’s another peculiarity. Property rights in land and other tangible, finite, and scarce things emerged among human beings to facilitate cooperation and flourishing. Society can be a setting in which people trade and go about their business only if they generally know in advance what they can and cannot do with the material objects around them. Ludwig von Mises, F. A. Hayek, Bruno Leoni, Bruce Benson, and John Hasnas are just a few of the many scholars who have elaborated this point from a multidisciplinary perspective. That prompts the question: Why assume that rules which emerged to avert social conflict over tangible objects are also appropriate to intangible things? I need not labor the point that ideas, or what Tom Palmer calls “ideal objects,” are different from material things. Two or more people cannot consume the same Coca Cola or develop the same parcel of land at the same time, but two or more people can possess and use the same idea at the same time. No one has put the issue better than Thomas Jefferson: “If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. 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. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and

improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. But aren't ideas scarce in the sense that if I exploit one commercially, your opportunity to do so is reduced? This mixes up two issues: the "thing" and its economic value. You can never own economic value. A falling market price for your house is not proof you've been robbed. Likewise, if your income from a book or CD falls, that also is not proof you've been robbed. Kevin Carson elaborates: It is sometimes argued, in response to attacks on patents as monopolies, that "all property is a monopoly." True, as far as it goes; but tangible property is a monopoly by the nature of the case. A parcel of land can only be occupied and used by one owner at a time, because it is finite. By nature, two people cannot occupy the same physical space at the same time. "Intellectual property," in contrast, is an artificial monopoly where scarcity would not otherwise exist. And unlike property in tangible goods and land, the defense of which is a necessary outgrowth of the attempt to maintain possession, enforcement of "property rights" in ideas requires the invasion of someone else's space. To Create Is Not to Own Why is this approach resisted by so many advocates of freedom? A key reason is the importance attached to the act of creation. If someone writes or composes an original work or invents something new, the argument goes, he or she should own it because it would not have existed without the creator. I submit, however, that as important as creativity is to human flourishing, it is not the source of ownership of produced goods. So what is the source? Prior ownership of the inputs through purchase, gift, or original appropriation. This is sufficient to establish ownership of the output. Ideas contribute no necessary additional factor. If I build a model airplane out of wood and glue, I own it not because of any idea in my head, but because I owned the wood, the glue, and myself. If Howard Roark's evil twin trespassed on your land and, using your materials, built the most creatively original house ever seen, would he own it? Of course not. You would—and you'd have every right to tear it down. Thus ceasing to treat ideas like property would not jeopardize real property. On the contrary, it would affirm it. Protection of intellectual "property" requires the violation of real property rights, since it forbids you to do certain things with your own CD or DVD burner and blank disks, your own copier and paper, and your own knowledge of production techniques and processes that are protected by state patents. The last example is most crucial today, Kevin Carson writes, because of "[t]he growing importance of human capital [i.e., the ideas in people's heads], and the implosion of capital outlay costs required to enter the market..." In other words, the free society and competitive economy require an end to intellectual "property."