

# ARE PATENTS AND COPYRIGHTS MORALLY JUSTIFIED? THE PHILOSOPHY OF PROPERTY RIGHTS AND IDEAL OBJECTS

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## I. INTRODUCTION

Arguments for the right of property ownership are manifold. It is quite common for a single author to invoke a wide range of these arguments to support private property rights, as in John Locke's famous chapter on property in his *Second Treatise of Government*. Indeed, the convergence of varying and non-contradicting arguments on the same conclusion tends to make us more confident of that conclusion. It serves as a kind of "fail-safe" device in intellectual discourse: If five different but all plausible arguments lead to the same conclusion, we are generally more justified in accepting that conclusion than if only one of those arguments supported it.<sup>1</sup>

Intellectual property, however, is a different matter. Interestingly, the various leading arguments that normally buttress each other and converge in support of private property diverge widely when applied to the concept of intellectual property. For example, a theory wherein property is viewed as the just reward for labor (a "desert theory") might very well support intellectual property rights, while at the same time a theory in which property is defined as the concretion of liberty might not.

Most of the arguments discussed in this Article, both for and against intellectual property rights, emanate from staunch defenders of a private property, free market system. This is not surprising, because those who strongly favor liberty and property are apt to see the concepts as intimately connected, and are thus more likely to be very concerned with the theory and application of property rights. With respect to intellectual property, however, one should not be surprised if they come to

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1. See Barnett, *Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 HARV. J.L. & PUB. POL'Y 611, 616-17 (1989).

differing conclusions. This occurs because liberty and property in this context may be irreconcilable; copyrights and patents seem to be property, but they also seem to restrict liberty. One would be hard-pressed, for example, to find two stronger defenders of liberty and property in Nineteenth Century America than the abolitionist Lysander Spooner and the Jacksonian editorialist William Leggett. Yet on the subject of intellectual property rights, they each came to opposite conclusions: Spooner steadfastly championed intellectual property rights while Leggett advocated with equal force the unrestricted exchange of ideas. Although they came to opposite conclusions, each argued that his beliefs were consistent with his overall stance in favor of liberty, private property, and freedom of trade.<sup>2</sup>

Sometimes the best developed arguments in support of intellectual property rights are advanced by relatively marginal authors, like Spooner for example. This is because the great pioneers of the philosophy of property rights wrote before property rights for authors or inventors had become a popular issue; it remained for lesser figures to mold the arguments for intellectual property based on the property theories that had been developed earlier by more prominent thinkers. Consequently, while Locke, Hume, Kant, Hegel, and other philosophers will figure significantly in this Article, attention will also be devoted to later interpreters, who applied the ideas of these and other great philosophers in new ways.

Intellectual property rights are rights in ideal objects, which are distinguished from the material substrata in which they are instantiated.<sup>3</sup> Much of this Article will therefore be concerned with the ontology of ideal objects. This is because the subject of intellectual property, indeed, the very idea of exercising property rights over ideas, processes, poems, and the like,

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2. See, e.g., Spooner, *A Letter to Scientists and Inventors, on the Science of Justice, and Their Right of Perpetual Property in Their Discoveries and Inventions*, in 3 *THE COLLECTED WORKS OF LYSANDER SPOONER* 68 (C. Shively ed. 1971); W. LEGGETT, *DEMOCRATICK EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY* 397-98 (L. White ed. 1984).

3. This catch-all category covers the subject matter of patents and copyrights, including those for algorithms, computer programs, manufacturing processes, inventions, musical or literary works, pictorial or other kinds of representations, sculptures, designs, and more. The relevant difference between such goods and tangible goods is that the former can be instantiated an indefinite number of times, that is, they are not scarce in a static sense, while tangible goods are spatially circumscribed and are scarce in both the static and the dynamic sense of the term.

leads directly to speculation about how such objects are similar to or different from other objects of property rights, such as trees, land, or water flows. One cannot address how (or whether) such things ought to be made the objects of ownership without addressing their fundamental nature. To some criticizing the notion that ideas could be made into exclusive property, the political economist Michel Chevalier properly rejoined:

After having fired off at patents this shot, so difficult to escape, the *Exposé des motifs* concludes by saying that all this is metaphysics on which it will not enter. An unhappy way of refuting itself; it is to fly from a discussion which the reporters had opened of their own accord. Should the legislator be ashamed of metaphysics? On the contrary, he ought to be a metaphysician, for what would laws be in the absence of what they call metaphysics; that is to say, recourse to first principles. If the legislator does not consent to be a metaphysician in this sense, he is likely to do his work badly.<sup>4</sup>

Thus, discussions in this Article about the legal foundations of intellectual property cannot proceed without our taking up the ontological foundations of intellectual property, which we will do in part III.

Many defenses of intellectual property rights are grounded in the natural law right to the fruit of one's labor.<sup>5</sup> Just as one has a right to the crops one plants, so one has a right to the ideas one generates and the art one produces.

Another tradition of property rights argument bases itself on the necessity of property for the development of personality. Personality develops itself in its interaction with the world; without a sphere of property over which we exercise control, for example, moral responsibility is unlikely to develop. Property rights, in this tradition, may incorporate an "economic" aspect, but it is fundamentally distinguished from other con-

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4. Chevalier, *Patents for Inventions Examined in their Relations to the Principle of Freedom of Industry, and That of Equality Among Citizens*, in *COPYRIGHT AND PATENTS FOR INVENTIONS* 5 (R.A. Macfie ed. 1883).

5. Natural rights arguments and utilitarian arguments (very broadly conceived) are close cousins. Utilitarian theories are explicitly consequentialist (and welfarist), while natural rights theories usually contain what Alan Ryan calls "a buried utilitarian assumption." A. RYAN, *PROPERTY* 63 (1987). Such "buried assumptions" concern human flourishing or the attainment of man's natural end. These consequences are usually attained indirectly, through respect for general rights, or rules of conduct, rather than directly, as in most utilitarian theories. The sharp separation in contemporary moral philosophy between natural rights and utility, or the common good, is, however, an artificial one, and would certainly be foreign to many of the great natural law theorists.

ceptions of property rights. Rather than looking to moral desert, or to maximization of utility, or to the omnipresence of scarcity, personality-based rights theories begin with a theory of the person. Often harkening back to Kant's discussions of the nature of authorship and publication and to Hegel's theory of cultural evolution, personality-based rights theory forms the foundation of German and French copyright law. Several personality-based arguments will be considered in this Article. As we shall see, some of these approaches provide a foundation for a more expansive form of intellectual property rights than do moral desert or utilitarian theories, extending, for example, to artists' inalienable "personal rights"<sup>6</sup> over their products.

Utilitarian arguments of various sorts can either support or undercut claims for intellectual property rights. Contingent matters of fact form an especially important part of the utilitarian structure. As I have written elsewhere on the utilitarian arguments for and against intellectual property rights,<sup>7</sup> I will limit myself in this Article to a few brief remarks on this subject.

Attempts have also been made to derive intellectual property rights from the retention of certain tangible property rights. Thus, ownership rights to tangible objects are constituted by a bundle of rights that may be alienated or rearranged to suit contracting parties. In selling or otherwise transferring a piece of property, like a copy of a book for example, some of these rights may be reserved, such as the right to make additional copies. The owner of the material substratum in which an ideal object is instantiated may reserve the right to use the material substratum for the purpose of copying the ideal object. This argument might be labelled the "piggy-back" theory: The intellectual property right obtains its moral force from its dependence on a more conventional right of property.

I will take the opportunity in parts II through V of this Article to present as clearly and fairly as possible each of these four kinds of property arguments. In turn, I will offer criticisms of

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6. Or *droit moral*, sometimes confusingly translated simply as "moral rights."

7. See Palmer, *Intellectual Property Rights: A Non-Posnerian Law and Economics Approach*, 12 *HAMLINE L. REV.* 261 (1989). This essay also reviews the history of intellectual property, considers the problem of whether common-law copyright extends after the act of publication, reevaluates the economics of public goods and property rights, and examines how markets for ideal objects without intellectual property rights function. For criticism of my position, see Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement*, 41 *STAN. L. REV.* 1343 (1989).

each of these arguments' internal structures and then attempt to apply them to ideal objects. In part II, I will take up the labor theory of property, and in part III, the personality theory. In part IV, I will address utilitarian concerns, but, as I have stated, only briefly. In part V, I will discuss the attempt to derive intellectual property rights indirectly, that is, "piggy-backing" on rights to tangible property. The concluding sections of the Article, parts VI and VII, present my own case for a private property system that does not recognize copyrights and patents.<sup>8</sup>

I make no claims to an exhaustive taxonomy of property rights theories. Other important theories of property and other theoretical concerns are not dealt with here, because I have chosen to concentrate on those most relevant to the problem of intellectual property. Further, I will have little to say about the actual historical genesis of intellectual property; while intellectual property originated in grants of monopoly from the state and received its legitimacy from that source, the public debate over its legitimacy shifted radically in the late Eighteenth Century. As Fritz Machlup and Edith Penrose note, "those who started using the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, 'property,' for a word that had an unpleasant ring, 'privilege.'"<sup>9</sup> Given this shift in the popular conception of patents and copyrights, I intend to question whether they are *legitimate* forms of property at all.

## II. LABOR AND THE NATURAL RIGHT TO PROPERTY

Lysander Spooner was surely one of the most remarkable American men of letters of the Nineteenth Century. He was a constitutional scholar, a fervent crusader for the abolition of slavery, an entrepreneur who succeeded through competition in forcing the American postal service to lower its rates, a philosopher, a writer on economic matters, and more.

Spooner begins his book, *The Law of Intellectual Property: or An Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas*,<sup>10</sup> by establishing the status of immaterial objects as

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8. As will be demonstrated, however, the approach I set forth would include trademarks and trade secrets as legitimate. Trademarks and trade secrets have roots in the common law and enjoy a contractual or quasi-contractual moral grounding.

9. Machlup & Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1, 16 (1950).

10. Spooner, *The Law of Intellectual Property: or An Essay on the Right of Authors and In-*

wealth. "Everything," writes Spooner, "whether intellectual, moral, or material, however gross, or however subtle; whether tangible or intangible, perceptible or imperceptible, by our physical organs—of which the human mind can take cognizance, and which, either as a means, occasion, or end, can either contribute to, or of itself constitute, the well-being of man, is wealth."<sup>11</sup> This obviously includes ideas, which are often the objects of economic transactions. Property, as Spooner defines it, is "simply wealth, that is possessed—that has an owner."<sup>12</sup> The right of property is the "right of dominion," the right "which one man has, as against all other men, to the exclusive control, dominion, use, and enjoyment of any particular thing."<sup>13</sup>

Thus, according to Spooner's definitions, the ideas we have, as well as our feelings and our emotions, are our property. "If the ideas, which a man has produced, were not rightfully his own, but belonged equally to other men, they would have the right imperatively to require him to give his ideas to them, without compensation; and it would be just and right for them to punish him as a criminal, if he refused."<sup>14</sup>

The foundations of property, according to Spooner, are the acts of possession and of creation. Property is necessary to secure the "natural right of each man to provide for his own subsistence; and, secondly, . . . his right to provide for his general happiness and well-being, in addition to a mere subsistence."<sup>15</sup> Thus, while Spooner's account of the natural right to property, and especially of intellectual property, falls among the moral-desert arguments for property, it contains a consequentialist element: property is justified because it is a necessary means to the attainment of man's natural end.

Having established that ideas are wealth and that all wealth is the product of intellect,<sup>16</sup> Spooner argues analogically that

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*ventors to a Perpetual Property in Their Ideas*, in 3 *THE COLLECTED WORKS OF LYSANDER SPOONER* (C. Shively ed. 1971).

11. *Id.* at 13.

12. *Id.* at 15.

13. *Id.* at 15.

14. *Id.* at 19. This assumes that a common right would necessarily entail a common claim to access.

15. *Id.* at 28.

16. *See id.* at 27

All that labor, which we are in the habit of calling physical labor, is in reality performed wholly by the mind, will, or spirit, which uses the bones and mus-

ideas are just as much property as tangible objects. If ideas pre-exist in nature and are merely discovered (as, for example, scientific principles or naturally occurring substances),<sup>17</sup> then “he who does discover, or first takes possession of, an idea, thereby becomes its lawful and rightful proprietor; on the same principle that he, who first takes possession of any material production of nature, thereby makes himself its rightful owner.”<sup>18</sup> On the other hand, if ideas are not pre-existing in nature, but are the products of an active intellect, then “the right of property in them belongs to him, whose labor created them.”<sup>19</sup>

Spooner spends the rest of the book defending his argument against objections. Against the objection that ideas are incorporeal, he argues that other incorporeal entities can also be objects of property rights, such as labor, a ride, one’s reputation and credit; even the right to property is itself, inalienable property. To the objection that property rights in ideas cease on publication or communication of an idea to another (“because that other person thereby acquires as complete possession of the idea, as the original proprietor”<sup>20</sup>), Spooner responds that it falsely assumes that “if a man once intrust his property in another man’s keeping, he thereby loses his own right of property in it.”<sup>21</sup> Possession is not equivalent to the right of use, for “where one man intrusts his property in another man’s possession, the latter has no right whatever to use it, otherwise than as the owner consents that he may use it.”<sup>22</sup>

Against the objection that some ideas are social in nature, Spooner argues that the role of society in the production of ideas is nil. Ideas are created by individuals, and only individuals have rights to them. As Spooner counters, “Nothing is, by its own essence and nature, more perfectly susceptible of exclusive appropriation, than a thought. It originates in the mind of

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cles merely as tools. . . . There is, therefore, no such thing as the physical labor of men, independently of their intellectual labor.

*Id.*

17. See Spooner, *supra* note 2, at 10.

18. *Id.* at 26. Note that this would go far beyond the traditional scope of the patent laws of the United States, which explicitly exclude discoveries of scientific or mathematical laws or of naturally occurring substances from patent protection. Recently, however, the U.S. Patent Office has been awarding patents to discoverers of useful mathematical algorithms, a trend that would surely have pleased Spooner.

19. *Id.* at 27.

20. *Id.* at 42 (emphasis in original).

21. *Id.*

22. *Id.* at 52.

a single individual. It can leave his mind only in obedience to his will. It dies with him, if he so elect."<sup>23</sup> Even granting the truth of the objection, he asks, do we deny private ownership of tangible objects because their creators availed themselves of pre-existing knowledge, or cooperated with others in their production?<sup>24</sup>

Spoooner also refutes the objection that ideas are non-rivalrous in consumption; that is, that the use by one person of an idea does not diminish anyone else's use, and that ideas are therefore unsuitable candidates for the status of property, by showing its consequences if applied to tangible property. For,

if it be a true principle, that labor and production give no exclusive right of property, and that every commodity, by whomsoever produced, should, without the consent of the producer, be made to serve as many persons as it can, without bringing them in collision with each other, that principle as clearly requires that a hammer should be free to different persons at different times, and that a road, or canal should be free to as many persons at once, as can use it without collision, as it does that an idea should be free to as many persons at once as choose to use it.<sup>25</sup>

The key to Spoooner's approach is to deny those defenses of property that rest on the joint operation of scarcity, the law of the excluded middle, and the desirability of avoiding violent conflict. He writes, "The right of property, or dominion, does not depend, as the objection supposes, upon either the political or moral necessity of men's avoiding collision with each other, in the possession and use of commodities . . ."<sup>26</sup> Rather, "the right of property, or dominion, depends upon the necessity and right of each man's providing for his own subsistence and happiness; and upon the consequent necessity and right of every man's exercising exclusive and absolute dominion over the fruits of his labor."<sup>27</sup> Similarly, the argument that the propagation of an idea is like the lighting of one candle by another, illuminating the former without darkening the latter, would "apply as well to a surplus of food, clothing, or any other commodity, as to a surplus of ideas, or—what is the same thing—to

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23. *Id.* at 58.

24. *See id.* at 61-64.

25. *Id.* at 79.

26. *Id.* at 81.

27. *Id.* at 81-82.

the surplus capacity of a single idea, beyond the personal use of the producer—by which I mean the capacity of a single idea to be used by other persons simultaneously with the producer, without collision with him.”<sup>28</sup>

A similar argument, but one that stops short of property rights in perpetuity, is offered by Ayn Rand. Rand states, “patents and copyrights are the legal implementation of the base of all property rights: a man’s right to the product of his mind.”<sup>29</sup> Patents and copyrights are moral rights, and not merely legal rights: “The government does not ‘grant’ a patent or copyright, in the sense of a gift, privilege, or favor; the government merely secures it—[that is], the government certifies the origination of an idea and protects its owner’s exclusive right of use and disposal.”<sup>30</sup> Like many other advocates of intellectual property rights, Rand sees patents as the highest form of property: “the heart and core of property rights.”<sup>31</sup>

In stopping short of granting to scientists and mathematicians rights to the facts or theories they discover, Rand relies on the same general moral principles as Spooner in her defense of the right to intellectual property, but adds a twist. Because of her focus on the role of “productive work” in human happiness, she advocates limits on the temporal duration of intellectual property:

[I]ntellectual property cannot be consumed. If it were held in perpetuity, it would lead to the opposite of the very principle on which it is based: it would lead, not to the earned reward of achievement, but to the unearned support of parasitism. It would become a cumulative lien on the production of unborn generations, which would immediately paralyze them. . . . The inheritance of material property represents a dynamic claim on a static amount of wealth; the inheritance of intellectual property represents a static claim on a dynamic process of production.<sup>32</sup>

Herbert Spencer, who testified on behalf of copyright before the Royal Commission of 1878, presented an argument for patents and copyrights based on moral desert.<sup>33</sup> “[J]ustice under its positive aspect,” he argued, “consists in the reception by

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28. *Id.* at 94.

29. Rand, *Patents and Copyrights*, in *CAPITALISM: THE UNKNOWN IDEAL* 130 (1967).

30. *Id.* at 126.

31. *Id.* at 128.

32. *Id.* at 127.

33. See II H. SPENCER, *THE PRINCIPLES OF ETHICS* 121 (T. Machan ed. 1978) (1893).

each individual of the benefits and evils of his own nature and consequent conduct"; therefore, "it is manifest that if any individual by mental labor achieves some result, he ought to have whatever benefit naturally flows from this result."<sup>34</sup> To the objection that the use of another's idea does not take property away from the originator of the idea but only allows its use, he responded first, that "the use by others may be the contemplated source of profit," second, that a "tacit understanding" limits the rights transferred to "the printed paper, the right of reading and of lending to read, but not the right of reproduction," and third, that patents and copyrights are not monopolies because monopoly is the use of force to constrain others in the use of what would "in the absence of such law . . . be open to all," while inventions and the like could not be said to exist before their creation.<sup>35</sup>

Lord Coke had defined monopoly as "an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons . . . whereby any person or persons . . . are sought to be restrained of any freedome, or liberty that they had before, or hindered in their lawfull trade."<sup>36</sup> Thus reasoned proponents of patents and copyrights, an exclusive right over an innovation could not be a monopoly, because prior to its invention it was not a "liberty that they had before."<sup>37</sup>

Another labor-based moral desert argument has been advanced by Israel Kirzner.<sup>38</sup> Kirzner begins with the assumption that one is entitled to "what one has produced." His primary concern is to provide a justification for entrepreneurial profits. He asks whether this entitlement derives from the contribution

34. *Id.* Spencer specifically disavows reliance on utilitarian concerns: "Even were an invention of no benefit to society unless thrown open to unbought use, there would still be no just ground for disregarding the inventor's claim; any more than for disregarding the claim of one who labors on his farm for his own benefit and not for public benefit." *Id.* at 127-28.

35. *Id.* at 122-24.

36. III E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND* 181 (London 1797) (ch. 85).

37. Robert Nozick argues on this basis that patents and copyrights do not run afoul of the "Lockean Proviso": "An inventor's patent does not deprive others of an object which would not exist if not for the inventor." R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 182 (1974).

38. See Kirzner, *Producer, Entrepreneur, and the Right to Property* in *PERCEPTION, OPPORTUNITY, AND PROFIT* 185-99 (1979); Kirzner, *Entrepreneurship, Entitlement, and Economic Justice*, in *id.* at 200-24. Kirzner does not apply the theory he advances directly to intellectual property, but the implications of his argument would naturally lead one to support patents and copyrights.

to the production process of factors of production or from entrepreneurial activity. Following what he calls the “finders-keepers” rule, he argues that “a producer is entitled to what he has produced not because he has contributed anything to its physical fabrication, but because he perceived and grasped the opportunity for its fabrication by utilizing the resources available in the market.”<sup>39</sup> He contrasts “ownership-by-creation” with “ownership-by-just-acquisition-from-nature” and argues that the former better justifies entrepreneurial profit because “until a resource has been discovered, it has not, in the sense relevant to the rights of access and common use, existed at all. By this view it seems plausible to consider the discoverer of the hitherto ‘nonexistent’ resource as, in the relevant sense, the creator of what he has found.”<sup>40</sup> Clearly, if one were to substitute such an “ownership by creation” theory (or “finders-keepers”) for “ownership-by-just-acquisition-from-nature,” then the case for intellectual property rights would become much more plausible.

All of these lines of argument strongly emphasize the moral desert of the creator, inventor, or author.<sup>41</sup> They are consistent with the argument of John Locke in his *Second Treatise* that no one, so long as there was “as good left for his Improvement,” should “meddle with what was already improved by another’s Labour; If he did, ‘tis plain he desired the benefit of another’s Pains, which he had no right to . . . .”<sup>42</sup> When one has improved what was before unimproved (or created what before did not exist), one is entitled to the result of one’s labor. One *deserves* it.

### *Objections to Labor-Based Moral Desert Theories*

Arguments such as Spooner’s and Rand’s encounter a fundamental problem. While they pay homage to the right of self-ownership, they restrict others’ uses of their own bodies in conjunction with resources to which they have full moral and legal rights. Enforcement of a property right in a dance, for example,

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39. *Id.* at 196.

40. *Id.* at 212-13.

41. Moral desert plays a powerful role in many theories of property. According to Lawrence C. Becker, “the concept of desert is constitutive of the concept of morality *per se* . . . .” L.C. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 51 (1977).

42. J. LOCKE, *TWO TREATISES OF GOVERNMENT*, 309 (P. Laslett ed. 1970) (3d ed. 1698).

means that force can be used against another to stop him from taking certain steps with his body; enforcement of a property right in an invention means that force can be used against another to stop him from using his hands in certain ways. In each case, an intellectual property right is a claim of a right over how another person uses her body.

As the pro-liberty journalist William Leggett, a leader of the Jacksonian Loco-Foco party and editor of the *New York Evening Post*, wrote,

We do not wish to deny to British authors a right; but we do desire that a legal privilege, which we contend has no foundation in natural right, and is prejudicial to 'the greatest good of the greatest number,' should be wholly annulled, in relation to all authors, of every name and country. Our position is, that authors have no natural right of property in their published works, and that laws to create and guard such a right are adverse to the true interests of society.<sup>43</sup>

Leggett opposed copyright and patent rights for two reasons: First, he argued that intellectual property rights stifled the free spread of ideas and damaged the public interest.<sup>44</sup> Second, he argued that such rights were in reality statutory monopolies that infringed upon the rights of others to the ownership of their own bodies:

Our position that an author has an exclusive natural right of property in his manuscript, was meant to be understood only in the same sense that a mechanic has an exclusive natural right of property in the results of his labour. The mental process by which he contrived those results are not, and cannot properly be rendered, exclusive property; since the right of a free exercise of our thinking faculties is given by nature to all mankind, and the mere fact that a given mode of doing

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43. W. LEGGETT, *supra* note 2, at 397-98. Interestingly, Leggett and Spooner not only agreed on the abolition of slavery, but also agreed that, if intellectual property rights are indeed natural rights, then they should not be limited in duration. According to Lessett,

An author either has a natural and just right of property in his production, or he has not. If he has, it is one not to be bounded by space, or limited in duration, but, like that of the Indian to the bow and arrow he has shaped from the sapling and reeds of the unappropriated wilderness, his own exclusively and forever.

*Id.* at 398.

44. If the principle of copyright were wholly done away, the business of authorship, we are inclined to think, would readily accommodate itself to the change of circumstances, and would be more extensively pursued, and with more advantage to all concerned than is the case at present.

*Id.* at 394.

a thing has been thought of by one, does not prevent the same ideas presenting themselves to the mind of another and should not prevent him from a perfect liberty of acting upon them.<sup>45</sup>

Leggett's argument, while containing strong consequentialist elements, rests on the intimate relationship between liberty and property:

The rights of corporeal property may be asserted, without the possibility of infringing any other individual's rights. Those of incorporeal property may obviously give rise to conflicting claims, all equally well founded. . . . [I]f you assert an exclusive right to a particular idea, you cannot be sure that the very same idea did not at the same moment enter some other mind.<sup>46</sup>

Israel Kirzner's attempt to substitute "ownership-by-creation" for "ownership-by-just-acquisition-from-nature" encounters difficulty because it leaves us with a mere assumption, that "a man deserves what he has produced," as a justification for property. However, entrepreneurial profits can be justified in other ways consistent with the theory of ownership-by-just-acquisition.<sup>47</sup> "Profits" are justified if they arise by means of Nozickian "justice-preserving transformations."<sup>48</sup> A rearrangement of property titles that emerged through a series of voluntary transfers, each of which was just, and which began on a foundation of just property titles, is itself just. If in the process profits or losses are generated, then these are just as well. The Kirznerian substitute, in contrast, suffers from a lack of grounding. "Because we produced it" is an inadequate answer to the question of why we deserve what we have produced.

These authors do not effectively deal with the important problem of simultaneous invention or discovery, which is often raised as an objection to positions such as those taken by Spooner and Rand. According to Rand:

As an objection to the patent laws, some people cite the fact that two inventors may work independently for years on the

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45. *Id.* at 399.

46. *Id.* at 399-400.

47. See Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). The arrangements of property that result from transference of justly acquired property titles are themselves just, and if some arrangements mean profits for some and losses for others, the justice of the profits or losses is ancillary to the justice of the resulting arrangement of property titles.

48. R. Nozick, *supra* note 37, at 151.

same invention, but one will beat the other to the patent office by an hour or a day and will acquire an exclusive monopoly, while the loser's work will be totally wasted. . . . Since the issue is one of commercial rights, the loser in a case of that kind has to accept the fact that in seeking to trade with others he must face the possibility of a competitor winning the race, which is true of all types of competition.<sup>49</sup>

This idea does not comport well with her earlier claim that intellectual property rights are natural rights that are merely recognized—not granted—by government; in this case a full monopoly is awarded by government to one inventor, while another with a claim equally valid in every respect except for a ten minute lead time at the patent office is denied any right to exploit the invention.

Spooner offers a very different response to the problem:

[T]he fact that two men produce the same invention, is a very good reason why the invention should belong to both; but it is no reason at all why both should be deprived of it.

If two men produce the same invention, each has an equal right to it; because each has an equal right to the fruits of his labor. Neither can deny the right of the other, without denying his own.<sup>50</sup>

What if, however, one of the inventors gives this right to the rest of mankind? As Leggett argued, in the case of authorship,

Two authors, without concert or intercommunion, may describe the same incidents, in language so nearly identical that the two books, for all purposes of sale, shall be the same. Yet one writer may make a free gift of his production to the public, may throw it open in common; and then what becomes of the other's right of property?<sup>51</sup>

The same argument can be extended, of course, to inventions.

Liberty and intellectual property seem to be at odds, for while property in tangible objects limits actions only with respect to particular goods, property in ideal objects restricts an entire range of actions unlimited by place or time, involving legitimately owned property (VCRs, tape recorders, typewriters, the human voice, and more) by all but those privileged to receive monopoly grants from the state. To those who might

49. Rand, *supra* note 29, at 133.

50. Spooner, *supra* note 2, at 68; see also R. NOZICK, *supra* note 37, at 182.

51. W. LEGGETT, *supra* note 43, at 402.

argue that any form of property limits liberty in some way, Jan Narveson responds:

This is to talk as though the 'restrictions' involved in ownership were nothing but that. But that's absurd! The essence of my having an Apple Macintosh is that I *have* one, at my disposal when and as I wish, which latter of course requires that you not be able simply to use it any time you like; it's *not* that you can't have one unless I say so.<sup>52</sup>

My ownership claim over my computer restricts your access to that computer, but it is not a blanket restriction on your liberty to acquire a similar computer, or an abacus, or to count on your fingers or use pencil and paper. In contrast, to claim a property right over a process is to claim a blanket right to control the actions of others. For example, if a property right to the use of the abacus were to be granted to someone, it would mean precisely that others could not make an abacus unless they had the permission of the owner of that right. It would be a restriction on the liberty of everyone who wanted to make an abacus with their own labor out of wood that they legitimately owned. This is a restriction on action qualitatively different from the restriction implied in my ownership of a particular abacus.

The previous paragraph illustrates that intellectual property rights are not equivalent to other property rights in "restricting liberty." Property rights in tangible objects do not restrict liberty at all—they simply restrain action. Intellectual property rights, on the other hand, do restrict liberty.

Arguments from self-ownership, including Spooner's (but perhaps not Rand's), hinge upon the idea of liberty. As I argued above, there is no reason that a number of different arguments might not be marshalled in favor of property. Locke's argument for labor as the foundation of property has three principal pillars: (1) Having established the right to property in oneself, how can we determine when something has become "so his, [that is], a part of him, that another can no longer have any right to it?"<sup>53</sup> The annexation of labor is the relevant point at which a thing becomes owned and therefore assimilated to

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52. J. NARVESON, *THE LIBERTARIAN IDEA* 77 (1988). For a liberty-based argument for property by Narveson, see *id.* at 62-93. But see Kelly, *Life, Liberty and Property*, in *HUMAN RIGHTS* 108-18 (1984).

53. J. LOCKE, *supra* note 42, at 305.

one's body, the violation of which constitutes an infringement of liberty. (2)

[God] gave [the earth] to the Industrious and Rational, (and Labour was to be his Title to it;) not to the Fancy or Covetousness of the Quarrelsome and Contentious. He that had as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to . . . .<sup>54</sup>

(3) "'tis Labour indeed that puts the difference of value on everything. . . . [T]he improvement of labour makes the far greater part of the value." Indeed, "in most of them 99/100 are wholly to be put on the account of labor."<sup>55</sup>

These three arguments all lend support, each in a different way, to private property rights in land—Locke's primary interest in the chapter on property. They diverge when it comes to ideal objects, however. Although the second and third arguments lend support to intellectual property rights claims, the first emphatically does not. For Locke, self-ownership serves several important functions. First, it is the foundation of liberty; indeed, it is synonymous with liberty. Second, it allows Locke to respond effectively to Filmer's criticism of the consent theories of property set forth by Grotius and Pufendorf. If appropriation of common property rests on unanimous consent, Filmer knows of at least one person who would refuse his consent, thus knocking the struts out from under the entire edifice. Locke seeks to show "how Men might come to have a property in several parts of that which God gave to Mankind in common, and that without any express Compact of all the Commoners,"<sup>56</sup> that is, in a way that will avoid Filmer's otherwise fatal objection. By beginning with one tangible thing that is so clearly one's own that no one else can claim it—one's own body—Locke can show how property rights can legitimately emerge without requiring universal consent, thus sidestepping Filmer's objection.<sup>57</sup>

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54. *Id.* at 333.

55. *Id.* at 338.

56. *Id.* at 327.

57. Though the Earth and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his.

Locke sees this right of self-ownership as necessary for liberty. He explicitly rules out “voluntary slavery” (or absolutism along Hobbesian lines) and takes care to argue that our self-ownership is inalienable.<sup>58</sup> Indeed, the preface of *Two Treatises*, in which he states that he hopes that his words “are sufficient to establish the Throne of our Great Restorer, Our present King William; to make good his Title, in the Consent of the People, which being the only one of all lawful Governments, he has more fully and clearly than any Prince in Christendom,”<sup>59</sup> indicates that the arguments are intended to overthrow Stuart despotism and usher in an era of liberty. (Remarkably, one of the principal popular complaints against the Stuarts was their patent policy.)<sup>60</sup>

Ownership in ourselves is the foundation for ownership of alienable objects because they become assimilated to our bodies.<sup>61</sup> At a highly strategic point in his argument, Locke raises the following problem:

He that is nourished by the Acorns he pickt up under an Oak, or the Apples he gathered from the Trees in the Wood, has certainly appropriated them to himself. No Body can deny but the nourishment is his. I ask then, When did they begin to be his? When he digested? Or when he eat? Or when he boiled? Or when he brought them home? Or when he pickt them up?<sup>62</sup>

Clearly, to force a man to disgorge his meal after he has eaten it would be to infringe his rights to his own body. But at what point does it become so intimately related to him, “so his, [that is], a part of him, that another can no longer have any right to it,”<sup>63</sup> that to take it from him would be an injustice? Locke settles on the transformation of the object through labor as the demarcation point: “And ‘tis plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common. That added something to them more than Nature, the common Mother of all, had done; and so

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*Id.* at 328.

58. *Id.* at 325.

59. *Id.* at 171.

60. See C. MACLEOD, *INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660-1800* (1988).

61. See Wheeler, *Natural Property Rights as Body Rights*, 14 *NOUS* 171 (1980).

62. J. LOCKE, *supra* note 42, at 329-30.

63. *Id.* at 328.

they became his private right."<sup>64</sup>

If the hinge to a Lockean labor theory of property, then, is ownership in ourselves (as I believe it is), the fact that his two additional supplementary arguments point toward a form of "property" that would infringe on our ownership in ourselves (as copyrights and patents do) indicates that they should be detached from the argument from self-ownership as contradictory to it. If one wished to insist on the justice of intellectual property claims, ownership rights in ourselves would have to be rejected as a foundation for property and independent arguments offered for rewarding moral desert based on labor. This is a difficult task, and one that has not been adequately undertaken, for reasons that Hume, Kant, and others have pointed out: desert has no principle, that is, no readily available and intersubjectively ascertainable measure.<sup>65</sup> Such an inherently subjective standard provides a poor foundation for the abstract and general rules that guide conduct in a great society.<sup>66</sup> In a great society, not all labor is rewarded;<sup>67</sup> and not all of the rewards to labor are in the form of property rights.<sup>68</sup>

Our ownership rights in ourselves are based on our natural freedom, and are indeed synonymous with it; they cannot rest

64. *Id.* at 330.

65. As David Hume notes,

'Twere better, no doubt, that every one were possess'd of what is most suitable to him, and proper for his use: But besides, that this relation of fitness may be common to several at once, 'tis liable to so many controversies and men are so partial and passionate in judging of these controversies, that such a loose and uncertain rule wou'd be absolutely incompatible with the peace of human society.

D. HUME, *A TREATISE OF HUMAN NATURE* 502 (P. Nidditch ed. 1978); see also F. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 73-75 (1989).

66. Frank Knight has characterized the patent system as "an exceedingly crude way of rewarding invention," for

as the thing works out, it is undoubtedly a very rare and exceptional case where the really deserving inventor gets anything like a fair reward. If any one gains, it is some purchaser of the invention or at best an inventor who adds a detail or finishing touch that makes an idea practicable where the real work of pioneering and exploration has been done by others.

F. KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* 372 (1921).

67. Indeed, often the greatest rewards go to those who have—in the usual sense of the word—labored the least. We may owe more to the laziest among us: to the person who was too lazy to carry loads by hand and came upon the idea of using a wheelbarrow, for example. Attempts to reduce such differentials in productivity to a substrata of undifferentiated labor are inherently doomed, as the failed attempt of Marxist systems indicates.

68. The reward to labor for inventiveness in marketing, for example, is greater sales or market share, not property rights in marketing techniques or (least plausibly) in market share.

on labor-based moral desert, as we are not the products of our own labor. But that is the subject of the next section of this Article.

### III. PERSONALITY AND INTELLECTUAL PROPERTY RIGHTS

The development of personality has been linked to property rights by a number of pro-property writers, notably the German classical liberal Wilhelm von Humboldt. In his seminal work, *The Limits of State Action*, von Humboldt declared that “[t]he true end of Man . . . is the highest and most harmonious development of his powers to a complete and consistent whole.”<sup>69</sup> Further, he wrote:

[R]eason cannot desire for man any other condition than that in which each individual not only enjoys the most absolute freedom of developing himself by his own energies, in his perfect individuality, but in which each external nature itself is left unfashioned by any human agency, but only receives the impress given to it by each individual by himself and of his own free will, to the measure of his wants and instincts, and restricted only by the limits of his powers and his rights.<sup>70</sup>

“Every citizen,” writes von Humboldt, “must be in a position to act without hindrance and just as he pleases, so long as he does not transgress the law . . . . If he is deprived of this liberty, then his right is violated, and the cultivation of his faculties—the development of his individuality—suffers.”<sup>71</sup>

Respect for property is intimately related to this self development. “[T]he idea of property grows only in company with the idea of freedom, and it is to the sense of property that we owe the most vigorous activity.”<sup>72</sup> Provision of security from external force is the proper end of government: “I call the citizens of a State secure, when, living together in the full enjoyment of their due rights of person and property, they are out of the reach of any external disturbance from the encroachments of others . . . .”<sup>73</sup>

This line of argument—deriving property from the require-

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69. W. VON HUMBOLDT, *THE LIMITS OF STATE ACTION* 16 (J. Coulthard trans., J.W. Burrow ed. 1969).

70. *Id.* at 20-21.

71. *Id.* at 116.

72. *Id.* at 39.

73. *Id.* at 83.

ments of personal development—seems in some ways a restatement of Locke's basic argument,<sup>74</sup> but with a different twist. Rather than emphasize the satisfaction of man's material wants and, through that, fulfillment of God's injunction to man in the Garden of Eden to prosper and multiply, von Humboldt emphasizes the development of human potential.<sup>75</sup> The key to both the Lockean and the Humboltean arguments is ownership in ourselves, with state power severely constrained and limited to the protection of liberty. As J.W. Burrow notes, "[Humboldt's] view of the State's functions may not differ in practice from a natural rights theory of the traditional Lockean kind."<sup>76</sup>

In practice, the Lockean and von Humboltean liberty-based arguments for property are fundamentally the same, although the emphasis differs. At base, each is intimately concerned with freedom. Indeed, von Humboldt's argument against the validity of testamentary dispositions that go beyond mere transference of property titles to one's heirs shows the primacy of freedom in his theory:

[A]s long as he lives, man is free to dispose of his things as he pleases, to alienate them in part or altogether—their substance, use, or possession; . . . But he is in no way entitled to define, in any way binding on others, what shall be done with his property after his decease, or to determine how its future possessor is to act. . . . [This] restricts that freedom which is essential to human development, and so runs counter to every principle we have put forward.<sup>77</sup>

This argument from personality offers little support for patents and copyrights, and, like other arguments from ownership rights in ourselves, would be more likely to undercut claims for intellectual property rights.

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74. See *supra* notes 53-67 and accompanying text.

75. As the English Leveller leader Richard Overton similarly argued,

To every Individuall in nature, is given an individuall property by nature, not to be invaded or usurped by any: for every one as he is himselfe, so he hath a selfe propriety, else could he not be himselfe, and on this no second may presume to deprive any of, without manifest violation and affront to the very principles of nature, and of the Rules of equity and justice between man and man; mine and thine cannot be, except this be: No man hath power over my rights and liberties, and I over no mans; I may be but an Individuall, enjoy my selfe and my selfe propriety, and may write my selfe no more then my selfe, or presume any further . . . .

Overton, *An Arrow Against All Tyrants*, in *THE LEVELLERS IN THE ENGLISH REVOLUTION* 68 (G.E. Aylmer ed. 1975).

76. Burrow, *Editor's Introduction to W. VON HUMBOLDT*, *supra* note 69, at xxxix.

77. W. VON HUMBOLDT, *supra* note 69, at 96-97.

A superficially similar, but in reality very different argument based on personality, is offered by Hegel in his *Philosophy of Right*.<sup>78</sup> Unlike von Humboldt's appeal to the development of personality, the Hegelian argument sees property not only as a necessary condition for this development, but as the manifestation of this development itself. In the *Phenomenology of Spirit*, Hegel emphasized that it is through work that the spirit comes to know itself.<sup>79</sup> In the *Philosophy of Right*, a treatise on law, property fills the role of work. Notably, the discussion of property culminates in patents and copyrights. For Hegel, personality forms the foundation of any system of rights: "Personality essentially involves the capacity for rights and constitutes the concept and the basis (itself abstract) of the system of abstract and therefore formal right. Hence the imperative of right is: 'Be a person and respect others as persons.'" <sup>80</sup>

Personality must be translated from mere potentiality into actuality, or, in Hegelian terms, from Concept (*Begriff*) to Idea (*Idee*).

A person must translate his freedom into an external sphere in order to exist as Idea. Personality is the first, still wholly abstract, determination of the absolute and infinite will, and therefore this sphere distinct from the person, the sphere capable of embodying his freedom, is likewise determined as what is immediately different and separable from him.<sup>81</sup>

Hegel specifically eschews utilitarian justifications for property, for "[i]f emphasis is placed on my needs, then the possession of property appears as a means to their satisfaction, but the true position is that, from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive end."<sup>82</sup>

The metaphysical grounding of this theory of private property is straightforward: "Since my will, as the will of a person,

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78. See G. HEGEL, *PHILOSOPHY OF RIGHT* (T. Knox trans. 1952).

79. See G. HEGEL, *PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans. 1977).

80. G. HEGEL, *supra* note 78, at 37. Knox points to a similarity in the treatment of *Bildung* (loosely translatable as "education" or "spiritual development") in both von Humboldt and Hegel. *See id.* at 315 n.58. The difference is that whereas von Humboldt saw the role of the state in the process of *Bildung* as "negative," that is, protecting citizens from violence but otherwise keeping out of the way, Hegel sees a positive role for the state in this process. *See id.*

81. *Id.* at 40.

82. *Id.* at 42.

and so as a single will, becomes objective to me in property, property acquires the character of private property . . . .”<sup>83</sup> Personality does not simply require external objects for its development. Its development is its objectification through externalization of its will.

Occupancy, not labor, is the act by which external things become property: “The principle that a thing belongs to the person who happens to be the first in time to take it into his possession is immediately self-explanatory and superfluous, because a second person cannot take into his possession what is already the property of another.”<sup>84</sup> This occupancy, or taking possession, can take three forms: (1) by directly grasping it physically, (2) by forming it, and (3) by merely marking it as ours.<sup>85</sup> It is the second of these forms of possession that is most interesting for our purposes. As Hegel remarks, “When I impose a form on something, the thing’s determinate character as mine acquires an independent externality and ceases to be restricted to my presence here and now and to the direct presence of my awareness and will.”<sup>86</sup>

Unlike Locke, Hegel does not see man as naturally free, and therefore as having natural, or pre-historic ownership rights in himself. It is only through the historical process of objectification and hence self-confrontation that one comes to be free: “It is only through the development of his own body and mind, essentially through his self-consciousness’s apprehension of itself as free, that he takes possession of himself and becomes his own property and no one else’s.”<sup>87</sup>

83. *Id.*

84. *Id.* at 45. Further, “[s]ince property is the *embodiment* of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite.” *Id.* (emphasis in original).

85. *Id.* at 46.

86. *Id.* at 47. This is the “mode of taking possession most in conformity with the Idea to this extent, that it implies a union of subject and object . . . .” *Id.*

87. *Id.* This process, as Hegel remarks in his notes, is the same as the dialectic of lord and bondsman described in the *Phenomenology of Spirit*. Remarkably, self-ownership emerges only at the end of a historical process of self-confrontation through possession of and transformation of the external world. The anti-liberal character of Hegel’s approach is made most clear in his identification of the “Idea” of freedom (its concretion and synthesis with the content of its concept) with the state:

But that objective mind, the content of the right, should no longer be apprehended in its subjective concept alone, and consequently that man’s absolute unfitness for slavery should no longer be apprehended as a mere ‘ought to be’, is something which does not come home to our minds until we recognize that the Idea of freedom is genuinely actual only as the state.

*Id.* at 48.

When it comes to intellectual property, Hegel does not go nearly as far as his epigoni, such as Gierke and Kohler. Like Kant, he offers great protection to literary works, but very little to the plastic arts. Kant argued for the protection of literary works in his essay, "On the Injustice of the Pirating of Books."<sup>88</sup> A brief digression on Kant's theory of copyright is appropriate here, after which we shall return to Hegel's treatment, and to its reformulation and extraordinary extension in more recent years.

In another of Kant's essays, *What is a book?*, he identified the equivocal use of the term "book" as the source of the copyright dispute.

The basic cause of an appearance of legality in something that is nevertheless, at the first inspection, such an injustice—as book piracy is—lies in this: that the book is, on the one hand, a corporeal product of art (*opus mechanicum*), which can be copied (by him, who finds himself in legal possession of an exemplar of this product)—consequently has a real right therein; on the other hand, however, a book is also merely an address of the publisher to the public, which this publisher, without having the authorization thereto of the author, may not publicly repeat (*praestatio operae*)—a personal right; and now the error consists in this, that the two are confused with each other.<sup>89</sup>

Thus, a "book" is both the corporeal thing I hold when I read ("my book"), and also the address by one person to another (the "author's book"). Kant argued that a book or other literary product is not simply "a kind of merchandise," but an "exercise of his [the author's] powers (*opera*), which he can grant to others (*concedere*), but can never alienate."<sup>90</sup> A copier, or infringer, offers to the public the thoughts of another, the author. That is, he speaks in the author's name, which he can properly do only with permission. The author has given permission, however, only to his authorized publisher, who is wronged when a book edition is pirated.

The extension of such a personal right beyond a real right is shown in the case of the death of an author prior to publication of his work:

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88. See Kant, *Von der Unrechtmässigkeit des Büchermachdrucks*, in 2 COPYRIGHTS AND PATENTS FOR INVENTIONS 580 (R. MacFie ed. 1883).

89. Kant, *Was ist ein Buch?*, in DIE METAPHYSIK DIE SITTEN 405 (T. Palmer trans., W. Weischedel ed. 1977).

90. Kant, *supra* note 88, at 582.

That the publisher does not conduct his business in his own name, but in that of another, is confirmed by certain obligations which are universally acknowledged. Were the author to die after he had confided his [manuscript] to the publisher for printing and the publisher had agreed to the conditions, still the publisher is not free. In default of heirs, the public has a right to compel him to publish it, or to give over the [manuscript] to another who may offer himself as publisher. For it had been a business which the author, through him, wished to carry on with the public, and for which he offered himself as agent. [H]e [the publisher] possesses the [manuscript] only on condition that he shall use it with the public in the interest of the author. If the publisher should mutilate or falsify the work after the death of the author, or if he should fail in producing a number of copies equal to the demand, then the public would have the right to require him to enlarge the edition and to exact greater accuracy, and, if he refused to meet these demands, to go elsewhere to get them complied with.<sup>91</sup>

Importantly, Kant limits these rights against copiers or mutilators to literary products and denies them to the plastic and representational arts.<sup>92</sup> Kant wrote:

Works of art, as things, can, on the contrary, from a copy of them which has been lawfully procured, be imitated, modelled, and the copies openly sold, without the consent of the creator of their original, or of those whom he has employed to carry out his ideas. A drawing which some one has designed, or through another caused to be copied in copper or stone, metal or plaster of Paris, can by those who buy the production be printed or cast, and so openly made traffic of. So with all which any one executes with his own things and in his own name, the consent of another is not necessary. For it is a work—an *opus*, not an *opera alterius*—which each who possesses, without even knowing the name of the artist, can dispose of, consequently can imitate, and in his own name expose for sale as his own. But the writing of another is the speech of a person—*opera*—and he who publishes it can only speak to the public in the name of the author. He himself has nothing further to say than that the author, through him, makes the following speech to the public.<sup>93</sup>

Thus, the key to Kantian copyright is speech; when no speech is present, no copyright accrues to the creator. Accordingly, Kant claimed consistently that translations or derivative works can-

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91. *Id.* at 584.

92. This may reflect the fact that Kant was a writer and not a sculptor.

93. *Id.* at 585.

not be restricted by copyright: "He [an editor] represents himself, not as that author as if he were speaking through him, but as another. Translation into another language is also not infringement, for it is not the very speech of the author although the thoughts may be the same."<sup>94</sup>

Like Kant, Hegel argues that artistic reproductions are "so peculiarly the property of the individual artist that a copy of a work of art is essentially a product of the copyist's own mental and technical ability," while the reproduction of literary works or of inventions "is of a mechanical kind."<sup>95</sup> Hegel declared further that "this power to reproduce has a special character, viz. it is that in virtue of which the thing is not merely a possession but a capital asset."<sup>96</sup> The right of reproduction of inventions or literary works derives from their nature as capital assets, and not mere possessions. They yield an income stream, the diminution of which substantially diminishes the value of the capital.

The theories of personal rights and of personality set forth by Kant and Hegel have been extended in the last hundred years or so to embrace a range of rights to artistic productions far wider than they envisioned. Indeed, these alleged rights are not, like Anglo-American copyrights, fully alienable, but are, as the French 1957 Law on Artistic and Literary Property<sup>97</sup> declares, "perpetual, inalienable, and imprescriptible."<sup>98</sup> Substantial efforts have been made to import this notion into American law, much of them occasioned by the introduction of the technique of "colorizing" films originally produced in black-and-white.<sup>99</sup>

As developed under French law, four such personal rights are retained by artists: the right of disclosure, the right of attribution, the right of integrity, and the right of retraction.<sup>100</sup>

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94. *Id.*

95. G. HEGEL, *supra* note 78, at 54.

96. *Id.* at 55.

97. C. civ. art. 543, Code pénal [C.pén.] arts. 425-429 ("Law of March 11, 1957 on literary and artistic property"); see also Loi du 11 mars 1957 sur la propriété littéraire et artistique, 1957 Journal Officiel de la République Française [J.O.] 2723, 1957 Recueil Dalloz Législation [D.L.] 102 (for amendments and cases interpreting the statute).

98. *Id.*

99. For an overview of the proposed legislation, as well as a discussion of the pros and cons of these proposals, see Donnelly, *Artist's Rights and Copyrights*, 1 CONG. QUARTERLY'S RES. REP. 245 (1988); see also Wash. Post, May 22, 1988, at F1, col. 1.

100. See Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 6-25 (1988).

Rather than offering a survey of some of the more *outré* results of this law, I will present instead a brief statement of its theoretical grounding.

Such rights entered the law (in France, at least, the place where they have received the greatest legal recognition) in court decisions governing the division of artistic property. In a 1902 case before the highest French court, the Court of Cassation, the court had to consider whether the ex-wife of an artist had the right to share in the commercial exploits of her husband's work.<sup>101</sup> The court ruled that she had a right to a share of the economic proceeds, but that this decision would not "detract from the right of the author, inherent in his personality, of later modifying his creation, or even suppressing it."<sup>102</sup>

Josef Kohler, author of an influential treatise on law, argued: "Personality must be permitted to be active, that is to say, to bring its will to bear and reveal its significance to the world; for culture can thrive only if persons are able to express themselves, and are in a position to place all their inherent capacities at the command of their will."<sup>103</sup> So far, this sounds familiar. But, Kohler argued further:

[T]he writer can not only demand that no strange work be presented as his, but that his own work not be presented in a changed form. The author can make this demand even when he has given up his copyright. This demand is not so much an exercise of dominion over my own work, as it is of dominion over my being, over my personality which thus gives me the right to demand that no one shall share in my personality and have me say things which I have not said.<sup>104</sup>

Damage to a work of art, even after ownership rights to it have been transferred to another party, constitutes damage to the personality of the creator; the work of art is an extension of the personality of the creator. Thus, according to Kohler, issuing an unauthorized, or *bowdlerized*, edition of an author's work, hanging red ribbons on a sculpture, or tearing down a piece of sculpture even so offensively ugly as Richard Serra's "Tilted

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101. *Cinquin v. Lecocq*, Req. Sirey, 1900.2.121, note Saleilles (1902) (cited in S. STROMHOLM, *I LE DROIT MORAL DE L'AUTEUR* 285 (1966)).

102. S. STROMHOLM, *supra* note 101, at 285.

103. J. KOHLER, *PHILOSOPHY OF LAW* 80 (G. Albrecht trans. 1914).

104. J. KOHLER, *URHEBERRECHT AN SCHRIFTWERKEN UND VERLAGSRECHT* 15 (1907) (quoted in Damich, *supra* note 100, at 29); see also Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 402 (1951).

Arc" (as was recently done in New York), all constitute damage to the personality of the creator.

In fact, the relationship between creator and creation is so intimate that when the personality of the former changes, so too can the treatment of the latter. Under article 32 of the French 1957 Law, for example: "Notwithstanding the transfer of his right of exploitation, the author, even after the publication of his work, enjoys a right of modification or withdrawal vis-a-vis his transferee."<sup>105</sup>

The concept of personal rights has also been extended to encompass the so-called *droit de suite*, or inalienable resale royalty rights. According to this idea, a part of French law<sup>106</sup> and relatively recently adopted into law by several American states, a percentage of the resale profits beyond a certain level must be given to the original creator.

### *Objections to Personality-Based Intellectual Property Theories*

At their foundation, personality-based theories of intellectual property suffer from a confusion about the ontological status of ideal objects and their relationship to their creators. If, as Hegel insists, "[a] person must translate his freedom into an external sphere in order to exist as Idea,"<sup>107</sup> this does not mean that this "translation" is constitutive of the person himself, nor that the artifacts resulting from this translation become inextricably bound up with the person. This is especially obvious in the case of such artifacts as a puff of smoke, a tracing in the sand, or a knot in a piece of rope. The smoke may dissipate; the tracing may be washed away by the tide; the knot may come undone; but in none of these cases is the personality of the creator diminished.

Most claims on behalf of personality-based rights are confined to "artistic" creations. Thus, Congressman Edward J. Markey (D-MA) argues that: "A work of art is not a utilitarian object, like a toaster; it is a creative work, like a song, a poem,

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105. C. civ. art. 543, Code pénal [C.pén.] arts. 425-429, art. 34. Damich, however, argues that, due to difficulties presented by practical application and conflict with other rights, the right of retraction is "a 'dead letter' even in French law." Damich, *supra* note 100, at 25.

106. C. civ. art. 543, Code pénal [C.pén.] arts. 425-429 ("The authors of graphic or plastic works of art have, notwithstanding any transfer of the original work, an inalienable right to participate in the product of all sales of this work made at auction or through the intermediation of dealers . . .").

107. G. HEGEL, *supra* note 78, at 40.

or a novel. We should not pretend that all connection between the artist and the creation is severed the first time the work is sold."<sup>108</sup>

Representative Markey, like the philosophers who have influenced him, has misunderstood the ontology of the work of art. The connection between "the artist and the creation" is indeed severed, not the first time the work is sold, but the moment that it is finished.<sup>109</sup>

Referents of discourse can enjoy various kinds of dependent being. They may, for example, be dependent upon another thing, as in the brightness of a surface being "dependent" on the surface, or they may be dependent in another way, as in the way that a hand is dependent for its being on the body to which it is attached, although the hand and the body may become separated, unlike the surface and the brightness.<sup>110</sup>

Two senses of dependence are confused by advocates of personality-based intellectual property theories: the dependence of the art work on a human agent or agents for its *creation*, and the dependence of that same work of art on a human agent or agents for its continued existence. While a work of art obviously depends on its creator(s) for its creation, and is therefore a "translation of his freedom into an external sphere," once it is created it enjoys its own objectivity. The sign that an art work exists as an objectivity is that we can always return to it and find the same work. We do not experience a different work every time we see or read Shakespeare's *Othello*.<sup>111</sup>

Once created, works of art are independent of their creators, as should be evident by the fact that works of art do not "die" when their creators do. While no longer dependent on their creators, they nevertheless remain dependent on some human

108. Markey, *Let Artists Have a Fair Share of Their Profits*, N.Y. Times, Dec. 20, 1987, § 3, at 2, col. 2.

109. This of course raises the question of when the work is finished. Who would know when it was finished? Would anyone else undertake to finish Schubert's "Unfinished Symphony"? The artist may indeed be in the privileged position of determining when a work is finished, but that does not privilege the subjective experience of the artist in the constitution of the art work as such.

110. The strategic differentiation between various kinds of dependence is elaborated in Husserl, *Investigation III: On the Theory of Wholes and Parts*, in 2 LOGICAL INVESTIGATIONS 436 (J. Findlay trans. 1970); see also PARTS AND MOMENTS: STUDIES IN LOGIC AND FORMAL ONTOLOGY (B. Smith ed. 1982).

111. I used the possessive—"Shakespeare's"—in describing this play to highlight the relationship of dependence that the work does have on its author. Shakespeare has been dead for centuries, while *Othello* lives on. One might say, however, that Shakespeare's mind remains active or still "lives" in *Othello*.

agency for their continued existence. The agents they depend on, however, are not artists, but audiences.<sup>112</sup>

Romantic notions of creativity, which stress subjective experience and its expression, emphasize the sublime experience of the artist. The reproduction of this experience is what constitutes the artistic attitude. The artist recreates her own experience in the audience by means of artistic works or performances. But the concrete experience of the artist cannot be identical with the concrete experience of the audience—the readers, listeners, or viewers. In opposition to the romantic notions of art taken up in personality theories of intellectual property, with their emphasis on the subjective, Roman Ingarden argues that the identification of the work of art with its creator's subjective experiences would mean that "it would be impossible either to have a direct intercourse with the work or to know it."<sup>113</sup>

The reason is that everything that would be directly accessible to us—except for the perceived characters—would be only our ideas, thoughts, or, possibly, emotional states. No one would want to identify the concrete psychic contents experienced by us during the reading with the already long-gone experiences of the author. Thus, the work is either not directly comprehensible, or else it is identical with our experiences. Whatever the case, the attempt to identify the literary work with a manifold of the author's psychic experiences is quite absurd. The author's experiences cease to exist the moment the work created by him comes into existence.<sup>114</sup>

In addition, as Ingarden points out, we would have to ask how we could exclude from an author's experiences "a toothache he might have had in the course of writing," while simultaneously including in his work "the desires of a character . . . which the author himself certainly did not, and could not, experience."<sup>115</sup>

The fact that two of us can appreciate the "same" work, (say, for example, a sonata), although we each undergo different perceptual experiences (you are in the front of the hall, I am at

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112. Of course, an artist may also be her own audience, but we are here speaking of ideal roles; one and the same person may fulfill various roles. When the term "artist" is used, it will be understood that artist *qua* artist is meant, and similarly of other roles, such as "audience."

113. R. INGARDEN, *THE LITERARY WORK OF ART* 13-14 (1973).

114. *Id.*

115. *Id.* at 14.

the back, etc.), indicates that the work enjoys at least an intersubjective availability. We do not say that we went to two different performances, nor that we heard two different sonatas, simply because our perceptions (or impressions) were not entirely the same. The objectivity of Shakespeare's *Othello* consists in precisely this: that there is one *Othello* for all of us, rather than one *Othello* for each of us, or even one for each of our separate readings or viewings of the play.<sup>116</sup>

Each separate performance of *Othello* is a real event, and as such is governed by property rights (the rights of self-ownership of the actors, the property rights of the theater owners, etc.), while *Othello* itself is neither a real event nor a real object. While the work of art does indeed originate in a definite time, as Ingarden notes:

not everything which originates in a definite time must therefore be something real. . . . Every real object and every real event is, above all, something which exists or takes place *hic et nunc*. But . . . the categories of *here* and *now* cannot be applied to the musical work and its content. . . . What is it supposed to mean, for example, that Beethoven's sonata, *Opus 13*, is 'here'? Where is 'here'?"<sup>117</sup>

The sameness, intersubjectivity, and objectivity of the work are intimately related. Without a manifold of appearances—like presentations and interpretations—the work cannot appear to us as “the same”; without appearing to us as the same, it cannot be intersubjective; and without intersubjectivity, it cannot be objective. In the dialectic of same and other, we cannot have the former without the latter; we cannot have “same” without “other.” Thus, we cannot have the sameness of a work of art

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116. This is what accounts for the non-rivalrous nature of the consumption of works of art and other ideal objects; their enjoyment by one person need not diminish their enjoyment by another. This also shows the difference between the concretion of a work, like a performance, and the work itself. My enjoyment of a performance may diminish your ability to enjoy the same performance, perhaps because I block your view, but it does not exhaust or in any way diminish the work itself. It is for this reason that Thomas Jefferson denied any natural property right in ideal objects: “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.” Jefferson, *Letter to Isaac McPherson, Monticello, August 13, 1813*, in XIII THE WRITINGS OF THOMAS JEFFERSON 326-38 (A. Lipscomb ed. 1904).

117. R. INGARDEN, *ONTOLOGY OF THE WORK OF ART* 35-36 (1989).

without a manifold of otherness in which its sameness can appear as an immanent pole of unity.<sup>118</sup>

Thus, a work of art enjoys its peculiar kind of objectivity only through a multitude of presentations and interpretations that provide the manifold within which it can appear as the same, not only to one interpreter, but to many.<sup>119</sup> The special kind of objectivity enjoyed by art is called "heteronomy" by Roman Ingarden.<sup>120</sup> The art work is objective, but "other ruled."

This situation of being "other ruled" arises from the dependence of the art work not only on the creative activity of the artist but—even more—on the activity of its audience. In order to exist as an art work, an object must have an audience that can appreciate it, that is, an audience with the appropriate capacities.<sup>121</sup> An audience of the tone deaf would be incapable of

118. See R. SOKOLOWSKI, *HUSSERLIAN MEDITATIONS* 99 (1974) ("Every 'cultural object' which requires a performance to be actualized—a musical composition, a play, dance, or poem—appears through a manifold of interpretations. All of them present the object itself, and the object is the identity within the interpretations."); see also R. INGARDEN, *supra* note 117, at 36 ("[H]ow does a literary work appear during reading, and what is the immediate correlate of this reading? . . . [A] distinction should be drawn between the work and its concretions, which differ from it in various respects. These concretions are precisely what is constituted during the reading and what, in a manner of speaking, forms the mode of appearance of a work, the concrete form in which the work itself is apprehended."); cf. H. GADAMER, *TRUTH AND METHOD* 274 (1982) ("Interpretation is not an occasional additional act subsequent to understanding, but rather understanding is always an interpretation, and hence interpretation is the explicit form of understanding."). Rather than simply reproducing the experience of the artist, each member of the audience contributes a different interpretation—the way in which the work "speaks to us" and allows us to learn from it, rather than simply reproducing "in us" someone else's experience. This manifold of interpretations is what makes possible the special kind of intersubjectivity and objectivity that works of art enjoy. The manifold of interpretations provide the "other" that is the necessary condition for the appearance of the "same."

119. For the general approach to objectivity outlined here, see E. HUSSERL, *FORMAL AND TRANSCENDENTAL LOGIC* 232 (1978).

120. R. INGARDEN, *supra* note 113, at 340, 349; see also Simons, *The Formalization of Husserl's Theory of Wholes and Parts*, in *PARTS AND MOMENTS*, *supra* note 110, at 135-42 (for a discussion of the kinds of dependence and independence set forth by Ingarden). Note that, while I have earlier used the term "ideal object" to cover all of the subject matter of copyrights and patents, Ingarden would limit that term to scientific discoveries, mathematical theorems, and the like (that is, typically to the subject matter of patents), and would consider works of art in a different category, since they come into being during a definite period of time and are not, unlike what he terms ideal objects, atemporal.

121. See R. INGARDEN, *supra* note 113, at 340, 349; see also Barry Smith, *Practices of Art*, in *PRACTICAL KNOWLEDGE: OUTLINES OF A THEORY OF TRADITIONS AND SKILLS* 174 (J. Nyíri & Barry Smith ed. 1988) ("Art works are dependent, now, not only upon the activities of their creators, but also upon certain correlated activities of an appropriately receptive audience. A shell, a leaf, or a relic of some lost civilization, existing in a world lacking every tendency toward appreciative evaluation, would be simply a shell, a leaf, or a lump of stone."); cf. N. GOODMAN, *LANGUAGES OF ART* 20 (1976) ("The distant or colossal sculpture has also to be shaped very differently from what it depicts in order

appreciating certain kinds of music; a group of Kalahari bushmen would be unlikely to appreciate a play by Moliere; and an audience of modern Americans would probably not grasp the subtleties of Japanese "No" theater. A special competence is presupposed on the part of an audience for a work of art to be distinguished from a mere thing or event.

Thus, if special personal rights governing works of art are to be recognized anywhere, they should be in the audience, and not in the artist, for it is on the audience that the art work depends for its continued existence, and not on the artist. The concept of the *droit moral* for artists is completely misguided. It reveals a faulty appreciation of the relationship between artist, art work, and audience.<sup>122</sup>

If rights do exist to enjoy works unaltered from their original state, they inhere, as Kant noted, not in the artist (or author), but in the audience. A publisher who passed off as Shakespeare's *Hamlet* a work that was missing the soliloquy would be defrauding the audience; he would not be doing any harm to the personality of the late Mr. Shakespeare. If, however, the work were published as "Shakespeare's Hamlet, Minus Various Indecisive Parts," then the purchasers of the work would have no grounds for legal complaint.

Personality-based intellectual property rights attaching to manufacturing processes or algorithms lack any of the special ontological claims of personal rights for artists; the scientist may realize his freedom in his discoveries, the inventor in his inventions, but the personality of neither is harmed when their results are put to new uses.<sup>123</sup> These claims to property rights

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to be realistic, in order to 'look right.' And the ways of making it 'look right' are not reducible to fixed and universal rules; for how an object looks depends not only upon its orientation, distance, and lighting, but upon all we know of it and upon our training, habits, and concerns.").

122. As a practical matter, one also faces the problem of identifying just who the artist is in any collaborative work. Testifying on behalf of moral rights legislation, film director and producer George Lucas referred to film colorizers and others who alter art works as "barbarians." His colleague Stephen Spielberg insisted that "without the agreement and permission of the two artistic authors (the principal director and principal screen writer), no material alterations [should] be made in a film following its first, paid, public exhibition." See Palmer, *Artists Don't Deserve Special Rights*, Wall St. J., Mar. 8, 1988, at 34, col. 5 (quoting testimony that Spielberg and Lucas gave to Senate Subcommittee). But, by his own theory, is not Mr. Spielberg (not to mention Mr. Lucas) a barbarian? What of the art of the actors? Why should they submit to having their work distorted or left on the cutting room floor? And what of the lighting crew, etc.? Are not these other collaborators artists? Why should only directors and screen writers enjoy such moral rights?

123. Whether they are harmed in the economic sense, in losing revenue, is another

as necessary to the realization of freedom reduce, then, to the argument of Wilhelm von Humboldt, which, as noted above,<sup>124</sup> is another version of the principal argument of John Locke. And this liberty-based argument, in its primary implications, is hostile rather than friendly to intellectual property claims, for such claims represent liberty-restrictions on others in ways that tangible property rights do not.

As to the *droite de suite*, or inalienable resale royalty right, the economic consequences of this notion have been explored elsewhere.<sup>125</sup> It should suffice to point out that this resale royalty right benefits some established artists by awarding them unearned windfall profits, while others suffer by having their freedom to negotiate over the schedule of payments coercively abridged. The prospect of having to part with a share of the appreciation of a work is capitalized into the sale price, meaning that the money received at the point of sale by the artist will be less.<sup>126</sup> In addition, like inalienable personal rights over art works, such "rights" reduce the moral agency of artists by restricting their rights to make contracts with others. The terms of the contract are fixed by others, and the contracting parties are constrained from freely transferring their property by contract.

#### IV. THE BASIC STRUCTURE OF UTILITARIAN ARGUMENTS AND INTELLECTUAL PROPERTY RIGHTS

As noted earlier, utilitarian arguments of a certain class can cut for or against intellectual property rights claims. As dealt with in much of the economics literature, for example, the utility gains from increased incentives for innovation must be weighed against the utility losses incurred from monopolization of innovations and their diminished diffusion. Some have argued that the first part of the comparison may be either nega-

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matter; as I have noted elsewhere, however, purely utilitarian claims on behalf of intellectual property rights are shaky, at best. See Palmer, *supra* note 7.

124. See *supra* notes 69-77 and accompanying text.

125. See, e.g., Rottenberg, *The Remuneration of Artists*, in *FRONTIERS OF ECONOMICS* 47-51 (K. Arrow & S. Honkapohja eds. 1985); Bolch, Damon, & Hinshaw, *An Economic Analysis of the California Art Royalty Statute*, 10 *CONN. L. REV.* 689 (1978).

126. Those who prefer payment now to payment later, such as the many artists who sell their work "on the street," are harmed by such a requirement. As Ben W. Bolch remarks: "Many artists, 'starving' or not, want their money now, not tomorrow. Otherwise, they would 'invest' in the art by keeping it for themselves." Bolch, *There Is No Just Price For Art*, *N.Y. Times*, Nov. 28, 1987, at 23, col. 4.

tive or positive; patents or copyrights may actually decrease innovation, rather than increase it.<sup>127</sup>

Thus, the specific situation matters a great deal in such arguments. But this kind of utilitarian argument does not exhaust the range of possible utilitarian approaches. Here, I will simply contrast arguments of this sort, which I will call "X-maximization arguments" (with "X" standing in for utility, wealth, or some other welfare-related maximand), with another sort of broad utilitarian concern: justice-as-order.<sup>128</sup> The former seeks to arrange property rights in such a way that some quantity is maximized; the latter seeks to create an overarching order within which human beings can realize their various ends without suffering from uncertainty arising from scarce resources, social conflict, and violent predation.<sup>129</sup>

X-maximization arguments over intellectual property rights hinge on contingent matters of fact. The relevant facts may change; technology, social practices, and other factors cannot be held constant in the real world.<sup>130</sup> Scarcity plays a vital role within such approaches. Innovations and research are scarce in the sense that they "use up" resources, and the allocation of these resources involves opportunity costs, alternative uses of the resources which are foregone. The problem, then, is to allocate property rights—including intellectual property rights—in such a way that the greatest net "X" (utility, wealth, and so on) is produced at the lowest cost.

127. By diminishing pre-patent cooperation among researchers, for example, or through diminishing opportunities for playwrights to emulate William Shakespeare, who rewrote Thomas Kyd's now-forgotten play "The Spanish Tragedy" and gave us "Hamlet." See also Bittlingmayer, *Property Rights, Progress, and the Aircraft Patent Agreement*, 30 J.L. & ECON. 227 (1988).

128. See H. SIDGWICK, *THE METHODS OF ETHICS* 440 (1981) ("What Hume . . . means by Justice is rather what I should call Order . . .").

129. Aristotle seems to have used both arguments in his dispute with Plato over the community of possessions. In his *Politics* he argued: "What belongs in common to the most people is accorded the least care: they take thought for their own things above all, and less about things common, or only so much as falls to each individually." ARISTOTLE, *THE POLITICS* 57 (C. Lord trans. 1984). This corresponds, more or less, to justice-as-"X-maximization." He addresses justice-as-order later: "In general, to live together and be partners in any human matter is difficult, and particularly things of this sort [owning common property]. This is clear in partnerships of fellow travellers, most of whom are always quarreling as a result of friction with one another over everyday and small matters. Again, friction particularly arises with the servants we use most frequently for regular tasks." *Id.* at 60.

130. See, e.g., E. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE: COMMUNICATIONS AND CULTURAL TRANSFORMATIONS IN EARLY-MODERN EUROPE* (1979) (discussing the impact of the printing press on a variety of areas, including intellectual property).

The role of scarcity within the justice-as-order approach is equally important, but leads us in an entirely different direction. Rights to property are allocated precisely because the scarcity of resources means that, without legal demarcation and protection of rights, human beings would come into violent conflict over these resources.

This relationship between justice-as-order and property rights is what Hume is getting at when he argues that without property there is no justice:

[T]ho' I assert, that in the *state of nature*, or that imaginary state, which preceded society, there be neither justice nor injustice, yet I assert not, that it was allowable, in such a state, to violate the property of others. I only maintain, that there was no such thing as property; and consequently cou'd be no such thing as justice or injustice.<sup>131</sup>

Scarcity in X-maximization arguments is the relevant factor in deciding whether intellectual property rights should be recognized, and if so, what form they should take. Scarcity in justice-as-order arguments is the relevant factor in determining when rights can or should be granted to resources over which humans may come into violent conflict. Intellectual property, however, does not have the "static" scarcity that tangible property has, and therefore does not qualify as a *locus* of property rights within justice-as-order arguments.<sup>132</sup> Two of us can think the same thought, sing the same song, or use the same method of making fishhooks without coming into violent conflict over the thought, song, or method. Justice-as-order, then, is incompatible with intellectual property rights.<sup>133</sup>

## V. PIGGY-BACKING ON THE RIGHTS TO TANGIBLE PROPERTY

One final argument for intellectual property rights, or at least for copyright, deserves consideration before turning to the foundation of a property-rights system consistent with liberty. That is the argument that intellectual property rights can be justified as "piggy-back" rights, logical extensions of the

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131. D. HUME, *A TREATISE OF HUMAN NATURE* 501 (P. Nidditch rev. ed. 1978) (emphasis in original).

132. Such objects, however, must be produced. In this sense they do share the kind of scarcity relevant to the X-maximization arguments.

133. As I shall argue at the conclusion of this Article, justice-as-order is *consistent* with—indeed it is the genus for—the self-ownership, liberty-based argument for property that, as I have argued above, is *inconsistent* with patent and copyright.

right to own and control tangible objects. Thus, Murray Rothbard justifies what he incorrectly<sup>134</sup> calls "common-law copyright" as amounting to "the author or publisher selling all rights to his property except the right to resell it."<sup>135</sup>

Rothbard's argument implicitly rests on the distinction drawn by Kant between a "book" (or other object) as a material thing, and a "book" as the work that is instantiated in a material object but is capable of being instantiated in other such substrata *ad infinitum*.<sup>136</sup> He extends his argument beyond the realm of literature to include any artifact that incorporates or instantiates an ideal object, whether a mousetrap (its design or the process by which it was made), a map, or a dance step—which is always materially instantiated in some way, whether in a performance on some piece of property, or through a description in a book, film, or other device.

This would extend a copyright-type of protection to the subject matter of patents as well. Thus, argues Rothbard:

suppose that Brown builds a better mousetrap and sells it widely, but stamps each mousetrap 'copyright Mr. Brown.' What he is then doing is selling not the entire property right in each mousetrap, but the right to do anything with the mousetrap except to sell it or an identical copy to someone else. The right to sell the Brown mousetrap is retained in perpetuity by Brown.<sup>137</sup>

134. See Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983).

135. M. ROTHBARD, *THE ETHICS OF LIBERTY* 144 (1982) (Rothbard seems to have made a slip here; he does not mean the right to "resell" the property, but the right to copy it).

136. See Kant, *supra* note 88 and accompanying text.

137. M. ROTHBARD, *supra* note 135, at 123. Rothbard seems to have confused what is being made the subject of a property right. Clearly he cannot mean the right to *sell* the object, for then nothing that was copyrighted could be resold, and the market system would either grind to a halt or copyright would become a dead letter. He must mean the right to *reproduce*, rather than to resell. Note that the argument Rothbard presents in *The Ethics of Liberty* represents a shift from the argument presented in his earlier treatise on economics, M. ROTHBARD, *MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES* 654-55 (1970), in which he attacks patents as monopolies, but justifies copyrights as a form of implicit contractual agreement not to copy. Such an implicit agreement differs from a right *reserved* by the creator. "[T]he inventor could mark his machine *copyright*, and then anyone who buys the machine buys it *on the condition* that he will not reproduce and sell such a machine for profit. Any violation of this contract would constitute implicit theft . . ." *Id.* (emphasis original). Rothbard's more recent proposal at least avoids the most obvious problem with his earlier position: what right would the originator have against a copier who did not buy the item, but simply saw it, heard of it, or found it. There could be no agreement, implicit or explicit, on the part of such a copier, and hence no obligation to refrain from copying. The later "reserved right" position allows the right to be reserved regardless of who comes into possession

The fact that a property right can be conceived as a bundle of rights to a thing indicates that one right among the many may be retained by the original producer, in this case, the right to reproduce the item. Just as a piece of land may be sold, and certain rights retained (easements, building restrictions, etc.), so all the rights to a mousetrap could be sold except one, the right to copy it. This argument is not novel, and was in fact criticized by Kant and Hegel.<sup>138</sup> 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? Could the retention of the right to copy include the right to remember?

Suppose that I had memorized the book and then spoke the words aloud to another. Would I be violating a retained right to the tangible object?<sup>139</sup> What if I had heard another person recite the work and then wrote it down and published it? Would I be guilty of a violation of the creator's property rights

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of the object, although it might face difficulties in enforcing the claim against someone who, say, recorded an illegally broadcast song or movie.

138. Kant's remarks deserve repeating: "Those who regard the publication of a book as the exercise of the rights of property in respect of a single copy—it may have come to the possessor as a [manuscript] of the author, or as a work printed by some prior publisher—and who yet would, by the reservation of certain rights (whether as having their origin in the author or in the publisher in whose favour he has denuded himself of them), go on to restrict the exercise of property rights, maintaining the illegality of reproduction—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?" Kant, *supra* note 88, at 581. Hegel argues: "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." G. HEGEL, *supra* note 78, at 55.

139. It is important to remember that the retained right involved is a right to control a tangible object. No claim is made to a direct right to own the ideal object embedded in the tangible object. The control over this ideal object is an indirect consequence of a property right over a tangible object.

by publishing a work that I had heard another recite? What if I recorded a broadcast on my VCR? Does the broadcaster own my television set and reserve the right to determine its use in recording signals that come over the airwaves?<sup>140</sup> If the answer is yes, then advocates of a "piggy-back" copyright cannot base their argument simply on a retained right to tangible property, for this amounts to asserting a direct claim to the ideal object itself.<sup>141</sup>

Rothbard would have been far better off looking to the law of trade secrets rather than to the law of copyright as a foundation for retained-right, or quasi-contractual legal exclusivity in the results of a creator's efforts. Under the law of trade secrecy, "trade secrets are not given protection against all the world, but only against one who has learned the secret by improper means or by virtue of a confidential relation."<sup>142</sup> Thus, if a secret, such as a manufacturing process, a design, or the internal operation of a device, is revealed to others who are not bound

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140. If an advocate of "piggy-back rights" were to respond that the airwaves can and should be the objects of ownership, as some have argued, he would reveal a misunderstanding of the status of "the airwaves." One cannot own the broadcast spectrum, although one can have the right to use one's broadcasting or receiving equipment without interference from others. Thus, the first broadcaster over a frequency in a given area can have a legally recognized right to broadcast over a part of the electro-magnetic spectrum without interfering with another broadcaster. But if another broadcaster can send out a narrow beam signal within that spectrum that does not interfere with the first broadcaster's signal (and hence with his use of his tangible property), then the first should have no right to stop the second. As Ronald Coase argues, assigning direct property rights over the broadcast spectrum is as sensible as assigning direct property rights over "the notes of the musical scale or the colors of the rainbow." Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 33(1959). In a private property system, "if there were a market, what would be sold, is the right to use a piece of equipment to transmit signals in a particular way." *Id.* The right in question would be a right over a tangible object, not over the immaterial broadcast spectrum. See also Mueller, *Reforming Telecommunications Regulation*, in TELECOMMUNICATIONS IN CRISIS: THE FIRST AMENDMENT, TECHNOLOGY, AND DEREGULATION 95-100 (1983).

141. The general thrust of Rothbard's overall argument for property seems to be consistent with the "justice-as-order" notion, although he sometimes does not make the distinctions necessary in order to address intellectual property issues. Thus, Rothbard defends the property right of a sculptor's creation without distinguishing between the different ways in which the sculptor might own his "product," like ownership of the material artifact, or ownership of the form embedded in it: "[T]he sculptor has in fact 'created' this work of art—not of course in the sense that he has created matter—but that he has produced it by transforming nature-given matter (the clay) into another form in accordance with his own ideas and his own labor and energy. Surely, if every man has the right to own his own body, and if he must use and transform material natural objects in order to survive, then he has the right to own the product that he has made, by his energy and effort, into a veritable extension of his own personality." M. ROTHBARD, *THE ETHICS OF LIBERTY* 48 (1983).

142. W. KINTNER & J. LAHR, *AN INTELLECTUAL PROPERTY LAW PRIMER* 163 (1982) (quoting *Carver v. Hart*, 132 N.J. Eq. 207, 209, 27 A.2d 895, 897 (1942)).

by contract or by a fiduciary relationship to keep the secret confidential, then the original proprietor of the secret has no grounds for legal action against others who would duplicate his product or otherwise use what was previously secret. If a chemist for the Coca-Cola Company were to reproduce the formula for Coca-Cola (a trade secret, unprotected by patent) on leaflets and drop them over New York City, the Coca-Cola Company would have uncontested grounds for (drastic) legal action against the violator of their secret and any of his conspirators, but not against all those on whom the leaflets fell who proceeded to duplicate the firm's production efforts. Similarly, independent inventors would be immune from legal action. If the proprietor of the trade secret were unable to show that another user had improper access to his product, his production process, or some other relevant aspect of his business, then he has no legal claim against the independent inventor. Thus, an ideal object can be constrained within a contractual nexus by property rights, but once that ideal object has somehow escaped the nexus, it can no longer be restrained by force of law. Such an approach is fully consistent with the property rights regime set forth in the remainder of this Article.

## VI. JUSTICE AND THE RIGHT TO PROPERTY

Having offered criticisms of various property rights claims, it is incumbent upon me to offer an alternative argument that will establish property rights to tangible objects while denying them for ideal objects.

As noted above, liberty-based arguments for property rights are fundamentally hostile to intellectual property claims, for patent and copyright monopolies interfere with the freedom of others to use their own bodies or their own justly acquired property in certain ways. Establishing a liberty-based right to self-ownership would create the foundation for property in tangible objects while excluding property in ideal objects, for the latter amounts simply to controls placed on the use of our own bodies and on the use of our legitimately acquired property.<sup>143</sup>

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143. *But see* Gordon, *An Inquiry Into the Merits of Copyright: The Challenge of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989). Arguing against my earlier essay which was critical of patents and copyrights (*see* Palmer, *supra* note 7), Gordon agrees that intellectual property claims are restraints on other property rights but responds, in Hohfeldian and positivist fashion, that "All entitlements limit each other." Gordon, *supra* at 1423.

The arguments of Locke and von Humboldt on the importance of ownership rights in ourselves and in tangible objects have already been discussed, so there is no need to review them further. What I do propose, however, is 1) that such rights have their foundation in nature and can without confusion be called natural rights, even though they emerge through a historical process and necessarily contain an element of the conventional and contingent (nature revealing itself through history); and 2) that self-ownership rights are consistent with justice-as-order (as discussed in the section on the structure of utilitarian arguments above).

The role played by scarcity in self-ownership theories is central, for the most obviously scarce of all physical resources is one's own body. If justice has any meaning at all, it refers at least to the allocation of various rights to control physical resources. Such a system of justice can emerge from a flow of historical events by an "invisible hand" process, without diminishing its "naturalness." As Hume remarks, "Tho' the rules of justice be artificial, they are not arbitrary. Nor is the expression improper to call them Laws of Nature; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species."<sup>144</sup> To say that a law is natural is not, however, to affirm that it is self-evident, or even that a sufficiently powerful deductive mind could arrive at it. As Hume remarks, "Nor is the rule concerning the stability of possessions the less deriv'd from human conventions, that it arises gradually, and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it."<sup>145</sup> Practice, in social experience as well as personal, plays a significant factor in the formation of ethics. ("Ethics" is, after all, but a transliteration of the Greek word perhaps best translated as "habit," that is, what is formed through practice.)

The fundamental question of who should have the right to control one's body and, by implication, the products of one's labor, is, in many respects, a problem of coordination. It is a problem of arriving at a stable equilibrium solution in a "game" that has no *unique* stable solution. Our bodies could be considered the property of the king; some class of people could

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144. D. HUME, *supra* note 131, at 484.

145. *Id.* at 490.

be owned by another; each of us could be common property, in the sense that a social decision would be made to determine every use of our bodies (participatory collectivism); or we could each be the owners of ourselves. Each of these possible solutions has been tried at one time or another. Modern society has tended to converge on the last, on self-ownership.<sup>146</sup>

What is it that might lead "players" in coordination "games" to converge on self-ownership? In coordination problems there is a natural tendency for players to converge on "obvious" solutions. The pioneering work of Thomas Schelling has shown that players in games with monetary payoffs for successful coordination tend to converge on certain solutions.<sup>147</sup> As Schelling remarks, "A prime characteristic of these 'solutions' to the problems, that is, of the clues or coordinators or focal points, is some kind of prominence or conspicuousness."<sup>148</sup> These conspicuous "clues" have come to be known as "Schelling points."

We can find Schelling points in "property games" as well. In the case of ownership of our bodies, what can be more natural—more prominent—than the allocation of personal ownership rights to each person?<sup>149</sup> As de Tracy affirms,

[I]f it be certain that the idea of property can arise only in a being endowed with will, it is equally certain that in such a being it arises necessarily and inevitably in all its plenitude; for, as soon as this individual knows accurately itself, or its

146. For a contrast in this respect between the ancient world and modernity, see B. CONSTANT, *The Liberty of the Ancients Contrasted with that of the Moderns*, in *POLITICAL WRITINGS* 308-28 (1988).

147. See T. SCHELLING, *THE STRATEGY OF CONFLICT* 53-58 (1960).

148. *Id.* at 57.

149. See T. HODGSKIN, *THE NATURAL AND ARTIFICIAL RIGHT OF PROPERTY CONTRASTED* 28-29 (Kelley ed. 1973) (1st ed. 1832).

Mr. Locke says, that every man has a property in his own person; in fact, individuality—which is signified by the word own—cannot be disjoined from the person. Each individual learns his own shape and form, and even the existence of his limbs and body, from seeing and feeling them. These constitute his notion of personal identity, both for himself and others; and it is impossible to conceive—it is in fact a contradiction to say—that a man's limbs and body do not belong to himself: for the words him, self, and his body, signify the same material thing. As we learn the existence of our own bodies from seeing and feeling them, and as we see and feel the bodies of others, we have precisely similar grounds for believing in the individuality or identity of other persons, as for believing in our own identity. The ideas expressed by the words mine and thine, as applied to the produce of labour, are simply then an extended form of the ideas of personal identity and individuality.

On the appreciation of the individuality and special status of other humans, see E. HUSSERL, *CARTESIAN MEDITATIONS* 129 (1960) (arguing that the reason we do not simply consider others as things or as meat is that we apprehend that we exist in a community, with an "[o]bjectivating equalization of my existence with that of all others . . .").

moral person, and its capacity to enjoy and to suffer, and to act necessarily, it sees clearly also that this self is the exclusive proprietor of the body which it animates, of the organs which it moves, of all their passions and their actions; for all this finishes and commences with this self, exists but by it, is not moved but by its acts, and no other moral person can employ the same instruments nor be affected in the same manner by their effects.<sup>150</sup>

Such an allocation may not make the best sense from a "social" perspective, that is, from the perspective of increasing the total utility of a group. But human beings typically are unable to make (and do not have to make) such God-like choices; our real choices are inevitably constrained by our own horizons. "Society" is not a single choosing entity, nor can it be considered as such.<sup>151</sup> The natural prominence of individuality and of our control of our own bodies naturally lends itself to a process whereby agreement is secured (it need not be explicit agreement) to respect rights to self-ownership and to the products of our labor. As Hume notes, "it must immediately occur, as the most natural expedient, that every one continue to enjoy what he is at present master of, and that property or constant possession be conjoin'd to the immediate possession."<sup>152</sup>

Let us make a distinction between goods that are simply given (if there are such goods) and goods that must be produced; one rule for allocating goods (such as equal division) might have a greater degree of "obviousness" when the goods are simply given than when they are produced; in the latter

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150. D. DE TRACY, *A TREATISE OF POLITICAL ECONOMY* 47 (A. Kelley ed. 1970) (T. Jefferson trans. ed. 1817).

151. *But cf.* Mirrlees, *The Economic Uses of Utilitarianism*, in *UTILITARIANISM AND BEYOND* 71 (1982). "Roughly speaking, [in a society of identical individuals] the totality of all individuals can be regarded as a single individual. Therefore total social utility, the sum of the total utilities of the separate individuals, is the right way to evaluate alternative patterns of outcomes for the whole society. That should be the view of any individual in the society, and therefore of any outside observer." This approach is subjected to withering criticism in Sugden, *Labour, Property and the Morality of Markets*, in *THE MARKET IN HISTORY* 9-28 (1986). *See also* R. SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION, AND WELFARE* 6-8 (1986) (criticism of the "U.S. Cavalry Model" of moral philosophy and presentation of an alternative based on the viewpoint of the individual decision maker). Sugden presents an extended argument about how property rights and other conventions can emerge spontaneously, without any centralized agency or guiding hand, and how they can gain in the process the moral approbation of the participants in the process, even though they may be "suboptimal" from some external perspective. I am deeply indebted to Professor Sugden's work for my own views on morality and property.

152. D. HUME, *supra* note 131, at 503.

case the association of self to labor to product is more prominent.

Hume proposes a thought experiment: "Suppose a German, a Frenchman, and a Spaniard to come into a room, where there are plac'd upon the table three bottles of wine, Rhenish, Burgundy and Port; and suppose they shou'd fall a quarrelling about the division of them; a person, who was chosen for umpire, wou'd naturally, to shew his impartiality, give every one the product of his own country. . . . [T]here is first a natural union betwixt the idea of the person and that of the object, and afterwards a new and moral union produc'd by that right or property, which we ascribe to the person."<sup>153</sup> This seems to be a sensible solution that the three drinkers might also arrive at themselves.

Now suppose that the things to be divided must be produced by the three persons and are not merely found at hand. Is it not more reasonable to suppose that they will insist on a division of the product that recognizes the separate contributions of each, rather than, say, equal division or, as in the case of the wine, division by national origin? Further, let us suppose that the problem is faced, not by three laborers who know each other immediately and are engaged in a joint enterprise, but is a problem faced by members of an extended order who, while necessarily dependent upon each other for sustenance, have no knowledge whatsoever of each other.<sup>154</sup> Is it not even more reasonable to suppose that they will converge, not on some principle of even distribution, or of distribution to the most deserving (desert having, as noted earlier, no principle), but that each be awarded his "own" product, that is, what he produces? (In a market system, this need not bear any close relationship to the "amount of labor" that might have been expended, but to what can be claimed on the basis of self-ownership rights and mutually satisfactory agreements among contracting parties.)

Such a system of self-ownership and derived ownership of tangible objects provides the foundation for a society and econ-

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153. *Id.* at 509-10.

154. By "extended order" I mean what Adam Smith referred to as a "Great Society." This is a sort of order that extends beyond the small group to include individuals who, while part of the same economic or legal order, will never have any face-to-face relationships.

omy based on contract,<sup>155</sup> as well as for justice-as-order. Property rights in ourselves and in alienable, material objects allow us to cooperate peacefully. They create an order within which people can pursue their separate or common ends.

By allocating resources through a property system we allow agents to negotiate (for example, through the price system) without resort to force in order to decide among potentially conflicting resources.<sup>156</sup> If a river can be used for boating, fishing, or swimming, but not for any combination of these three, then property rights and the market system that emerges from such rights allow parties that are potentially in conflict to use reason, rather than brute force, to decide how the river will be used.<sup>157</sup> As Adam Smith noted of the market exchange system,

If we should enquire into the principle in the human mind on which this disposition of trucking [exchange] is founded, it is clearly the natural inclination every one has to persuade. The offering of a shilling, which to us appears to have so plain and simple a meaning, is in reality offering an argument to persuade one to do so and so as it is for his interest. Men always endeavour to persuade others to be of their opinion even when the matter is of no consequence to them.<sup>158</sup>

The function of property rights in such a liberal order, then, is not to maximize some maximand, but to allow human beings

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155. See Barnett, *supra* note 47; Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179 (1986). As Barnett argues, a natural-rights self-ownership model leads, not to absolutism and slavery (as Richard Tuck has argued, R. TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* (1979)), but to inalienable liberty. Although Tuck has argued that self-ownership must imply that one could alienate all rights over oneself to a sovereign, Barnett argues that this presupposes an ontological impossibility, the alienation of one's self from oneself. On the consent theory of contract and inalienable rights, see also W. VON HUMBOLDT, *supra* note 69, at 94-95.

156. See Demsetz, *Toward a Theory of Property Rights*, in *THE ECONOMICS OF PROPERTY RIGHTS* (1974) (originally published in 57 AM. ECON. REV. (1967)). Note that in Demsetz's model, scarcity—in the static sense—is central to the origin of property rights.

157. Spooner objects that the argument from avoiding "collision" would as clearly require "that a hammer should be free to different persons at different times, and that a road, or canal should be free to as many persons at once, as can use it without collision, as it does that an idea should be free to as many persons at once as choose to use it." Spooner, *supra* note 2, at 79. This ignores the fact that use of tangible objects can come into collision, even if at any particular moment they are not in collision. (In addition, it ignores the fact that "nonuse," such as speculative withholding from the market, is as legitimate a use of one's property as is its active exploitation. Further, this "externalities-based" approach explains how property rights can emerge and change over time, as expanding populations, changing market conditions, and new technologies make possible forms of "collision" that were previously unknown. Cf. Mueller, *supra* note 140; Demsetz, *supra* note 156).

158. A. SMITH, *LECTURES ON JURISPRUDENCE* 352 (Glasgow ed. 1978).

to cooperate in the allocation of scarce resources. Intellectual property rights, however, do not arise from scarcity, but are its cause. As Arnold Plant observes,

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 (as we might somewhat loosely say) to lead us 'to make the most of them,' property rights in patents and copyright make possible the creation of a scarcity of the products appropriated which could not otherwise be maintained.<sup>159</sup>

Scarcity of this sort being central to the legitimation of property rights, intellectual property rights have no legitimate moral grounding.

## VII. CONCLUSION

Four possible theories of intellectual property rights have been examined: labor-desert, personality, utility, and "piggy-backing" on rights to tangible property. In each case I have argued either that the particular arguments cannot be applied to ideal objects or that the arguments themselves are weak. This is not to deny that each contains some grain of truth, nor does this mean that they contribute nothing to our understanding of the moral foundations of property.

The idea of desert has an important place among our moral intuitions, although such moral intuitions may have their proper role in the moral order of the small group such as the family, and not in the extended order, where abstract rules prevail.<sup>160</sup>

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159. A. PLANT, *The Economic Theory Concerning Patents for Inventions*, in *SELECTED ECONOMIC ESSAYS AND ADDRESSES* 36 (1974); see also F. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 6 (1988):

The difference between these [copyrights and patents] and other kinds of property rights is this: while ownership of material goods guides the use of scarce means to their most important uses, in the case of immaterial goods such as literary productions and technological inventions the ability to produce them is also limited, yet once they have come into existence, they can be indefinitely multiplied and can be made scarce only by law in order to create an inducement to produce such ideas. Yet it is not obvious that such forced scarcity is the most effective way to stimulate the human creative process.

*Id.* 160. See F. HAYEK, *supra* note 65, at 11-21. We learn our morality, Hayek argues, within the small group, notably the family, in which face-to-face interaction prevails.

If the foundation of the natural right to ownership is ownership in one's self, however, then claims to own ideas or other ideal objects conflict with this right to self-ownership, for such a claim is no less than a claim of the right to control how another uses his body. When one claims to own a dance step, for example, one claims that no one else can so move his body as to perform this dance, and therefore that one has a right of dominion over the bodies of everyone else. Similarly, a copyright over a musical composition means that others cannot use their mouths to blow air in certain sequences and in certain ways into musical instruments they own without obtaining the permission of the copyright holder. Thus the real objects the copyright holder controls are the body and instruments of the other musicians. The same holds true of a patent governing the combination of a group of chemicals or the arrangement of the parts of a fishhook.

The theory of property that emphasizes personality also has something to add to our understanding of property. The development of personality and moral agency is certainly a good thing, and for full development it requires at least a minimal sphere of property. Aristotle recognized, for example that liberality is impossible without property and liberty, the necessary conditions for the expression of this virtue.<sup>161</sup> But the more elaborate attempts to use this as a foundation for property, such as those of Hegel and his epigoni, suffer from serious philosophical difficulties. This is most notable when a theory of an inalienable *droit moral* for artists is built upon it. The relationship between artist, art work, and audience is a complex one, but it does not lend support to the idea that the work of the artist is an extension of the artist's personality, capable of being damaged in a way analogous to the bodily damage that could be inflicted on the artist. Personality and property are indeed related, as expressed by Richard Overton's statement: "To

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But we must also live in a world of strangers, in which "concrete, commonly perceived aims" cannot be assumed, nor can knowledge of the needs or abilities of others. "Part of our present difficulty is that we must constantly adjust our lives, our thoughts and our emotions, in order to live simultaneously within different kinds of orders according to different rules. If we were to apply the unmodified, uncurbed, rules of the microcosmos ([that is], of the small band or troop, or of, say, our families) to the macrocosmos (our wider civilization), as our instincts and sentimental yearnings often make us do, we would destroy it. Yet if we were always to apply the rules of the extended order to our more intimate groupings, we would crush them. So we must learn to live in two sorts of worlds at once." *Id.* at 18.

161. See ARISTOTLE, *supra* note 129, at 61.

every Individuall in nature, is given an individuall property by nature, not to be invaded or usurped by any: for every one as he is himselfe, so he hath a selfe propriety, else could he not be himselfe . . . .”<sup>162</sup> But this necessity of property for one to “be oneself” means preeminently self-ownership, which is a principle in conflict with intellectual property rights.

Utilitarian arguments also have a role to play in understanding the moral grounds of property rights. That people will be more productive and will generate wealth that can be enjoyed by all only when they can reap the rewards of their efforts is certainly true and has been recognized at least from the time of Aristotle’s criticism of communism.<sup>163</sup> This is certainly an important consideration in judging whether private property is superior or inferior to state ownership. But to tailor legislatively the abstract rules of the extended order in an effort to reach predetermined results reveals a serious misunderstanding of the rule of (abstract) law, which aims at no definite result but which provides the framework within which just results can emerge. In contrast, the kind of utilitarian<sup>164</sup> account of law that has been characterized as “justice-as-order” does not seek to maximize some particular maximand, but to create an overarching order within which human beings can realize their various ends without coming into violent conflict over resources. As an empirical matter, we have good reason to believe that when individuals know what their property rights are, they will be more productive and prosperous than if such rights are uncertain. The key, therefore, in such a legal system is to avoid conflicts between rights.<sup>165</sup> Intellectual property rights, however, do create conflicts between rights to self and to tangible goods. Moreover, it is far from clear that intellectual property rights increase incentives for innovation, rather than hamper them. (This last consideration is a matter for empirical investigation and cannot be decided on *a priori* grounds.)

The case for “piggy-back” rights is also built around a hard kernel of truth. Various rights that resemble in some respects intellectual property rights, such as trade secrets, can indeed be

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162. Overton, *supra* note 75, at 68.

163. See ARISTOTLE, *supra* note 129, at 55-61.

164. I use the term here in a broad enough sense to include David Hume.

165. Of course, people of good faith often do come into conflict, which is why we have courts of law to adjudicate disputes. To admit the possibility of such conflicts, however, is a far cry from seeing conflict as a built-in feature of a social order.

built on the foundation of rights to tangible objects. But a trade secret is not a right against the whole world, as a patent is, but a right against those who interfere with rights to tangible goods or who violate legally binding contracts. A monopoly right restricting others, for example, from independently inventing and building a new contraption cannot rest on a foundation of contract, for contract presupposes consent and the point of intellectual property rights is that they bind non-consenting parties.

Finally, property has been examined as a means of realizing freedom and achieving social coordination, "justice-as-order." The foundation of such a system of social coordination is self-ownership, the "node" around which the conventions of property are constructed. Self-ownership is an "obvious" solution to coordination games and plays an important role in the historical development of natural law. Such "games" in real life are played because of the scarcity of resources. If goods were truly superabundant, there would be no need for property, for conflicts could not arise. The very nature of an economic good involves choice, however, and choice implies scarcity. This is most obviously true of our own bodies, which can be used as food for others, as objects to gratify the sexual lusts of others, or in a number of other ways. The problem for which self-ownership provides the answer is how to allocate rights over the most scarce of scarce resources, one's own body. This principle of self-ownership then, by analogy provides the basis for ownership of objects that are not parts of our body.<sup>166</sup>

The key to all of this is scarcity. Without scarcity, an argument based either on the realization of freedom or on finding a solution to coordination games cannot generate a property right. Tangible goods are clearly scarce in that there are conflicting uses. It is this scarcity that gives rise to property rights. Intellectual property rights, however, do not rest on a natural scarcity of goods, but on an "artificial, self created scarcity." That is to say, legislation or legal fiat limits the use of ideal objects in such a way as to create an artificial scarcity that, it is hoped, will generate greater revenues for innovators. Property rights in tangible goods channeled them into their most highly

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166. Recall the discussion by John Locke regarding the question of when acorns that a person has eaten become his own: "so his, [that is], a part of him, that another can no longer have any right to it." J. LOCKE, *supra* note 42, at 328.

valued uses. The possibility for exchanging transferable property titles means that holders of property will constantly rearrange the titles in search of profit. Without scarcity this process would be unnecessary. But the attempt to generate profit opportunities by legislatively limiting access to certain ideal goods, and therefore to mimic the market processes governing the allocation of tangible goods, contains a fatal contradiction: It violates the rights to tangible goods, the very rights that provide the legal foundations with which markets begin.

