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Libertarian views on intellectual property law

An analysis of laissez-faire theories applied on the modern day IP system

University of Cape Town

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Introduction

During the elections for the European Parliament in June 2009, an unknown party in Sweden turned out to be very successful. The Pirate Party, campaigning for patents to be scrapped and copyright to last just five years instead of 70, received 7% of the votes in the Scandinavian country, giving the party the right to a seat in the Parliament in Brussels. These modern day pirates are most successful in Sweden, but similar parties exist in the United States and a number of European countries as well.¹

In modern society, copyrights, patents, and other forms of intellectual property play a bigger role in normal life than they did one or two decades ago. This development makes people more aware of all the effects of intellectual property theory and policy cause. It also brings up the discussion concerning whether the original goals of the policies are still being pursued properly. Is the chosen path in IP law still a valid one in this digital age or is it time to rethink the structure?

A political theory that widely assesses IP rights is libertarianism. This political philosophy, based on individual freedom through private property, has had my interest for some years now, and I have found out that whether one supports the doctrine or not, the link with private property creates an extremely wide range of interesting views on IP. A very convenient side effect is that the (significant amount of) libertarian theorists who do not believe in IP rights, publish their writings on the World Wide Web for free, which stimulates extensive research.

In this research project, besides fulfilling my desire to learn more about the libertarian philosophy, my goal is to show how within an apparently harmonious body of thought, much controversy can exist regarding one of the pillars of its theory (a form of property). First, I want to give sufficient analyses regarding libertarianism in general. Then, I shall discuss the libertarian views on property. In the third chapter I will focus on the theories of intellectual property theory, and chapter four will be dedicated to the complete range of libertarian opinions regarding these theories. In the last chapter I want to pay attention to critics who base their views on different (but still liberal) ideologies, with regard to the general libertarian philosophy and the practical elaboration of IP rights in the modern society.

¹ 'Swedish Pirate Party Sails to Success in European Elections' available at <http://www.guardian.co.uk/technology/2009/jun/11/pirate-party-sweden>

The essay contains not only a legal basis, but deals with philosophy, economy, politics and technology as well. This diversity is in my opinion not only very interesting, but also necessary for legal research today, since nowadays one can lose oneself quite easily in extremely detailed legal issues, while the political and economical reasoning behind it is ignored.

It is not my goal to prove a certain theory, regulation or opinion right or wrong, although I shall intensively analyze and critically approach them while not hesitating to express my own opinion where I think it is necessary. The aim of this paper is to provide the reader with a clear overview of the similarities and differences in reasoning regarding the libertarian philosophy, with particular focus on intellectual property rights.

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1. The libertarian theory

The idea that most people have when they think about libertarianism is probably “an extreme form of liberalism.” In some cases this might be true, but it does not give us any fundamental information regarding the thoughts of the liberal theorists. Ultimately, the aim of this paper is to critically assess the thoughts that libertarians (or laissez-faire theorists) have on intellectual property law. However, to understand these opinions, it is necessary to have a proper understanding of the background of the body of thought of these writers, theorists, economists and politicians. In the first chapter I wish to explain the roots of the libertarian idea, consider the visions of the main characters in libertarian history, and discuss the position that libertarianism has in the world today. In order to have a better understanding of the rest of this thesis, this chapter should make the reader aware of what libertarianism is, but also what libertarianism is not. In the last few centuries, an impressive amount of literature has been produced with regard to this topic. Many liberal philosophers, legalists and – above all – economists from all over the world have produced books and articles regarding this subject, all of them with a common, general liberal background, but with their own unique views too. It will be a challenge to filter the variations and come up with “the general libertarian theory,” but the reader should keep in mind that it is simply a clarification of the foundations for the following chapters.

1.1 The basis of libertarianism

One could say that the only thing that really matters in the doctrine of libertarianism is individual liberty. Everyone has the right to do whatever he wants, and because that counts for every single person, there is a need for respect for the liberty of others. Jan Narveson starts his work “The libertarian Idea” with the following definition:

‘[The doctrine is] that there is a delimitable sphere of action for each person, the person’s “rightful liberty,” such that one may be forced to do or refrain from what one wants to do only if what one would do or not do would violate, or at least infringe, the rightful liberty of some other person(s). No other

reasons for compelling people are allowable: other actions touching on the life of that individual require his or her consent.’²

Narveson adds that later on in his study, the idea will be refined, but it will only be a refinement of the particular idea, rather than some hybrid of evolutionary version.

Let us consider how different the belief in the single rule “other people are not your property” is from other visions that seem to have more support nowadays. Libertarianism is one form of liberalism, and by other parties often incorrectly generalized. Although many writers tend to think about libertarians as structural opponents in the political arena, it is impossible to call libertarians left- or right-winged. One can take American politics as a simple example: the Right has completely different ideas than liberals regarding the war on drugs, prostitution, gambling, pornography and other vices and the way the government (in relation with the church) ought to deal with these subjects. The Left, on the other hand, wants the government to regulate the economy intensively using progressive taxation and efforts to equalize. This is in no way compatible with the liberal view. The main aspect that distinguishes Left and Right from libertarians (from a philosophical point of view) is that they want too much involvement of the government as far as libertarians are concerned.

In the 20th century, several theorists – of which the majority was specialized in economics – developed their views on liberty and state. With ideas based on writers from earlier ages (like Aristotle, Adam Smith and John Locke) a new generation of libertarians arose, and continues to play a very important role in today’s views. Ludwig von Mises, Murray Rothbard, Robert Nozick and Friedrich Hayek are some of the theorists whose ideas still form the basis of almost all of today’s publications in the libertarian context. These laissez-faire writers have in common that they criticize the political and economic situations of their time, and propose how more prosperity can be found by an increased attention and valuation of individual freedom. Nowadays, their visions are the basis of libertarian organizations such as The Mises Institute and The CATO Institute. These two examples of cooperating free market supporters play an important role in critically assessing world policy from a libertarian point of view.

² Narveson 1988 p.7

Libertarians advocate a minimal state, an ultraminimal state, or even the absence of a state. Many people thus believe that libertarians are utopians who believe that all people are good, and that therefore state control is not necessary. If this were true, I would not have put in the effort to write a dissertation on this topic. In an article written in 1980, Murray Rothbard handles various – what he calls – myths about libertarianism. According to this specific misunderstanding he makes clear that there are no libertarian writers who have held this “romantic” view. ‘On the contrary, most libertarian writers hold that man is a mixture of good and evil and therefore that it is important for social institutions to encourage the good and discourage the bad.’³ However, it is a known fact that right now the only social institution able to gather income and wealth by coercion is the state. Everyone else can do this only by trade in goods or services, or by receiving voluntary gifts. Furthermore, the state is the only (possible) institution to use the revenue of this coercion to regulate the life and property of the people. To illustrate the problem about this power according to libertarians, Rothbard quotes economist Frank Knight: ‘The probability of the people in power being individuals who would dislike the possession and exercise of power is on a level with the probability that an extremely tenderhearted person would get the job of whipping master in a slave plantation.’⁴ Libertarians believe that the allocation of this power to the state is part of the problem of tyranny in society, and is exactly what should be changed: ‘Liberty and the free market discourage aggression and compulsion, and encourage the harmony and mutual benefit of voluntary interpersonal exchanges, economic, social, and cultural.’⁵

I think these words are chosen to form an answer to the fear that exists in a world with unlimited liberty. This does make sense, because while many individuals are unhappy with certain choices and actions of governments, on the other hand the state gives them an overall feeling of safety and certainty. “It might not be perfect, but at least we know what we can expect.” So the challenge for libertarians is to convince these people of the idea that safety and certainty will not vanish in a free market with a minimal state. Rothbard uses the following description for the philosophy:

³ Rothbard 1980 p.9

⁴ Knight 1938 quoted in Hayek 1944 p.152

⁵ Rothbard 1980 p.9

‘Libertarianism is a political philosophy which says: Given any existent human nature, liberty is the only moral and the most effective political system. Obviously, libertarianism – as well as any other social system – will work better the more individuals are peaceful and the less they are criminal or aggressive. And libertarians, along with most other people, would like to attain a world where more individuals are “good” and fewer are criminals. But this is not the doctrine of libertarianism *per se*, which says that *whatever* the mix of man’s nature may be at any given time, liberty is best.’⁶

Considering what the libertarian body of thought comprises, I want to stick with the aspects that matter for the subject of this thesis. This means I will discuss the basic libertarian vision on government, law and economy. The next chapter will deal with the views on property law.

1.2 Libertarians and the government

The ultimate libertarian program would be the abolition of the public sector and a conversion of all governmental operations and services to voluntary-based activities undertaken by the private sector. It seems hard for many people to believe in the feasibility of a world without government interference, so libertarians owe us a more detailed explanation regarding the (ultra)minimal state. In 1973, Rothbard wrote *For a New Liberty: The libertarian Manifesto* in which he makes his (libertarian) view very clear. Using some examples, I wish to show how libertarians have established their case for a free market without a government.

A very common first response to the libertarian idea is the question: who will provide us with roads and basic infrastructure when there is no government? Of course, the libertarian answer to this is “the free market” (in combination with private property). Abolition of the public sector means automatically that all the land (including roads) is owned privately. So everything is owned by individuals, companies or other groups of people and capital. It is not hard to imagine how railroads and airlines can work when privatized and unsubsidized, and highways with toll-gates are already used by governments, but when it comes to streets and roads Rothbard gives several examples of how private enterprises in combination with

⁶ Rothbard 1980 p.9

modern technology can come up with rational, feasible solutions.⁷ Not only the “street-owner,” but also merchants along roads and in towns will have a vested interest in having proper streets and safe neighborhoods, which encourages them to invest and come up with modern, creative solutions.

Another important form of criticism, and probably the most important one, deals with the area where critics really think a government is essential: policy, law and courts. In his recent work *Deleting the State*, Aeon Skoble summarizes the different libertarian views and divides the laissez-faire theorists into anarcho-libertarians and minimal-statists. Skoble explains that what separates the two is how the minimal statist are influenced in their liberal views by what he calls the Hobbesian Fear, after the views of 17th century philosopher Thomas Hobbes.

‘Simply stated, a Hobbesian Fear is the notion that political authority is necessary for society to exist; more specifically, that political authority is the only way to secure enforcement of contract and is therefore a necessary condition of the social cooperation that is essential for life. If we did not have a government, the argument has it, we would find ourselves at each others’ throats.’⁸

Skoble thinks that minimal-statists are wrong, and that the true libertarian is the libertarian anarchist. He means that the Hobbesian Fear can be proven wrong by “game theory,” and uses an example similar to the “prisoners dilemma.”⁹ The essence of this theory is that, according to Skoble, the Hobbesian Fear is an irrational one, because when it comes to disputes or dilemmas in society, it is most beneficial for the individuals involved to cooperate, instead of counteract each other’s interests. This way he means to prove Rothbard’s philosophy in a theoretical way.

Anarcho-libertarians think a society without a government can still be safe and just. First, this means that according to libertarians, private protection services in a free market are a proper alternative to ensure safety and security for individuals. Rothbard gives examples of how these agencies should be seen in a modern society, and gives sensible arguments to support such a system over the current one.¹⁰

⁷ See Rothbard 1973 chapter 11

⁸ Skoble 2008.p.39

⁹ Ibid. p.57

¹⁰ See Rothbard 1973 chapter 12

Secondly, there is the issue of courts and jurisdiction. Although it seems hard to imagine private courts in a free market, which have the right to try free individuals, libertarians have their reasons to argue in favor of such a system. Skoble calls this a polycentral legal theory and explains – based on works of Nozick, Rothbard, Barnett and some others – how libertarians think a legal and judicial system is possible without the influence of the public sector.¹¹

I would like to add what Hans-Hermann Hoppe stated in an interview about Ludwig von Mises, regarding the question of the state. Hoppe uses Mises' words to make the idea of a stateless society in which safety and order are guaranteed more feasible:

‘Mises thought it was necessary to have an institution that suppresses those people who cannot behave appropriately in society, people who are a danger because they steal and murder. He calls this institution government. But he has a unique idea of how government should work. To check its power, every group and every individual, if possible, must have the right to secede from the territory of the state. He called this the right of self determination, not of nations as the League of Nations said, but of villages, districts, and groups of any size. In *Liberalism and Nation, State, and Economy*, he elevates secession to a central principle of classical liberalism. If it were possible to grant this right of self-determination to every individual person, he says, it would have to be done. Thus the democratic state becomes, for Mises, a voluntary organization.’¹²

What Hoppe makes clear here, is that – of course – libertarians acknowledge the presence of people who are a danger to society. However, since individual freedom is the most important right, individuals should have the right to self-determine whether or not they want to be ruled by this “government” and how far the power of these leading bodies reaches for them in particular. It is questionable if one can call an institution of which one can secede yourself a government, but Mises' interesting idea of the state is definitely something completely different from the only institution with coercive powers we know today.

¹¹ See Skoble 2008 chapter 4

¹² ‘An Interview with Hans-Hermann Hoppe, Austrian Economics Newsletter, Vol.18 No.1, Austrians and the Private-Property Society’ available at http://mises.org/journals/aen/aen18_1_1.asp

1.3 Libertarians and the economy

The remarks I made in the paragraph above are in response to the fact that individual freedom has great value for libertarians. This basic value, in combination with the ideas regarding government, law and courts, implies quite radical views in the field of economics as well. Without a doubt, the most important one is “without a state, no taxation.”

Probably the most well known publication in the field of libertarian economic views is *Economics in One Lesson*, written by Henry Hazlitt, and based on an article from 1863 written by famous libertarian (law) theorist Frederic Bastiat.¹³ The “one lesson” is the following: ‘The art of economics consists in looking not merely at the immediate but at the longer effects of any act or policy; it consists in tracing the consequences of that policy not merely for one group but for all groups.’¹⁴ Hazlitt exemplifies this lesson by explaining the effects of one common economic belief, and proving that common economic belief to be a fallacy.

The advocates of free market economy and their ideas are commonly referred to as the Austrian School of economics. The reason for this is that, in the 19th century, economists with the same laissez-faire views on money, market and economic theory were centered in Austrian universities.¹⁵ Libertarianism has – and always has had – a great deal to do with economics, but it comprises more than that. The Austrian School can be seen as the economic representation of libertarianism.

Completely based on the thought that the economy will rule itself and is not helped with state intervention, the Austrian School can be characterized as ‘a full-fledged defence of a capitalistic and stateless social order, based on property and freedom of association and contract.’¹⁶ The Austrian school (or Vienna School, or Psychological School) is definitely not mainstream economic thought. It is a controversial, heterodox school of economics whose ideas are generally not applied in modern politics. This is not surprising since it represents the belief that a government should not interfere in economics. The Austrian School consists of rigorous laissez

¹³ See Bastiat ‘Ce qu'on voit et ce qu'on ne voit pas’ available at <http://bastiat.org/fr/cqovecqonvp.html>

¹⁴ Hazlitt 1946 p.5

¹⁵ ‘What is Austrian Economics’ available at <http://mises.org/about/3223>

¹⁶ Ibid.

faire-views on taxation, inflation, money production, economic growth, subsidies, and minimum wages, in stark contrast to the accepted models of mainstream theory.

1.4 Conclusion

Libertarians care about individual liberty. Their thoughts are not explicitly right or left in the political spectrum, but focus on a minimal state, or even the absence of a state. This does not mean that libertarians have the illusion that all people in society are good. Rather, libertarians believe that liberty and the free market discourage aggression and encourage harmony and mutual benefit with regard to economy and society. Concerning government, laissez-faire theorists expressly disagree with the notion that political authority is a necessary condition of the social cooperation that is essential for life. Rather, they share the opinion that in a free market-society, people will intensively cooperate when they find out that effectively, cooperation is most beneficial.

The idea of a “state” as an organization that takes care of people’s interests in exchange for a payment (taxes) is in the eyes of a libertarian not necessarily a bad thing, as long as this process takes place voluntarily. What libertarians find problematic is the coercion of people by governments, subjecting them to involuntary control by government institutions.

2 Libertarian views on property

One of the main things libertarian writers have in common is the opinion that property rights are of high importance and should be respected. However, it is not self-evident that property rights are essential for the existence of the advocated liberty. In this chapter, I want to make clear the exact reasoning for the importance of property rights. I shall also compare libertarian views to approaches that are based on principles other than the thoughts of free enterprisers. The ethical and philosophical reasoning that is used by famous libertarian theorists is an interesting topic that shapes the basis of several approaches to different property laws, and therefore gives reason to discuss the essence of (private) property.

2.1 Scarcity

I would like to start with a hypothetical situation concerning scarcity, based on an example that is brought forward by Hoppe.¹⁷ Let's say one person, X, lives on an island, where he can do as he pleases. Because he is alone, no questions arise concerning rules of orderly human conduct (social cooperation). This question will play a role only once another person, Y, arrives on the island. However, with two people on this island, the question of social cooperation need not be raised unless scarcity exists. For now, we suppose there is no scarcity on the island. All external goods are available in superabundance (as in the Garden of Eden). Everything is "free," just as our daily sunlight and the air we breathe. Whatever X may do with these goods, none of his actions will cause (unpleasant) consequences for present or future supply of such goods, for himself or for Y. The same can be said about the way Y uses the goods. Because of the absence of scarcity, it is impossible that there could be a conflict between X and Y regarding the use of such goods. A conflict is only possible if goods are scarce. Only then the need to formulate rules that make orderly (conflict free) social cooperation possible, arises.

However, there are scarce goods in the Garden of Eden: the physical body of a person and its standing room. X and Y both have only one body and they can stand

¹⁷ See Hoppe 1993

only at one place at one time. This scarcity can indeed cause problems, even in the Garden of Eden. Namely, they cannot occupy the same standing room without coming into physical conflict with each other. So even in this wonderful place, rules of orderly social conduct should exist in order to avoid these physical conflicts. ‘And outside the Garden of Eden, in the realm of scarcity, there must be rules that regulate not only the use of personal bodies but also of *everything* scarce so that *all* possible conflicts can be ruled out. This is the problem of social order.’¹⁸

The mentioned example could use a more detailed view on what society would be like if it recognized only liberty rights and no other. Nozick, writer of arguably the most important work in the field of the minimal state (*Anarchy, State, and Utopia*), divided the space for principles on the subject of property into three classes:

‘(1) *initial acquisition*, that is, the acquisition of property rights in external things from a previous condition in which they were unowned by anyone in particular; (2) *transfer*, that is, the passing of property (that is to say, property rights) from one rightholder to another; and (3) *rectification*, which is the business of restoring just distributions of property when they have been upset by admittedly unjust practices such as theft and fraud.’¹⁹

The first two classes are of particular importance to clarify the need for the recognition of property and why it provides society with the structure it is said to create. To be able to conclude why it is (private) property that solves the problem of social order, we could serve ourselves by having a closer look at the origins of property.

2.2 The libertarian property doctrine

Seventeenth century philosopher John Locke is famous for his theory of value and property. It is used by the majority of the libertarian writers as a basis for private property theories. Locke wrote about property in both a broad and narrower sense. In the broad sense he meant property to cover a wide range of human interests and aspirations. The narrow definition refers to material goods. The allocation of property is, according to Locke, derived from labor. Once a place or good has been

¹⁸ Hoppe 1993 p.2

¹⁹ Nozick 1974 quoted in Narveson 1988 p.64

appropriated, by mixing one's labor with it, ownership of such places and goods can be acquired only by means of a voluntary – contractual – transfer of property title from a previous to a new owner. In addition to this, property precedes government and government cannot 'dispose of the estates of the subjects arbitrarily.'²⁰

To understand how libertarians came to see (private) property rights as the basis for liberty overall, Rothbard did an excellent job in describing how property rights are the origin of all other rights:

'In the profoundest sense there *are* no rights but property rights ... there are several senses in which this is true. In the first place, each individual, as a natural fact, is the owner of *himself*, the ruler of his own person. Then 'human' rights of the person that are defended in the purely free-market society are, in effect, each man's *property right* in his own being, and from *this* property right stems his right to the material goods that he has produced.

In the second place, alleged "human rights" can be boiled down to property rights ... for example the "human rights" of free speech. Freedom of speech is supposed to mean to mean the right of everyone to say whatever he likes. But the neglected question is: Where? (...) [C]ertainly not on property on which he is trespassing. In short he has this right only either on his *own* property or on the property of someone who has agreed, as a gift or in a rental contract, to allow him on the premises. In fact then, there is no such thing as a separate "right to free speech"; there is only a man's *property right*: the right to do as he wills with his own or to make voluntary agreements with other property owners.'²¹

Rothbard's message is clear: if one thinks liberty is the most fundamental right there is, this means that we should be able to do as we want. And that, in itself, means that we should have the opportunity to do so with various parts of ourselves. Moreover, it is not doing what we want with anything else unless we have in some way acquired the right so to do.²²

These words are right, assuming a person is the owner of his own body and goods he appropriated with this body. With Hoppe, I think this assumption is correct, because if a person were not the owner of his own body and the places and goods originally appropriated and/or produced with this body as well as owner of the goods voluntarily (contractually) acquired from another previous owner, then only two alternatives would exist: either another person should be considered the owner, or

²⁰ Locke 1689 chapter XI sec.138

²¹ Rothbard 1970 p.76 quoted in Narveson 1988 p.67

²² Narveson 1988 p.67

both persons must be equal co-owners of all this.²³ The first option reminds us of slavery and I think the ethic universal unacceptability does not need further explanation. The second option might indeed mean that there is an equal law for everyone, but this theoretical situation is impossible to work out in real life. It would mean that all goods were co-owned by everyone.

‘No one, at no time and no place, would be allowed to do anything unless he had previously secured every other co-owner’s consent to do so. Yet how could anyone grant such consent were he not the exclusive owner of his own body (including his vocal chords) by which means his consent must be expressed. Indeed, he would first need another’s consent in order to be allowed to express his own, but these others could not give their consent without having first his, and so it would go on.’²⁴

2.3 Practical issues of private property

Unlike the three classes of property Nozick came up with, modern times saw theorists inventing different classifications. Libertarian law-theorist Richard Epstein divides property into the following three central features: exclusion, use and disposition. Exclusion is the first great objective of social order: the separation of the owner from everyone else. The advantage in a social context is that it is scalable. Ownership also includes the right to use property. An owner has the right to transform, develop, consume or dispose of his property. Epstein describes the third feature, disposition, as the right to sell or give away property, during life or at death, from one person to another.²⁵ However, he also adds remarks regarding the downside of private property. Regarding exclusion, it can be said that these rights work well when those excluded have other choices. No problems arise when competitive markets provide for the same (type of) property, but troubles will occur when there is no alternative to the property owner. Furthermore, because use and exclusion come together in this point of view, in most cases it is efficient to assign the single owner exclusive right to use for each piece of property. However, exclusive use is not the same as unlimited use of property. So Epstein concludes, ‘Every legal system has to decide how to limit one

²³ Hoppe 1993 p.3

²⁴ Ibid. p.4

²⁵ Epstein 2008 p.22

person's use of his rights in order to protect his neighbour's. The challenge is to create a common regime that will maximize the value of the individual holdings, which happens only when restrictions on use cost each owner less than the benefits they afford his neighbours.'²⁶ To continue with Epstein's example of neighbors: one can easily imagine obvious limits to the rights of the individual where they encroach on the rights of others (do not trespass on the land of your neighbor, do not build structures that overhang your neighbor's land), but one can also easily imagine circumstances for which limits are less easily defined. Examples of this kind of nuisance are production of loud noises or practices that cause unpleasant smells. Limits for this type of nuisance are far more arbitrary.

Similar difficulties can – often more easily – apply to the right of disposition. First, incorrect descriptions of property can make the simplest of contracts fail. Besides that, parties can take advantage of one and other using duress, fraud or concealment. Moreover, a contract between A and B regarding property, may generate harmful consequences to third persons. For example, business agreements are often said to cause monopoly power and enhance economic efficiency. According to Epstein, in this particular situation, '[t]he proper response may be to ban the combination or merger, or to allow it to go forward subject to limitations on rates. But however difficult it is to combat collusion, one point remains clear: the state should never use force to restrict competition in the open market.'²⁷ I do not wish to discuss different opinions on these particular examples in this chapter, but I believe that Epstein comes up with useful cases of every-day problems that highlight the difficulties that can occur within property law-theory (hence his terminology "downside of private property").

2.4 The classical approach: economics of private property

Libertarians do not only think that the idea of private property aligns with moral intuitions and therefore is the solution to the problem of social order; they also believe it should be seen as the basis for social welfare, through economic prosperity. In this

²⁶ Epstein 2008 p.23

²⁷ Ibid. p.25

paragraph I will make clear how laissez-faire theorists link private property to liberty in a free market.

An important (scientifically accepted) approach to the improvement of social welfare is the so-called Pareto-efficiency, named after Italian economist Vilfredo Pareto. This theory asserts that given a set of alternative allocations, say money or goods, a change from one allocation to another that can make at least one individual better off without making any other individual worse off means a(n) (Pareto) improvement. Let us analyze private property in the light of the Pareto-criterion, based on the possible action undertaken with (appropriated or produced) property.

The act of original appropriation meets the requirement of the Pareto-criterion. One person, the appropriator, increases his welfare by “mixing his labor” with it, while no other person’s physical wealth is diminished. Others maintain the same level of property as before, and the appropriator gains new, previously non-existent property. It seems clear that the act of original appropriation always increases social welfare.

What can we say about any further action with these goods and territories? The liberal view is that no matter what a person does with his property, he chooses to do so in order to increase his welfare. Whether he consumes or decides to produce new property out of “nature,” it enhances social welfare. An act of production is motivated by the desire of the producer to increase the value of the entity, and thus, social welfare. The only requirement is that the consumption or production does not lead to physical damage or diminution of property owned by others. When we have a look at the transfer of appropriated goods, we see that an exchange of property is only possible if the owners are convinced that what they acquire has more value to them than what they give up. Naturally, when two persons gain in welfare from every exchange of property, and the property under the control of everyone else is unchanged, we can conclude that every voluntary transfer of appropriated or produced property from one owner to another increases social welfare.

Considering the mentioned fulfillment of the Pareto-criterion in every possible action concerning appropriated property, Hoppe concludes: ‘[i]n distinct contrast, any deviation from the institution of private property must lead to social welfare loss.’²⁸ Hoppe also adds that this is not a particularly new point of view. It is a ‘classic theory

²⁸ Hoppe 1993 p.9

of private property, based on self-ownership, original appropriation (homesteading), and contract (title transfer)' that was being used for centuries before libertarians such as Rothbard published their contributions.²⁹

2.5 Comparison to the Chicago approach

Economists and legal theorists in association with the University of Chicago have provided a significant number of publications in which the classical, economic approach to private property is criticized. Important writers such as Ronald Coase, Harold Demsetz and Richard Posner put forward ideas that contest the classical "solution" of first appropriation. The Chicagoan views are not completely the same, but have enough commonalities to be considered as one school of thought for the purposes of this paper. To illustrate the differences between the classic and Chicagoan views, I use an example articulated by libertarian Walter Block:

'Let us suppose that the damage to a farmer's crops from a neighboring factory amounts to \$100,000; that there is no way that the farmer himself can prevent the damage to his crops; that bargaining transactions between the farmer and the manufacturer are costless; that changes in the distribution of wealth between them can be ignored; and finally, that the manufacturer can stop the crop damage by installing a smoke prevention device (SPD) which will cost him \$75,000.'³⁰

While, according to the classic point of view, there is a need to establish who was there first (the farmer or the factory) in order to judge a conflict like this, Chicagoans have a different point of view. The answer, primarily structured by Coase, is twofold. First, and positively, he states that it does not matter how property rights and liability are allocated as long as they are allocated and provided that there are no transaction costs. Neither the farmer nor the factory is wrong or right, but rather what needs to be solved is the fact that the factory negatively affects the farmer and thus what needs to be decided is how to restrain the factory.

Looking at the allocation of economic resources in this problem, we can say the following: if the factory is found liable for the crop damage, they will install an

²⁹ Hoppe 1993 p.11

³⁰ Block 1997 p.111

SPD for \$75,000, or take measures to cease operations that cause the damage. If the factory is found not liable, then the farmer will pay a sum between \$75,000 and \$100,000 to install an SPD. This means both situations result in a solution of the conflict. But as Hoppe (handling a comparable example) mentions correctly, in an inverse situation (the costs of crop loss is \$75,000 and the costs of the installation of an SPD are \$100,000) an SPD will never be installed. Because if the factory is found liable it will cover the farmer's loss, but not install an SPD, and if the factory is found not liable, the farmer is unable to pay the factory enough to install the SPD. 'Therefore, regardless of how property rights are initially assigned, according to Coase, Demsetz, and Posner the allocation of production factors will be the same.'³¹

Second, and normatively, the Chicagoans argue that courts should assign property rights to the contesting parties in such a way that "wealth" or the "value of production" is maximized. This means that judges should always rule in favor of the solution that costs less money. So if we look at Block's example, the factory will be found liable because the costs of an SPD are not as high as the farmer's loss.

Libertarians agree that both the positive and the normative claim of the Chicagoans must be rejected. They think that it surely does matter to the farmer and the factory to whom the property rights are assigned. The most important reason for this is the problem of knowledge, in slightly different areas. For the value of social production, it does matter how property rights are assigned. Resources allocated to productive ventures are not simply given; they are rather the outcome of previous acts of appropriation and production themselves. According to Hoppe and Block, only if appropriators and producers are the absolute owners of their goods, will the level of welfare be maximized, and not with a judicial decision afterwards.

Besides that, how should a judge decide if the farmer's loss would not be the crops he was going to sell, but the (for other people nearly worthless) flowers he and his wife enjoy looking at every day? If the factory is found not liable, the farmer would probably still not be able to come up with the funds to install the SPD.

With regard to the normative claim of the Chicagoans, the libertarian answer is that any interpersonal comparison of utility is scientifically impossible. Arbitrary assumptions will lead to even more arbitrary cost-benefit analyses. In addition, the difficulties arising because of arbitrary assumptions will lead to great uncertainty

³¹ Hoppe 1993 p.13

about property-titles. Fluctuating market-data creates different circumstances, and the re-distribution of property will be necessary. This is considered to be unjust and, from an economic standpoint, terribly inconvenient. Block concludes that the Chicagoan approach is ‘plain downright immoral. It’s evil and vicious to violate our most cherished and precious property rights in an ill conceived attempt to maximize the monetary value of production.’³² I want to end this chapter by citing Hoppe, who expresses himself in a more nuanced way, very representative of the libertarian idea:

‘No one can determine *ex ante* whether or not his actions will lead to social wealth maximization. If this can be determined at all, it can only be determined *ex post*. Nor does anyone have control over whether or not his actions maximize social wealth. Whether or not they do depends on others’ actions and evaluations. Again, who in his right mind would subject himself to the judgment of a court that did not let him know in advance how to act justly and how to avoid acting unjustly but that would judge *ex post*, after the facts?’³³

2.6 Conclusion

The basic concept of property from a libertarian point of view is scarcity. Goods are not available in superabundance and thus there needs to be a system to assign them to individuals. John Locke’s approach of mixing labor in order to appropriate goods is the foundation of the laissez-faire view on private property. The pure libertarian idea is that while considering the possessions of ourselves, there are no rights but property rights.

Different libertarians have different ideas when it come to the practical issues of private property rights, because clearly the major dilemma concerns where a legal system ought to draw the lines to limit one person’s use of his rights in order to protect the rights of another individual. As will be explained later, this also is a key concern in *intellectual* property rights discussions.

The first approach to resolve friction in private property issues is the classical approach that uses the logic of the Pareto-efficiency. Motivated by desire to increase (individual) social welfare, owners will transfer appropriated goods if they are

³² Block 1977 p.115

³³ Hoppe 1993 p.15

convinced that what they acquire has more value to them than what they give up. In a negative approach to this statement, it is even said that any deviation from the institution of private property must lead to social welfare loss.

The liberal counterpart of the classical approach is the Chicago approach. Unlike the libertarian way of assessing who is the first appropriator and how that individual acts to improve his welfare, Chicagoans mainly use an approach of financial allocation to maximize wealth and value of production. Libertarian criticism of this approach is that this is scientifically impossible. In their eyes, arbitrary assumptions will lead to even more arbitrary analyses, which is immoral and undesirable due to its inability to determine situations in advance.

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3 Intellectual property law theories

Now that I have made clear what the general libertarian view on law, government and economy is, and what this means for libertarian thoughts on private property, it is time to let the laissez-faire views rest for a while, and pay more attention to the field of law that is essential to this thesis: intellectual property (IP). In this chapter, I wish to deliberate on the theory of IP law. I will discuss the foundations of the type of law in practice all over the world today.

To explain the application of the theories, it is helpful to briefly analyze the four specific modes of IP (patents, copyrights, trademarks and trade secrets), as the criticism that I wish to review later in this thesis, as well as the South African issues concerning IP rights, is often addressed to (a) specific form(s) of intellectual property.

It is found that the arguments for the current valid regulations are mainly found in the utilitarian theory. However, there are more theories of IP law that lead to a similar approach of regulation, and these are based on the natural law approach (i.e. John Locke's provisions). The Lockean view is a very important one for the aim of this thesis, because almost all libertarian supporters and libertarian opponents of intellectual property ultimately root their arguments in his statements regarding property. I will handle Locke's theory intensively, but save the depth of the libertarian discussion for the next chapter.

The Lockean view on IP law is not the only way to apply the natural rights doctrine to intellectual property. I will also discuss a theory that is based on the "personality"-views of Georg Hegel (and Emmanuel Kant), which have a different approach, but quite a similar practical outcome in their argumentations.

3.1 Intellectual property regulation

A convenient way to begin looking at worldwide usage of IP regulations is to analyze the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, which is an important pillar of the World Trade Organization (WTO). The WTO presumably exists to increase world economic welfare, which means that its rules and processes should be structured to ensure that the outcomes of the agreements and negotiations

achieve or claim to achieve that end.³⁴ Every one of the 153 member countries of the WTO is obligated to sign this agreement, which means they must have TRIPS-compatible IP regulation. The preamble of the TRIPS agreement states that the members desire to reduce distortions and impediments to international trade, and take into account the need to promote effective and adequate protection of intellectual property rights, and wish to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.³⁵ This says more about the will to reduce trade barriers caused by different intellectual property regulations than it does represent the justification member states have for their intellectual property laws in the first place. Nevertheless, it creates a huge restriction of the freedom of states to shape their IP legislation. This system ensures that the national regulations enact strong(er) protection for intellectual property. For example, under TRIPS:

- Patents must be granted in all "fields of technology," and at least for 20 years (article 33). Although exceptions for certain public interests are allowed.
- Copyright must be granted automatically, and not based upon any "formality", and the terms must extend to 50 years after the death of the author. (Article 12)
- Computer programs shall be protected in the same way as "literary works" under copyright law. (Article 10)
- An extensive protection of geographic indications is covered. This comprehends characteristics of the good that are essentially attributable to the geographical origin of a member state. (Article 22)
- Exceptions to the exclusive rights must be limited, provided that a normal exploitation of the work (Art. 13) and normal exploitation of the patent (Art 30) is not in conflict.

Article 7 of the TRIPS agreement states the objective that should be implied in national legislations:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer

³⁴ Hindley 2006 p.33

³⁵ Agreement of Trade-Related aspects of Intellectual Property Rights

and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The main reason for unification of IP rights may be to eliminate trade barriers, but it gives us an overview of the structure of the IP legislation in the WTO member states (despite the usage of exceptions). Apparently, the objective of the regulations themselves is contribution to the promotion of innovation to enable producers and knowledge-users to benefit. We will find out that this description is based on the utilitarian theory, but also fits into the doctrine of approaches that are based on the natural rights-theory. I wish to discuss which theory or theories are represented by the (non-trade related) objectives of the TRIPS agreement and, thus, worldwide IP regulation. However, it is useful to pay more attention to the different modes of intellectual property as we know them in present IP laws.

3.2 The modes of intellectual property

The different modes of IP rights have different legal and economic backgrounds. To give an overview of the basic patent, trademark, copyright and trade secret law, the reader should keep in mind that where I become more detailed, I deal with a focus on United States law. The reason for this approach is the sheer volume of US-based literature in the field of IP law, but more important: in libertarian writings. However, the laws of other countries will be examined when showing significant differences from US legislation. I shall describe the legal rights in the particular field of law, followed by the standard economic justifications.

3.2.1 Patents

An invention falls within the scope of patentable subject matter when it concerns a machine, process, manufacture or composition of matter, and when it meets the following three statutory criteria: novelty, utility, and nonobviousness.³⁶ Patent

³⁶ See 35 U.S.C. paragraphs 101, 103

protection is not available for laws of nature, natural phenomena and abstract ideas. The novelty requirement is normally satisfied as long as the patent applicant was the first to invent the claimed invention. The utility condition requires that the invention works and that it serves some minimal human need. An invention is too obvious if the differences between the claimed invention and the relevant prior art are such that the claimed invention would have been “obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains.” In most other countries this (most difficult to fulfill) requirement is that it must demonstrate an “inventive step.”³⁷

Once a US patent is granted, the patentee may exclude others from using the invention (in many ways) in the United States for a term ending twenty years from the date on which the application was filed.³⁸ If the owner of the patent suspects that someone is making, using, or selling without permission, she can file suit for patent infringement.

In their economic and legal analysis of IP rights and remedies, Blair and Cotter describe the reasoning of the patent system as follows:

‘The fundamental premise of the patent system is that society benefits when people conceive of new inventions; develop and commercialize new products incorporating those inventions (a process referred to as innovation, as distinct from invention); a publicly disclose information about their inventions, so that others may learn from and improve upon those inventions.’³⁹

They add that most people probably agree with this premise, but that obviously the difficult question is how to optimize these social benefits, or, more precisely, the surplus of social benefits over social costs. As we will see, this question of policy is a crucial aspect in the (libertarian) discussion regarding IP rights.

3.2.2 Trade secrets

Trade secret protection is different than patent law, especially because it is much easier to obtain. Under the US Uniform Trade Secret Act, any information that

³⁷ Blair and Cotter 2005 p.9

³⁸ See 35 U.S.C. paragraphs 154(a), 271(a)

³⁹ Blair and Cotter 2005 p.13

provides a person with a competitive advantage as long as it remains secret is potentially protectable as a trade secret. Because the stringent novelty and nonobviousness conditions of patent law do not apply, unpatentable items can still qualify as trade secrets. Trade secret protection may be easier to obtain, the downside is that it is more vulnerable to forfeiture. The owner may exclude another from, among other things, acquiring the secret by “improper means” such as theft or espionage, or through another person who had “improper means” or a duty to maintain secrecy.⁴⁰ However, often every way that an owner can lose his trade secret will give the owner the right of recourse under other (criminal or civil) laws. Besides that, ‘unlike a patentee, the trade secret owner has no recourse against independent discovery or reverse engineering. Moreover, trade secret protection lasts only for as long as the information remains secret and valuable.’⁴¹

Regarding the reasoning behind trade secret law, this departure from patent law has two advantages: first, it supplements the patent system, because it provides an incentive to develop information that has some social value, though not enough to warrant a patent. Second, it arguably discourages socially wasteful measures to protect the secrecy of one’s invention, since “normal” reasonable precautions are less, or no longer, required.⁴²

3.2.3 Copyrights

‘Copyright laws protect virtually all “original works of authorship,” including literary, musical, dramatic, and choreographic works; pictorial graphic, and sculptural works; motion pictures and other audiovisual works; architectural works; and, in the United States and some other countries, sound recordings.’⁴³ The originality criterion is not hard to fulfill. US jurisprudence shows that “originality” means only that the work exhibit independent creation and some minimal degree of creativity either in the expression of underlying facts or ideas or in the selection or arrangement of those facts.⁴⁴ However, a very important addition for the purpose of this thesis is that ideas

⁴⁰ Blair and Cotter 2005 p.24

⁴¹ Ibid. p.24-25

⁴² Ibid. 2005 p.26

⁴³ Ibid. 2005 p.27

⁴⁴ See *Feist Publications, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 344-51 (1991)

and facts themselves are not subject to protection. The thin line between protectable expression, selection or arrangement and unprotectable ideas or facts can raise difficulties. Besides that, it is not hard to imagine how arbitrarily and vague courts' findings are to conclude that an accused work is "substantially similar" to the complainant's work. Blair and Cotter explain how copyright law admits many more exceptions than patent law:

'There is, first, a *first-sale* or *exhaustion* doctrine, similar to what we find in patent law, which permits the owner of a lawfully made copy to distribute and display that copy without permission of the copyright owner. Second, a variety of limited exceptions apply only to certain works or certain uses; many of these provisions of the U.S. Copyright Act tend to be highly technical. Third, the United States recognizes the *fair use* defence, an open-ended exception that, when successful, can exempt the defendant from liability in a number of different situations.'⁴⁵

Just like patent law, the reasoning of copyright regulations is found in an incentive and a prospect-like function.

'The incentive theory suggests that, in the absence of copyright protection, the number of works created and published would be less than optimal due to the ability of others to free-ride upon the efforts of creators and publishers and thereby prevent them from recouping their investments in creation and publication. (...) The prospect theory suggests that according ownership rights in all of the various uses for any given copyrighted work will maximize social welfare by encouraging the efficient development of markets for those uses.'⁴⁶

As this is not the place to discuss them, suffice it to say that there are different forms of criticism of these theories. However, in this chapter the general basis of the theories and their origins will be explained.

3.2.4 Trademarks

The last source of intellectual property I wish to cover is the field of trademarks. Any symbol that identifies a unique product or service can be a trademark. The most obvious forms are words, but trademark rights can subsist in pictures, numbers,

⁴⁵ Blair and Cotter 2005 p.29

⁴⁶ Ibid. p.31

letters, or even colors or fragrances. In the US, use of a trademark is usually a prerequisite to protection: the first person to make a lawful, commercial use of a symbol to identify her product or service acquires a trademark right by operation of law. In other countries however, a person acquires a trademark right through registration, although subsequent use of the mark within a specified period of time is usually necessary to keep the registration in force.⁴⁷

Trademarks differ from patents and copyrights, because their protection is based on the law of unfair competition. The ownership of a trademark gives the owner the right to exclude others from the commercial use of a mark that is likely to cause confusion with the owner's mark as to the source or sponsorship of parties' goods or services.⁴⁸ The second right is only applicable to famous, highly distinctive rights. It is the right to prevent trademark dilution, which is the lessening of the capacity of a mark to identify a unique product or service.⁴⁹ Its aim is to prevent this use, which would diminish the value of the mark.

Blair and Cotter name four economic functions trademarks serve: first, they lower search costs by allowing consumers to distinguish between products that differ in quality but that, in the absence of differing brand names, would be difficult or impossible to distinguish at the point of purchase. Second, and closely related to this argument, it encourages producers to invest in quality control or, more broadly, the development of the consumer goodwill that trademarks symbolize. Third (but more controversial), the quality of trademarks that may be more relevant to the antidilution cause of action is the ability of trademarks to serve as vehicles for persuasive advertising. The last (and by far most controversial) function is to promote monopolistic competition by encouraging consumers to perceive differences among products that are not, in any meaningful sense, distinct.⁵⁰

One could say that trademarks get special attention from the critics. Because of their competition law-basis, trademarks are afforded legal protection that differs from the other fields of intellectual property. Moreover, in my opinion it is the mode of IP which it is the most difficult to support with (incentive) arguments using the utilitarian theory, as we will find out later in this chapter.

⁴⁷ Blair and Cotter 2005 p.33

⁴⁸ See 15 U.S.C. paragraphs 1051, 1072, 1115

⁴⁹ See 15 U.S.C. paragraph 1127

⁵⁰ Blair and Cotter 2005 p.38

3.3 Intellectual property theory

It is not surprising that intellectual property right theories are classified differently by different writers. However, in analyzing these classifications one will be able to make a distinction between the broad, general theories.

In his contribution to the *Encyclopedia of Law and Economics*, Peter Menell divides the IP theories into the utilitarian, and non-utilitarian arguments. Among the many – though very briefly discussed – non-utilitarian theories mentioned by Menell, are John Locke’s natural rights/labor theory, and the personhood theory introduced by Emmanuel Kant and Georg Hegel.⁵¹ Menell also covers the libertarian view on IP rights, but his work does little more than to tell us that the libertarians base their views on some of the above-mentioned theories, refer to several libertarian writers – which I will discuss in upcoming chapters – and conclude with the statement that ‘liberty interests do not decisively cut in just one direction.’⁵²

In 2001, William Fisher published an article in which he condensed the different theories of intellectual property into four approaches. Fisher too, starts with the most popular utilitarian theory, and follows Menell in his attention paid to Locke’s labor theory and Hegel’s personality approach. He adds a fourth theory to the spectrum: the social planning theory. An approach ‘very similar to utilitarianism in its teleological orientation, but dissimilar in its willingness to deploy visions of a desirable society richer than the conceptions of “social welfare” deployed by utilitarians.’⁵³ Fisher’s intention in this article is to compare the theories. Hence, unlike Menell, he pays the same amount of attention to all of the theories.

In my opinion, for the purpose of this thesis, the difference between the social planning-idea of a desirable society and the utilitarian wish of social welfare is not particularly relevant. For that reason, I wish to use this paragraph to garner insight into how the combination of the utilitarian argument and the natural law approaches (labor and personality theory) resulted in the IP legislation we know today.

⁵¹ See Menell 2000

⁵² Menell 2000 p.159

⁵³ Fisher 2001 p.6

3.3.1 Utilitarian theory

The aim of using the utilitarian or economic theory of IP law in legislation is to maximize, for the whole of society, the welfare that is being created by innovations. In his writings on general theories of intellectual property, Menell states the following about the utilitarian argument:

‘The social value of utilitarian works lies principally if not exclusively in their ability to perform tasks (for example, a better mousetrap) or satisfy desires more effectively or at lower costs. It is logical, therefore, that society would seek to protect such works within a governance regime that itself is based upon utilitarian precepts. Furthermore, inventions – new processes, machines, manufactures, or compositions of matter – unlike artistic or literary expression do not generally implicate personal interests of the creator.’⁵⁴

The doctrine of the economic case for, for example, patent protection is quite simple. In his contribution to *The Intellectual Property Debate* Brian Hindley calls it an exercise in second-best economics: ‘the best available option when, for some reason, the absolute best cannot be achieved. There are in fact two economic arguments for a patent system: one applying when the nature of an invention can be kept secret and the other when it cannot. The latter is the more important case in the modern world, and also the one that has more in common with other intellectual property.’⁵⁵

Hindley means that an IP system is mostly required in situations where the nature of the inventions cannot be kept secret. Inventors are likely to encounter difficulty in obtaining a return on resources they invest in their projects. ‘[I]n the absence of a patent system, the socially valuable activity of invention is likely to be under-rewarded, and therefore to be undersupplied, in comparison with an ideal allocation of resources.’⁵⁶

Utilitarian theory went through significant development during the last few centuries. William Landes and Richard Posner (both important supporters of the Chicago School) are responsible for relevant and recent work in which they use arguments brought up by Jeremy Bentham, John Stuart Mill and Arthur Pigou. The first theorists responsible for the utilitarian body of thought were philosophers

⁵⁴ Menell 2000 p.130

⁵⁵ Hindley 2006 p.34

⁵⁶ Ibid. p.34

Bentham and Mill. Mill adjusts the “happiness-principle,” introduced by Bentham. In his work *Utilitarianism*, Mill describes this perspective in the following way: “The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.”⁵⁷ Pleasure and pain are not only meant in a physical way, but intellectual as well. So the protection of intellectual property rights is designed to create general happiness by allowing the inventor or creator to profit from his effort.

To defend this theory, an advocate of the utilitarian IP theory should hold that society benefits from inventions in the first place. After all, isn’t it obvious that there are also many inventions that are harmful, and should society put in the effort to protect these ideas? And what about books and art?

When it comes to patents (on inventions) the answer to this question lies in evolutionary development. ‘Secondary inventions – including essential design improvements, refinements, and adaptations to a variety of uses – are often as crucial to the generation of social benefits as the initial discovery. (...) Many studies emphasize the critical importance of linking innovation with understanding of consumer needs and astute marketing.’⁵⁸ Regarding copyrights (on arts, for example), the answer must be found in another way. What Menell argues regarding secondary inventions is less imaginable for art. In an article in which Posner compares the pure economic approach with the economic analysis of law-view, he states the following about what he calls “derivative works”:

‘A possible economic justification for the law's different treatment is that technological improvement is typically a continuous, collaborative process, and allowing unauthorized improvers to patent their improvements encourages maximum participation in efforts to improve the originally patented process or product. Progress is much less pronounced in the arts; we do not think that after Shakespeare wrote each of his plays, other playwrights would have been well employed trying to improve them.’⁵⁹

⁵⁷ Mill 1863 p.9

⁵⁸ Menell 2000 p.135

⁵⁹ Posner 2005 p.70

But when we reevaluate Mills' happiness-approach of utility, the answer should probably be found in the explanation that as long as the arts do not hurt society (a standard that is impossible to measure), they are a benefit to it. When you look at them as a complex of opportunities of experience (Mill also uses the word "quality"), arts and other authentic works fulfill the requirements of the Greatest Happiness Principle.⁶⁰

3.3.2 Natural rights arguments

The labor-theory and the personhood-theory can both be seen as a natural rights argument in favor of intellectual property protection. Locke bases his defense in labor, Hegel bases it in personality, and they are both used as an argument for the existence and interpretation of present IP laws.

According to Fisher, besides the utilitarian argument, until recently, the labor theory was commonly used in the United States, while the European judges explained IP law more often using the personality-approach. The reason for this is the influence that Kant and Hegel had in – particularly – the German and French law systems. Over the last decades, American lawmakers became more familiar with this "moral rights-doctrine" and it plays a larger part in US IP legislation. I wish to discuss solely the doctrine of both theories and how they are important in current policy. It is no surprise that virtually all of the libertarian supporters and opponents of intellectual property – who I will handle in the next chapter – use the Lockean theory as a starting point. I have already discussed Locke's theory on property. In this chapter, I will pay closer attention to the intellectual property aspects of his IP approach.

3.3.2.1 Hegel's personality doctrine

Briefly, the personality theory of intellectual property law is derived from the opinion that private property rights are crucial to the satisfaction of some fundamental human needs. Fisher describes the task of the authorities in light of this theory as the duty to

⁶⁰ Mill 1863 p.13-14

allocate entitlements to resources in the fashion that best enables people to fulfill those needs.

‘[I]ntellectual property rights may be justified either on the ground that they shield from appropriation or modification artifacts through which authors and artists have expressed their “wills” (an activity thought central to “personhood”) or on the ground that they create social and economic conditions conducive to creative intellectual activity, which in turn is important to human flourishing.’⁶¹

In his political work *Philosophy of Right*, Hegel ventilates his views on abstract rights (such as property and contract), morality and the ethical system. Based on the article ‘The Philosophy of Intellectual Property’ written by Justin Hughes in 1988 in which he extracted an overview of Hegel’s guidelines concerning the proper shape of a system of intellectual property, Fisher summarized this Hegelian system as following:

‘(a) We should be more willing to accord legal protection to the fruits of highly expressive intellectual activities, such as the writing of novels, than to the fruits of less expressive activities, such as genetic research. (b) Because a person’s “persona” – his “public image, including his physical features, mannerisms, and history” – is an important “receptacle for personality,” it deserves generous legal protection, despite the fact that ordinarily it does not result from labor. (c) Authors and inventors should be permitted to earn respect, honor, admiration, and money from the public by selling or giving away copies of their works, but should not be permitted to surrender their right to prevent others from mutilating or misattributing their works.’⁶²

To compare this with Locke’s views, one needs to see that this Hegelian system has its grounds in his basis for appropriation. Hegel’s opinion is that ‘a person has the right to direct his will upon any object, as his real and positive end. The object thus becomes his. As it has no end in itself, it receives its meaning and soul from his will. Mankind has the absolute right to appropriate all that is a thing.’⁶³ So property is derived from a person’s natural right to “put his will into a thing” and make it his. The difference with Locke is the basis of this natural right of appropriation: will instead of labor. In Hegel’s own words, this means the following for the multiplying of literary works:

⁶¹ Fisher 2001 p.7

⁶² Hughes 1988 quoted in Fisher 2001 p.6

⁶³ Hegel 1821 p.57

‘Since the purchaser of such a product of mental skill possesses the full use and value of his single copy, he is complete and free owner of that one copy, although the author of the work or the inventor of the apparatus remains owner of the general method of multiplying such products. The author or inventor has not disposed directly of the general method, but may reserve it for his private utterance.’⁶⁴

Thus, according to Hegel, when the users of intellectual property pay for this use, it is an act of recognition (as a person), a non-economic form of respect for the “owner” that has the same objective as the economic reward. For this justification of alienation, Hughes argues that two criteria are essential: the creator of the work must receive public identification, and the work must receive protection against any changes unintended or unapproved by the creator.⁶⁵ The IP legislation we know takes care of both of these criteria and shows us how Hegel’s philosophy is respected by present IP policy.

3.3.2.2 Locke’s labor theory

Where supporters of Locke think that property proceeds from labor, it seems likely that one’s mental labor can also be the basis for appropriation. When someone has property in his own person (self-ownership) and he can make something his property by mixing his labor with it, this will work for mental labor too. Property does not have to be the work of one’s hand, otherwise a person who works with his feet, teeth or another part of his body is not able to own his labor. Intellectual works develop from someone’s mental labor, and will be expressed “outside” by means of labor of a person’s body. The self-ownership doctrine of owning oneself and one’s actions, combined with the labor-theory leads to an understandable argument in favor of intellectual property rights.

However, to compare Locke’s labor theory with the utilitarian view, we have to keep in mind that there are two important differences between intellectual property and tangible or physical property. First, as I explained in the beginning of chapter two, most tangible goods are rivalrous, which means that they can be consumed by only one person at a time, and this is not the case for intellectual works. For example, the

⁶⁴ Hegel 1821 p.74

⁶⁵ Hughes 1988 p.350

use of a computer program by one person does not exclude another person from use and enjoyment of the same program. The second major difference can be found in the availability for appropriation. In his defense of the Lockean theory of IP, Adam Moore uses the following words: '[w]hile all matter, owned or unowned, already exists, the same is not true of intellectual property. Putting aside platonic models (or discovery models), it seems that many intellectual works are created *ex nihilo* – from nothing.'⁶⁶ Moore means to say that the basis for appropriation of intellectual works is practically unlimited.

‘Moreover, since it is possible that two or more individuals can own the same intellectual work, we must include the set of privately owned intellectual works along with the practically infinite set of non-actual ideas or collections of ideas. Only the set of ideas that are in the public domain or those ideas that are a part of the common culture are not available for acquisition and exclusion.’⁶⁷

Then why do writers like Moore interpret Locke’s works in such a way that it gives room for the worldwide IP practice we are dealing with today, in spite of the two differences that exist between intellectual and tangible/physical property? The answer is that the advocates only disagree with a limited part of the doctrine, rather than with the reason behind some of the rules. I wish to discuss this topic with a focus on Moore’s argument in favor of the Lockean theory.

First, there is the distinction between idea and expression, which is not sustainable in light of the Lockean doctrine. Moore has problems with ‘the truism in copyright and patent law that you cannot protect an idea but only your expression or the physical embodiment of it’, and he advocates a system in which ideas and their expression should not be separated but rather treated as a whole.⁶⁸ The discussion about whether one can own and register an idea will be elaborated on in the following chapter.

Another issue that causes friction is the free use zones of first sale or fair use. Except for musical recording and videos, an owner of a copy can do whatever he wants with the copy he acquired. This rule is based on the assumption ‘that we can distinguish between the owner of an intellectual work and the owner of the physical

⁶⁶ Moore 1997 p.77

⁶⁷ Ibid. p.77

⁶⁸ Ibid. p.94

embodiment of that intellectual work.’⁶⁹ This statement contains some overlap with the idea-expression distinction. According to Moore, and in contrast to the utilitarian view, granting authors and inventors control of expressions beyond the first sale would not diminish overall social utility and also would not reduce incentives.

The final utilitarian idea that cannot be defended by a Lockean, is the view that there are limits on the rights of created, rather than discovered, intellectual property. To make clear what the argument of a Lockean might be regarding the limitations of these rights, Moore refers to Nozick:

‘[A] known inventor drastically lessens the chances of actual independent invention. For persons who know of an invention usually will not try to reinvent it, and the notion of independent discovery here would be murky at best. Yet we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, not having knowledge of the invention, for independent discovery.’⁷⁰

Nozick (as a libertarian advocate of IP) will get more attention in the next chapter. For now, he describes the basis of Moore’s disagreement with the separation of created and discovered rights. He calls this argument for limiting rights the “shadow of Locke’s proviso.” ‘The proviso sanctions takings so long as others are not worsened. If opportunities are valuable, then as time passes the probability that some other inventor has been worsened with respect to a certain intellectual work grows.’⁷¹

Altogether, Moore draws the following conclusion:

‘There is no room in this account for the idea-expression distinction, the free use zones of first sale or fair use, and the limits on the rights of created, rather than discovered, intellectual property. While these changes may sound radical, upon adopting a Lockean model we will have good reason to believe that actual practices will not change much. What will have changed, however, is our underlying theoretical commitment to protecting the rights of authors and inventors.’⁷²

⁶⁹ Moore 1997 p.94

⁷⁰ Nozick 1974 p.182 quoted in Moore 1997 p.102

⁷¹ Moore 1997 p.102

⁷² Ibid. p.108

I refer to Moore here because he explains how the present IP system – with some adjustments – can be advocated using Locke’s labor theory. However, in this stage, the aim is to stress the different IP law theories that can be seen as the basis of the worldwide legislation we know (as a part of it is mentioned in TRIPS). That not everyone can see how Locke’s views should lead to this IP protection system, is made clear by Fisher.

According to him, ‘it is not altogether clear that the labor theory supports any sort in intellectual property law. The source of the difficulty is the ambiguity in Locke’s original rationale for property rights – from which this entire theory springs.’⁷³ Fisher questions why exactly labor upon a resource held “in common” should entitle the laborer to a property right in the resource itself. He claims to filter several different answers from Locke’s work *Two treatises of government*, which lead to different conclusions and, thus, do not generate a unified view on IP law.⁷⁴ The controversy explains the different views of intellectual property among the natural rights-based libertarians, and I will extensively discuss those views in the next chapter.

3.4 Conclusion

The TRIPS agreement shows us how far we are in the process of unification of intellectual property law. The aim might be the improvement of worldwide trade, but it leaves the WTO-states with a clear-cut system of strict IP regulation.

Looking at this system, we see the influence of the analyzed theories on legislation regarding copyrights, patents, trademarks and trade secrets. For the libertarian debate on IP, the primary focus will be copyrights and patents, because the other two are easier to justify as will appear later on.

The utilitarian theory of IP rights is based on the thought that society benefits from created works and inventions. The ultimate source of this view can be found in Mill’s happiness-principle which holds that so long as an intellectual work does not hurt society, it is beneficial and the system should stimulate creators.

⁷³ Fisher 2001 p.21

⁷⁴ Ibid. p.22-23

The natural theory comes in two different forms: based on personhood (Hegel) and based on labor (Locke). We find Hegel in the middle of utilitarians (for the belief in “recognition” as a reward for creating works) and Lockean (because Hegel states that an individual has a natural right to “put his will into a thing” and make it his). The difference between Hegel and Locke in that respect is that this natural right is based on will instead of labor. However, both of these founding fathers have “desert” as an important factor of their theory. To keep a proper separation between the proponents and opponents of IP rights, in the next chapter I will focus on utilitarians and Lockean natural rights theorists only.

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4 Libertarians on intellectual property

Now that I have outlined the general libertarian theory, the general libertarian view on property, and the most important theories intellectual property law can be based on, I shall discuss the range of ideas regarding IP law that exist amongst libertarian theorists. The reason this is an interesting challenge is that there is not one obvious body of thought. Although all libertarians have the same (free market, free society) basis, they draw different conclusions when it comes to intellectual property, hence libertarian views range from full support of IP, to arguments in favor of complete abolition. Some supporters mainly base their opinion on the utilitarian theory, and even more use the natural rights arguments. The foundations of these doctrines I covered in the last chapter.

It is worth mentioning that the discussion concentrates specifically on copyrights and patents, so that will be the focus in this chapter as well. The reason for this is that the general view of the laissez-faire theorists is that trademarks and trade secrets are not very problematic in the free market. Trade secrets are mainly seen as legitimate since it can be applied to a person who improperly acquires a trade secret, or a person who breaches a contract by divulging it. Trademarks are also considered acceptable, although the pure libertarian thinks that the consumer's rights are violated, rather than the company originally using the trademark.⁷⁵

Libertarians exchange the majority of their arguments through writings in legal and economic journals, often related to worldwide libertarian institutes and related gatherings. This global network of ideas is the reason that the communication between libertarian theorists concerning this particular topic often functions as a large dialogue. In works and journals, they refer to and answer each other's arguments. This creates valuable information for the purport of this essay on the one hand, but also makes it quite difficult to separate the distinct views without constantly referring to arguments made by the other party. The course of this chapter is based on this type of exchange of arguments, and as such I will fluctuate between the opinions of IP advocates and the counter-attacks of their opponents.

First, I will discuss the arguments of the proponents of IP rights who base their views on the utilitarian theory, and how this causes friction with the anti-IP rights

⁷⁵ Kinsella 2001 p.58

libertarians. Then, I will do the same with regard to the proponents of IP rights who approve of copyright and patent protection based on the natural rights theory. Finally, I shall pay more attention to scarcity, the central focus of the antagonists of IP law, and the arguments of all parties regarding this topic.

4.1 Discussing the utilitarian theory

In 1989 Tom Palmer published an article titled ‘Intellectual Property: A Non-Posnerian Law and Economics Approach,’ in which he made clear why he does not believe that IP legislation is compatible with the libertarian body of thought. “Non-Posnerian” relates to United States Federal Judge Richard Posner, who cannot be seen as a libertarian, but surely as an advocate of IP regulation from a utilitarian point of view. Palmer’s position is described accurately by (pro-IP libertarian on utilitarian grounds) Ejan Mackaay, who summarized Palmer’s ideas as follows:

‘1. *Patent and copyright are not the product of an evolutionary process.* Patent and copyright are not the result of an evolutionary process and require massive amounts of state intervention for their sustenance. Trademark and trade secrecy laws by contrast are legitimate products of such a process and have a different foundation.

2. *Patent and copyright have grown out of illegitimate privileges.* Patent and copyright have grown out of privileges (monopolies) granted to manufacturers and printers rather than to inventors and authors. (The alleged unsavory origin of an institution does not, however, of itself entail its condemnation.)

3. *Patent and copyright are not species of property rights.* “Patent and copyrights are forms, not of legitimate property rights, but of illegitimate state-granted monopolies.”⁷⁶

4. *Rights cannot be created at will by the authorities.* “Rights are not creations of the state, bestowed as gifts upon the people by wise and beneficent legislators, but simultaneously the spontaneous product and the ground (...) of the system of voluntary interactions we call the market.”⁷⁷ This thesis is further articulated in a footnote quotation: “It is one thing to articulate an ex post property right interpretation of the mining district, the oil lease; (...) it is quite another to design ex ante property right institutions that will operate in the way we claim these ‘natural experiments’ have operated.”⁷⁸

5. *Patent and copyright must not be justified by appealing to (static) efficiency.* Patent and copyright must not be justified by appealing to (static)

⁷⁶ Palmer 1989 p.264-68 quoted in Mackaay 1990 p.869

⁷⁷ Palmer 1989 p.280 quoted in Mackaay 1990 p.869

⁷⁸ Palmer 1989 p.281 quoted in Mackaay 1990 p.869

efficiency, as is proposed by Richard Posner. This reflects a constructivist or interventionist bias. The law is concerned with attributing rights rather than with the promotion of some social policy judged to be desirable. This criticism extends to Bentham and perhaps to all forms of utilitarianism.

6. *Our thinking faculties cannot be the object of exclusive rights.* “[T]he right of a free exercise of our thinking faculties is given by nature to all mankind (...). [T]he mere fact that a given mode of doing 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 acting upon them.”⁷⁹

7. *Spurs to innovation are present in the market, without state intervention.* “Regimes that foster innovation and creativity can and do emerge through the market process without legislative or judicial intervention.”⁸⁰

8. *The alleged “public good” character of information does not justify state intervention.* The “public good” character of information, frequently invoked as reason for state intervention creating patent and copyright, is not an immutable fact of nature, but a drawback contingent upon the techniques available for curtailing free riding. It is a cost of producing information as it is a cost of property rights in physical commodities. Market forces, left to themselves, will seek to adopt innovations driving this cost down.’⁸¹

Most of the anti-copyright and -trademark libertarians argue that the lack of scarcity in intellectual property is the main argument against IP legislation. The nature of economic goods involves choice, and scarcity and choice go hand in hand. Property is needed because (tangible) goods are scarce. If goods were available in superabundance, there would be no need for property, since conflict would not arise.

‘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.’⁸²

In his answer to Palmer, Mackaay pays attention to what drives a person to be innovative. Referring to Hayek and Israel Kirzner, he makes clear that a reward is an important, if not necessary condition for a substantial innovation. Regarding the matter of choice and economics, it is a fact that choice requires information as a major ingredient. The amount of information required is infinite. Moreover, transaction costs, the cornerstone of the economic analysis of law, are the result of imperfect

⁷⁹ Palmer 1989 p.287 quoted in Mackaay 1990 p.870

⁸⁰ Palmer 1989 p.273 quoted in Mackaay 1990 p.870

⁸¹ Mackaay 1990 p.869-870

⁸² Palmer 1990 p.864

information, and these costs can be lowered by the availability of better information.⁸³ However, what do utilitarians think regarding the problems with exclusivity (which basically means secrecy) and scarcity of information, when it comes to intellectual property?

4.1.1 Rewards and contracts

Regarding “realism in the law,” Mackaay’s opinion is that “[i]n recognizing a property right in certain forms of information, the legislator complements what can be achieved by a simulated property right (practical exclusivity plus contracts with chain clauses) by adding the possibility of systematically ensuring exclusivity against third parties.”⁸⁴ The anti-IP libertarians have the opinion that these simulated property rights are unnecessary, because these problems can be solved by personal contracts. The question is: how? Stephan Kinsella, author of the work *Against Intellectual Property*, explains IP as a possible contract. He and many other opponents of IP rights support ‘only contractual arrangements to protect ideas and innovations – private contracts between property owners.’⁸⁵ Patents and copyrights should be respected by all people, while a contract only binds the parties to the contract. To make clear how far contracts reach, Kinsella uses the example of a book publisher:

‘A writes a book and sells physical copies of it to numerous purchasers (...) with a contractual condition that each buyer *B* is obligated not to make or sell a copy of the text. Under all theories of contract, any of the buyers *B* becomes liable to *A*, at least for damages if he violates these provisions. (...) [T]he use of the contract only gets us so far. A book publisher may be able to contractually obligate his purchasers to not copy his book, but he cannot prevent third parties from publishing and selling it, unless some contract prohibits this action.’⁸⁶

This basic view is convenient to assess the difficulties of the theory of contract. The next step Kinsella takes is the handling of “reservation of rights,” mentioned by what he calls “quasi-IP advocates.” This means that total property is seen as a divisible

⁸³ Mackaay 1990 p.891

⁸⁴ Mackaay 1990 p.904

⁸⁵ Kinsella 2001 p.33

⁸⁶ Ibid. p.35

bundle of rights and the owner sells under the reservation of some of these rights, so that ‘a type of “private IP” can be privately generated by creatively “reserving rights” to reproduce tangible items sold to purchasers.’⁸⁷ According to Kinsella, the problem that can be ascertained here is that an important function of property rights is lost, because the difference between goods with or without certain reserved rights is difficult, if not impossible to see: limiting the ability to prevent conflict and to put third parties on notice as to the property’s boundaries. ‘Only if borders are visible can they be respected and property rights serve their function of permitting conflict-avoidance. Only if these borders are both visible and objectively just (justifiable in discourse) can they be expected to be adopted and followed.’⁸⁸

In addition and closely related to this topic, Kinsella discusses “the right to remember.” Because when we take the example one step further, more vagueness shows up. Imagine *A* sells the book to *B*, who lends it to a third person, *T1*, who likes to read. *T1* is learning the information contained in the book and teaches the content to another third party: *T2*. Neither *T1* nor *T2* has a contract with *A*, but both of them possess certain knowledge from the book.

‘Even if the book somehow does not contain within it a “right to reproduce,” how can this prevent *T1* and *T2* from using their own knowledge? And even if we say that *T1* is somehow “bound” by a contractual copyright notice printed on the book (an untenable view of contract), how is *T2* bound by any contract or reserved right?’⁸⁹

Anti-IP libertarians like Kinsella and Palmer think that ideas in someone’s mind are not owned any more than labor is owned. Kinsella even criticizes famous libertarians for losing sight of scarcity as a necessary aspect of a homesteading thing, and of (Locke’s) first occupancy homesteading rule as the way to own such property: ‘Rothbard and others are sidetracked into the mistaken notion that ideas and labor can be owned.’⁹⁰ So again, it comes down to the apparent misrecognition of scarcity and the fact that in the eyes of these libertarians only tangible resources can be owned. This view recognizes that it will never be possible for an inventor or artist to protect their works from third parties not bound by a contract. ‘The reserved right-approach

⁸⁷ Kinsella 2001 p.36

⁸⁸ Ibid. p.49-50

⁸⁹ Ibid. p.51

⁹⁰ Ibid. p.52

does not change this. Thus, it would probably be difficult to maintain anything similar to our present patent and copyright laws using contract alone.’⁹¹

Pro-IP libertarians and their opponents like Kinsella do actually share the same visions regarding this aspect of copyrights and patents. The difference is that the utilitarians see this as a problem. When Mackaay analyzes the extent of the protection of information in safeguarding legal systems, he realizes that with “chain clauses” like the one Kinsella gives as an example, ‘one may attempt to extend contractual restrictions to third parties. The difficulty is, especially when one has to contract with a great many individuals, that the chain may be broken without the information “owner” being able to trace the source of the “leak.”’⁹² Mackaay finishes his elucidation concerning “realism in the law” with the following statement:

‘[T]he possibility of systematically ensuring exclusivity against third parties] should be available only where a simulated right might be viable and (...) in all instances the interested parties must play an active role in the enforcement of exclusivity. For both patent and copyright, this test would be met. One can imagine copyrighted work and patented inventions being made available on conditions defined in contracts containing chain clauses. Both rights respect the proportionality criterion.’⁹³

According to Mackaay, copyrights and patents (simulated rights) are not problematic, as long as these rights are viable and proportionate. Referring to Hayek, he explains that over time, the reward structure that will prove most satisfactory to beneficiaries and patrons alike is one in which the relative remunerations that the individual can expect from the different uses of his abilities and resources correspond to the relative utility of the results of his efforts to others, and is a reward structure in which these remunerations correspond to the objective results of his efforts rather than to their subjective merits.⁹⁴

We can conclude that the utilitarian view on this specific aspect is that a belief in the viability of the simulated rights (copyright and patents) combined with a useful, proportional remuneration creates space for a system that optimizes innovation and inventions where possible, instead of concluding that this is an unbalanced way of dealing with the libertarian body of thought, like their opponents state.

⁹¹ Kinsella 2001 p.56

⁹² Mackaay 1990 p.901

⁹³ Ibid. p.904

⁹⁴ Hayek 1948 p.21 quoted in Mackaay 1990 p. 873

Anti-IP libertarians like Tom Bell express their critiques of the arbitrariness of this explanation. Besides the “unnaturalness” of copyrights and patents, which I shall discuss later in this chapter, Bell’s opinion is that ‘[n]otwithstanding the ubiquitous claims that copyright and patent policy strikes a delicate balance between public and private rights, thus maximizing social utility, it almost certainly does not strike such a balance.’⁹⁵ The point is that even if political authorities could measure all the relevant (economic, legal, technological and cultural) factors in the light of intellectual property, they still would not be able to balance these values. This comment definitely represents the basis of the argument of free market-approach libertarians.

However, not all laissez-faire theorists agree with the immeasurability of the benefits of copyrights and patents. David Friedman supports the utilitarian views of Macksay, who also has the opinion that there are indeed certain models that show the benefits of a regulated IP system. Basing on the ideas of economist Edmund Kitch, Friedman states that there is proof of a positive development in innovation by offering the right coordination and protection:

‘[O]ne factor relevant to the value of intellectual property protection is the shape of the supply curve. Another factor is the need for coordination in production. As Edmund Kitch⁹⁶ has pointed out, one function of intellectual property is to give the owner both the ability and the incentive to coordinate further developments within his “claim.” Where such coordination is important to the production of further intellectual property, intellectual property protection is more valuable than where development can proceed without any formal coordination.’⁹⁷

Friedman adds that another relevant factor is the availability of substitutes for legal protection, such as secrecy. ‘If denying legal protection to a particular sort of intellectual property results in the producer’s substitution of equally effective but more costly alternatives, that is an argument in favor of providing legal protection.’⁹⁸

The discussion about the possibility of assessing these factors in the field of IP law, is a complicated one, and extremely economical. Numerous works have been written about the different economic approaches of intellectual property, but a detailed analysis of this topic surpasses the aims of this paper. However, we have

⁹⁵ Bell 2002 p.7

⁹⁶ Kitch 1977 p.267-71

⁹⁷ Friedman 1994 p.1116

⁹⁸ Ibid. p.1116

noted the basis of the disputes of this particular discussion between libertarians (the difference in belief in innovation and improving welfare without IP protection), and how the utilitarian libertarians advocate a slight sidestep from the pure libertarian idea in order to end up with a result of a fair economy and more prosperity.

4.1.2 Monopolies

There is another aspect that separates the utilitarian libertarians from other laissez-faire theorists, closely related to the topic of the last subparagraph, that I wish to discuss as well. It is the matter of creating “artificial monopolies.” With the libertarian body of thought in the back of our minds, it is no surprise that these advocates of free markets see the creating of monopolies by state and law as something extremely antagonistic of the capitalistic view they share. It is a fact that all types of intellectual property have some measure of monopoly in them, since they guarantee exclusivity.

About half of Palmer’s remarks I quoted at the beginning of this chapter address the matter of the created monopoly, through what he calls illegitimate privileges and exclusive rights due to state intervention. Interestingly, Mackaay quite easily downplays this phenomenon by concluding that a patent (the best example for a monopoly) is just one of the elements used in competition. He also bases his views on Kitch’s economic research, who’s opinion is that the ‘ownership of patents is no different than the ownership of any other property right necessary as an input, and that we should no more assume that the owner of a patent is a monopolist than we should assume that the owner of particularly fertile land, especially productive skills, or of an advantageous location is a monopolist.’⁹⁹ “Clearly an extra value, but not nearly a monopoly,” seems to be the utilitarian opinion of Mackaay. Besides that, he explains that for a patent, the benefits in this area work stronger than for a copyright, which is the (reasonable) reason that the term for patent protection is substantially shorter than that of copyright.¹⁰⁰

Kinsella’s fundamental problem with this type of utilitarian criticism is that the law does not exist for wealth maximization: ‘rather, the goal is justice – giving each man his due. Even if overall wealth is increased due to IP laws, it does not

⁹⁹ Kitch 1986 p.33

¹⁰⁰ Mackaay 1990 p.905

follow that this allegedly desirable result justifies the unethical violation of some individuals' rights to use their own property as they see fit.'¹⁰¹ Therefore, in his eyes, whether it creates a full monopoly or not and whether it might or might not practically increase welfare, IP protection creates an unethical and thus unacceptable violation of individual rights.

In his conclusion, Mackaay stresses that he only disagrees with the first three statements his "opponent" Palmer made (patent and copyright are not the product of an evolutionary process, they have grown out of illegitimate privileges, and they are not species of property rights).¹⁰² The disagreements regarding the evolutionary process and the illegitimate privileges lead to the disputes about (un-)measurable welfare and the possible incentives to stimulate innovation and welfare, as well as the dilemma of an artificially created monopoly. The third point of controversy is one that suits the discussion that will be discussed in the next paragraph; whether (Locke's) natural rights theory is of the same importance in light of libertarianism when it concerns *intellectual* property.

4.2 Discussing the theory of natural rights

In chapter 3, I explained how writers have sought and found a way to explain the natural rights theory of liberal founding father John Locke in such a way that it applies to intellectual property as well. I want to clarify once more that Locke himself wrote hardly anything regarding IP rights.

Some of the libertarian natural rights-based proponents of IP have specific views on the issue of *creation*. Ayn Rand, libertarian author of the work *Capitalism, The Unknown Ideal* is a supporter of IP rights and states the natural rights ratio as follows:

'Patents and copyrights are the legal implementation of the base of all property rights: a man's right to the product of his mind. What the patent and copyright laws acknowledge is the paramount role of mental effort in the production of material values; these laws protect the mind's contribution in its purest form:

¹⁰¹ Kinsella 2001 p.12

¹⁰² Mackaay 1990 p.907

the origination of an *idea*. The subject of patents and copyrights is *intellectual property*.¹⁰³

Legal theorist Epstein is more aloof in his opinion about the connection between (intellectual) property rights and liberty, but he also thinks that ‘the gulf between property rights in tangibles and property rights in intangibles is far narrower than these theorists [opposing copyrights] believe.’¹⁰⁴

In *Anarchy, State and Utopia*, Nozick pays some concise but influential attention to the connection between intellectual property and Locke’s famous proviso, which is, briefly stated, the proposition that a person may legitimately acquire property rights by mixing his labor with resources held “in common” only if, after the acquisition, there is enough in common for others.¹⁰⁵ According to Nozick, the correct interpretation of this limitation is that the acquisition of (intellectual) property through labor is legitimate only if other individuals do not suffer any net harm as a result. Fisher explains this terminology:

‘Net harm for these purposes includes such injuries as being left poorer than they would have been under a regime that did not permit the acquisition of property through labor or a constriction of the set of resources available for their use -- but does not include a diminution in their opportunities to acquire property rights in unowned resources by being the first to labor upon them.’¹⁰⁶

So consumers are helped, not hurt, by the assignment of a patent right to an inventor because even though other individuals’ access to the invention is undoubtedly limited by this patent, without the efforts of the patent holder, the invention would not have existed at all.

‘Nozick contends, however, that fidelity to Locke’s theory would mandate two limitations on the inventor’s entitlements. First, persons who subsequently invented the same device independently must be permitted to make and sell it. Otherwise the assignment of the patent to the first inventor would leave them worse off. Second, for the same reason, patents should not last longer than, on average, it would have taken someone else to invent the same device had knowledge of the invention not disabled them from inventing it independently. Although Nozick may not have been aware of it, implementation of the first of

¹⁰³ Rand 1966 p.130

¹⁰⁴ Epstein 2004 p.5

¹⁰⁵ Locke 1689 chapter V sec.27

¹⁰⁶ Fisher 2001 p.5

these limitations would require a substantial reform of current patent law -- which, unlike copyright law, does not contain a safe harbor for persons who dream up the same idea on their own.¹⁰⁷

Apparently, Nozick's direct application of Locke's proviso contains space for IP rights for two creators "dreaming up" the same work.

Let us take a step back and connect Locke's natural rights theory to copyrights and patents, as I also covered in chapter 3. Briefly, the starting point for advocates of IP rights is that they are justified because 1) a creator owns himself, 2) he owns his labor, and 3) thus, he owns those intellectual properties with which, by dint of these creative acts, he mixes his labor.

No libertarian will disagree with the statement that an individual owns himself and has the freedom to decide the use his own labor, so it is no wonder that the third point is the most controversial aspect. The critics of this justification think that copyright and patent protection actually contradict Locke's justification of property. While partly referring to Palmer, Bell paid some unambiguous attention to the "unnaturalness" of copyrights and patent rights:

'By invoking state power, a copyright or patent owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of their tangible property. Because it thus gags our voices, ties our hands and demolishes our presses, the law of copyrights and patents violates the very rights that Locke defended.'¹⁰⁸

Bell also thinks that, looking at the American system of IP protection, the reasons to support a system of IP rights by itself stand more in utility than natural rights. He argues that the argument for natural rights in copyrights and patents cannot claim the support of the US constitution, judicial interpretation, Locke's theory of property, or the Founders' views of copyrights and patents. 'On that evidence I conclude that copyrights and patents represent notable exceptions to the default rule that a free people, resting common law rights and engaging in market transactions, can copy original expressions and novel inventions at will,'¹⁰⁹ Bell stresses. The fact that he believes to have proven that the original initiators of the US constitution nowhere defended the clause as a measure necessary to protect the natural rights of authors and

¹⁰⁷ Fisher 2001 p.5

¹⁰⁸ Bell 2002 p.4

¹⁰⁹ Ibid. p.5-6

inventors, makes Bell convinced of the idea that ‘copyrights and patents are exceptions to natural rights so extraordinary as to require explicit constitutional authorization.’¹¹⁰

Epstein does not agree with this. Firstly, he makes clear that these types of property are the result of pure labor, which, according to Locke’s theory, the creator cannot keep because first possession of a tangible object allows him only to protect the paper on which the draft is written, rather than the draft itself. ‘Yet by the same token, the author has not taken anything else out of the commons and so does not run into the joint contribution objections that undermine the power of the first possession rule for tangible objects. The only function of legal intervention here is to protect that investment in labor, without any expropriation.’¹¹¹ I think this is indeed an important remark. However, Epstein makes an even more interesting point regarding the “cultural common” for inspiration and ideas. Obviously, it is not solely the mental activity which creates inventions or art. ‘All individuals are constantly subject to a wide range of external influences, which enrich their works. (...) [S]ome believe the creation of the copyright monopoly is one of the factors that prevents the proportionate response of return to labor.’¹¹² But according to Epstein, this leaves us with the ridiculous challenge to reason who gets how much credit for the influences that lead to the work or innovation. His answer to this specific challenge is the same as it is in the general case – confession and avoidance:

‘There is little question that all these influences come to bear on the individual author. But by the same token, it is possible to locate in one person, or a small group of joint authors, the creative spark or hard effort that took these disparate influences and melded them into a coherent work, worthy of our attention. The others with whom the creator works can protect themselves by contract. It thereby gives the entire claim to the one person who has contributed the lion’s share to the finished product, with the precise intention of slighting the indirect contributions of other individuals to this product.’¹¹³

Epstein also assesses how serious the conflict is between copyright and freedom of speech, and finds similarities with the “cultural commons” discussed above. His view is that we deal with a common domain of ordinary speech and language that is outside

¹¹⁰Bell 2002. p.6

¹¹¹ Epstein 2004 p.28

¹¹² Ibid. p.29

¹¹³ Ibid. p.29-30

the scope of the copyright law, which facilitates creation of writings that are properly subject to protection under the law. ‘The legal monopoly conferred by a copyright or a patent need not translate itself into an economic monopoly so long as there are close substitutes, as there are for every new popular song that is released.’¹¹⁴ In this field, Epstein’s opinion has close relations to the utilitarian statements regarding monopoly, and its focus on substitutes even rings the “libertarian bell” that the market will settle this competition by itself. Of course, there is a significant difference between songs or musical work (copyrights), and, for example, genetic material (patents). Generally, everyone agrees that the duration for a patent, if any, should be shorter than that of a copyright, but beyond that, there are considerable differences in opinion. Epstein thinks that the problem is well handled by traditional doctrines, but he realizes that there is a group of ‘others who think, even more emphatically, quite the opposite.’¹¹⁵

Epstein’s analysis regarding the sources of creation is also acknowledged by Kinsella. He expresses this by commenting on the work of his “opponent” Rand. Concerning patents, Rand notes that a discovery cannot be patented, only an invention can. She explains this by stressing that discovery identifies a law of nature, a principle or a fact of reality not previously known. ‘[A discovery] cannot be the exclusive property of the discoverer because: (a) he did not *create* it, and (b) if he cares to make his discovery public, claiming it to be true, he cannot demand that men continue to pursue or practice falsehoods except by his permission.’¹¹⁶ However, Kinsella thinks that a distinction between creation and discovery is ethically irrelevant in defining property rights. ‘No one creates *matter*; they just manipulate and grapple with it according to physical laws. In this sense, no one really creates *anything*. They merely rearrange matter into new arrangements and patterns.’¹¹⁷ After giving some examples about how people would be ignorant of ways matter can be manipulated and utilized, Kinsella comes to the point where Epstein ends: adopting a limited term for IP rights. This, as opposed to a perpetual right, also requires arbitrary rules.

‘No one can seriously maintain that nineteen years for a patent is too short, and twenty-one years too long, any more than the current price for a gallon of milk can be objectively classified as too low or too high. Thus, one problem

¹¹⁴ Epstein 2004 p.30-31

¹¹⁵ Ibid. p.31

¹¹⁶ Rand 1966 p.130

¹¹⁷ Kinsella 2002 p.24

with the natural-rights approach to validating IP is that it necessarily involves arbitrary distinctions with respect to what classes of creations deserve protection, and concerning the length of the term of the protection.¹¹⁸

Kinsella is clearly correct about the arbitrariness of the validity of a copyright or a patent. Moreover, it is an argument that reminds us of Bell's aversion to the lack of measurability of the economic benefits of a system of IP rights. The fact that a certain regulation must rely on arbitrary conditions chosen by the state is clearly a reason for many libertarians to disapprove of this regulation.

4.3 Discussing scarcity

As I already made clear while handling the theorists with a utilitarian background, the fundamental idea for the anti-IP libertarians is that property rights are necessary because tangible goods are naturally scarce (as analyzed in chapter 2), unlike ideas. According to the antagonists, scarcity should not be created. '*Prima facie*, therefore, IP law trespasses against or "takes" the property of tangible property owners, by transferring partial ownership to authors and inventors.'¹¹⁹

What exactly is the relation between scarcity and creation? In a reply to Kinsella in 1995, David Kelley holds that not scarcity, but rather creation is the source of property rights. He thinks that property rights are required to support man's life by the use of his reason, and that the primary task in this context is to create values that satisfy human needs, rather than relying on what we find in nature:

'The essential basis of property rights lies in the phenomenon of creating value. Scarcity becomes a relevant issue when we consider the use of things in nature, such as land as inputs to the process of creating value. As a general rule, I would say that two conditions are required in order to appropriate things in nature and make them one's property: (1) one must put them to some productive use, and (2) that productive use must require exclusive control over them, i.e., the right to exclude. Condition (2) holds only when the resource is scarce. But for things that one has created, such as a new product, one's act of creation is the source of the right, regardless of scarcity.'¹²⁰

¹¹⁸ Kinsella 2002 p.25

¹¹⁹ Ibid. p.36

¹²⁰ Kelley 1995 p.13

Rand and Murray Franck have the same opinion.¹²¹ Nevertheless, Kinsella disagrees and focuses on the first possessor. ‘Given scarcity,’ he states, ‘and the correspondent possibility of conflict in the use of resources, these conflicts are avoided and peace and cooperation are achieved by allocating property rights to such resources.’¹²²

Referring to Hoppe, Kinsella continues:

‘For if rules allocating property rights are to serve as objective rules that all can agree upon so as to avoid conflict, they cannot be biased or arbitrary. For this reason, unowned resources come to be owned – homesteaded or appropriated – by the first possessor.¹²³ The general rule, then, is that ownership of a given scarce resource can be identified by determining who first occupied it. (...) However, “creation” itself does not justify ownership in things; it is neither necessary nor sufficient. One cannot *create* some possibly disputed scarce resource without first using the raw materials used to create the item. But these raw materials are scarce, and either I own them or I do not. If not, then I do not own the resulting product. If I own the inputs, then, by virtue of such ownership, I own the resulting thing in which I transform them.’¹²⁴

This takes us back to the basis of property in the libertarian context. To discuss scarcity as Kinsella does, rooting it as the essence of his solution, I get back to Epstein once again. He highlights the problems of first ownership and mixing labor in situations where it is not clear who owns raw materials. First, he thinks it is not right to treat all resources as *res nullius* (things owned by no one) instead of *res commune* (things that are common property). This raises the problem of distinguishing people who take innocently from those who take in bad faith, and how to handle both of these characters in the correct way. The outcomes, according to Epstein, are unsatisfying and ‘not the sets of results Locke had hoped to achieve by mixing private labor with commonly owned natural resources. However, it follows inexorably from his description of the initial ownership position.’¹²⁵

Indeed, sidestepping from these problems (treating the gifts of nature as *res nullius*) shifts the system in such a way that every individual can take as much as he pleases. This actually brings up the question of what exactly an individual is required to do in order to become an owner. Epstein asks himself what is of greater

¹²¹ See Rand 1966 and Franck 1995

¹²² Kinsella 2002 p.36

¹²³ Hoppe 1989 p.142 quoted in Kinsella 2002 p.36

¹²⁴ Kinsella 2002 p.36-37

¹²⁵ Epstein 2004 p.18

importance, and whether the mixing of one's labor is part of appropriation or already the "creating" phase:

'Locke in a sense has it all backwards. The purpose of the first possession rule is to allow for the easy acquisition of material things so that their owners will be in a position to expend labor on them. It makes sense to demand the huge expenditures of labor as a precondition of ownership. Locke only alludes to that erroneous view because he wants to make the pre-existing value of natural resources small relative to the labor used to improve them. That might be true in some cases, but not for all. (...) The movement from *res commune* to *res nullius* escapes the serious objections to the theory of combining labor with external objects, but standing alone it does not answer all questions that the philosophical skeptic can raise relating to the troubled status of private property.'¹²⁶

This explains how Epstein finds the link between liberty and property that he applies to intellectual property. 'There is an unearned increment of talent or wealth that is not deserved under some strong theory of individual moral desert.'¹²⁷ However, in the opinion of Epstein this is not a big problem, because the general case will be that no one else could mount a claim based on desert either. That is why according to Epstein '[t]he best solution is to develop some cheap rule that allows individuals to mark off property as their own as cheaply as possible.'¹²⁸ The limitations by law are designed to continue the process of creating long-term social improvement by sensible incremental modifications of a system of property rights, and not to challenge the legitimacy of liberty or private property, or to set these two in opposition to each other.¹²⁹

Paul Cwik, who expressed his criticism of Kinsella's statements in 2008, supports Epstein with regard to the disagreement with Kinsella's scarcity-doctrine. Cwik questions whether IP rights fit into a system of Austrian Economics, and answers affirmatively. He especially disagrees with Kinsella's belief that his approach is a correct interpretation of Rothbard's findings, as Cwik stresses that the correct interpretation of Rothbard's *The Ethics of Liberty* sees that there is most certainly

¹²⁶ Epstein 2004 p.20-21

¹²⁷ Ibid. p.25

¹²⁸ Ibid. p.25

¹²⁹ Ibid. p.26

room for IP rights in Austrian Economics.¹³⁰ His conclusion is that IP rights would benefit the society pursued by libertarians:

‘Rights are designed to reduce conflict and without IP rights some may perceive the copiers of another work as parasites and things could turn nasty. Austrian economists have been at the vanguard on tissues such as privatizing the commons, creating private companies to provide public goods, and creating property rights to solve problems of externalities. (...) It is up to us to apply the same techniques that we have successfully used in the past.’¹³¹

The complexity of this thesis is made clear by the way in which libertarians argue about the explanations of well-established founders of the libertarian body of thought. In the end, it seems that while the proponents of IP rights take a small step back from their downright laissez-faire ideas, they are able to express an underpinned opinion about why IP rights are fair, or at least, not unfair. I wish to conclude this chapter by highlighting the way that Epstein acknowledges the friction, but finds himself able to rest with the compromise:

‘Quite simply, any system of property imposes heavy costs of exclusion. However, these costs can only be eliminated by adopting some system of collective ownership that for its part imposes heavy costs of governance. The only choice that we have is to pick the lesser of two evils. There is no magic solution for liberty or property that creates benefits without dislocations. But once we recognize that trade-offs are an inescapable feature of social activity, we could conclude that a sensible system of copyrights is not such a bad trade-off after all.’¹³²

4.4 Conclusion

Libertarians have diverse opinions about how intellectual property fits into a free market-society. Three distinct groups are relevant when it comes to IP rights from a laissez-faire perspective: utilitarians, natural rights theorists and antagonists.

The utilitarians focus on rewarding inventors by offering exclusivity against third parties in order to improve innovation, and have the opinion that the effect of this is demonstrably positive. Antagonists disagree and think that the arbitrariness and

¹³⁰ Cwik 2008 p.17

¹³¹ Cwik 2008 p.17

¹³² Epstein 2004 p.38

lack of measurability are reason enough not to protect patents and copyrights with simulated rights. When it comes to the doctrine of using contracts to protect works, both parties agree about the inability to protect creations in such a way. The difference is that utilitarian's think this is a problem with regard to innovation and prosperity, while antagonists have the view that this is harmless. Concerning the fact that the antagonists state that the artificial monopolies are unacceptable because they are illegitimate privileges due to state intervention, utilitarians remark that a copyright or patent is only one aspect of competition and is therefore limited in influence. This will not convince antagonists, since one of their most fundamental statements in this area is that the law exists not for wealth maximization, but rather only for justice.

The dispute between natural rights theorist and antagonists goes back to property, scarcity and creation. Locke's proviso is being interpreted so that one owns the intellectual property one creates, because one owns himself and his labor. Antagonists claim that the outcome actually contradicts Locke's justification of property, and that IP rights are exceptions to the free society. Whether purely based on Locke's thoughts or not, natural rights theorists realize that society's "common pool" of resources demands for a compromise that exists in an IP rights system. Again, arbitrariness is one of the main complaints regarding this solution and is deemed unacceptable by the antagonists, who heavily disagree with the statement that creation is a source of property rights. They consider natural scarcity the one and only basis for property, but in the end there are many pertinent views that negate this rationale.

In my opinion, the view on resources in a *res commune* way (rather than *res nullius*) is a valid one that actually makes the plea for compromise the most deliberate and adjective argument I have discussed in this chapter.

5 Criticism of libertarians and their views on intellectual property

When it comes to intellectual property rights, libertarians clearly debate much amongst themselves. However, in this last chapter, I wish to take the comparison of views one step further. With regard to both the general libertarian idea and their vision on IP laws, there are critics that can be considered as liberal who have interesting comments on libertarians while still sincerely respecting individual freedom.

I will especially discuss the body of thought of John Rawls concerning disagreements with the libertarian view in general. To further the discussion about intellectual property, I will mainly pay attention to theorists Lawrence Lessig and James Boyle, both IP experts with a possible solution for the complicated discussion regarding IP rights in our modern society.

5.1 The Rawlsian disagreement

Nozick's work *Anarchy, State and Utopia* appears to be of great fundamental importance to the opinions discussed in the previous chapters. An interesting fact is that this writing is partly an answer to the groundbreaking work of liberal theorist John Rawls: *A Theory of Justice*, first published in 1971. In light of this thesis, the form of criticism on libertarianism based on Rawls liberal views is a relevant one, since Rawlsians consider liberty to be the primary aim of the political system, but believe that libertarians underestimate the inequality caused by a (complete) free market society.

An impressive number of writers carried out parallel studies comparing the ideas of Nozick and Rawls. An important one is Will Kymlicka, writer of the in 1990 released work *Contemporary Political Philosophy*, in which he clearly supports Rawls' theory which can be described as "justice as fairness." Rawls bases his theory on the two pillars that together should lead to this fairness: the principle of equal liberty and the difference principle.¹³³ Rawls agrees with Nozick that liberty is an important aspect of a fair society, but he does not support the extreme way in which Nozick thinks individual liberty should be respected and untouched no matter what.

¹³³ Rawls 1999 p.xii

As we have discussed earlier, according to Nozick, every individual is entitled to the goods he currently possesses, and the goods should be distributed in a free market through free and voluntarily exchanges. Everyone should be allowed to use their own possessions in whatever manner they wish, as long as he practices this without intervention of third parties. Besides this, people own themselves, and every individual should be seen as an “end,” and not as a “mean” for other ends without their consent. Taxation is the main example of individuals as means.

Why does Rawls think that this does not lead to justice as fairness, and what are the grounds for his view that the state has rights over at least a portion of individuals’ goods and the distribution thereof? Kymlicka supports the opinion of liberals. He states that taxation removes undeserved disadvantages in people’s circumstances, and that it is fair to provide limits on the way resources can be transferred. A taxation scheme is a proper way of continuing to mitigate the effects of undeserved natural disadvantages after that initial distribution, in order to implement ‘a more general right to a fair go in life.’¹³⁴ This Rawlsian idea does not agree with Nozick’s notion that individuals have “absolute rights” over goods they acquired through free exchanges. Liberals refer to the fact that obviously a person did not choose their natural limitations to pursue prosperity, and for that reason they should not suffer because of it. In the end, for whatever reason, a person might be unable to produce or generate his own food (a lack of earning power¹³⁵), which without a doubt leads to suffering.

Nozick’s argument of “self-ownership” generates friction with Rawls principle of difference, because he advocates a transfer of a production (made by an individual using his talents) to others. However, Rawls’ ”justice as fairness” theory claims to respect these talents and its owner, but because the distribution of talent is a matter of luck, disadvantaged people have a legitimate claim on those with advantages, and vice versa, the advantaged have a moral obligation to the disadvantaged:

‘Liberals accept that I am the legitimate possessor of my talents, and that I am free to use them in accordance with my chosen projects. However, liberals say that because it is a matter of brute luck that people have the talents they do,

¹³⁴ Kymlicka 1990 p.102

¹³⁵ Ibid. p.101

their rights over their talents do not include the right to accrue unequal rewards from the exercise of those talents.’¹³⁶

Rawls thinks that his “justice as fairness” can be reached by finding a basis for public agreement, by finding a way of organizing familiar ideas and principles into a conception of political justice that expresses those ideas and principles in a slightly different way than before:

‘Justice as fairness tries to do this by using a fundamental organizing idea within which all ideas and principles can be systematically connected and related. This fundamental idea is that of a society as a fair system of social cooperation between free and equal persons viewed as fully cooperating members of society over a complete life.’¹³⁷

Applied to individuals, Rawls’ principle of fairness states that ‘a person is required to do his part as defined by the rules of an institution when two conditions are met: the institution is just (or fair; it fulfills the requirements of his two principles) and one has voluntarily accepted the benefits of the arrangements or taken advantage of the opportunities it offers to further one’s interests.’¹³⁸

I sense a similarity with Mises’ opinion about the government as mentioned in the first chapter of this thesis. Individuals can limit their liberty and end up in consent with people who voluntarily restrict their powers and allow others to make decisions that influence their lives. However, the libertarian view is that this agreement cannot be established by coercion, but only in a free market.

In his article on (intellectual) property, Epstein compares Rawls and Locke, and states that, according to the Rawlsian view on fairness and redistribution, it ‘takes a good deal of confidence to believe that we have a strong knowledge of the determinants of individual success.’¹³⁹ According to the finding that we do not allow individuals to make gifts of what they have created, even to their loved ones, Epstein concludes the following:

‘[T]he argument has shifted, at least in part, from justice in the acquisition of liberty and property to justice in transfer. (...) If people do not own their own

¹³⁶ Kymlicka 1990 p.105

¹³⁷ Rawls 1996, p.9

¹³⁸ Rawls 1971 p.111-112

¹³⁹ Epstein 2004 p.8

talents, they cannot transfer the fruits of their labor to anyone else either, or so it would appear. (...) If I do not deserve the fruits of my labor, genetic endowments and parental assistance, then who does?'¹⁴⁰

A way to link the general views to the function of IP rights is to assess the (possible) effects of IP law on society. In an contribution to a symposium on intellectual property and its function for social justice, Anupam Chander and Madhavi Sunder ask if the libertarian vision of Nozick is 'in ascendance in intellectual property, overshadowing Rawls's egalitarianism,'¹⁴¹ and find the answer is no. A legal regime might be created for one purpose (IP for instrumental reasons), but that should not mean that the implications for all other purposes should be ignored. They argue that the view that intellectual property law seeks to solve a fundamental problem of information economics makes the proponents of the original view single minded: 'to incentivize the production of information.'¹⁴² Chander and Sunder argue that the view is too narrow, and therefore the Rawlsian approach is more suitable because (1) understanding intellectual property's impact on a variety of social values helps us restrain maximalist intellectual property demands; (2) relying on the tax and welfare systems to remedy any resulting distributional deficiencies is unrealistic; (3) the *raison d'être* of Western intellectual property laws is not necessarily globally scalable because of varying capacities to innovate; (4) we must attend to the kind of innovation that law spurs (for example, does the existing regime adequately incentivize the discovery of treatments for poor people's diseases?); and (5) we can best understand fair use doctrine not just as market failure but as an important component of free speech.¹⁴³

The discussion between Rawlsians and libertarians seems to come down to certain aspects that we have discovered in dialogues earlier in this paper. The (possibility of having) knowledge of the determinations of individual success combined with the admissibility of welfare-redistribution on these grounds is an important issue that Epstein points out. Besides that, we seem to return to the discussion of the measurability of benefits of IP rights in different economic and

¹⁴⁰ Epstein 2004 p.8-9

¹⁴¹ Chander & Sunder 2007 p.564

¹⁴² Ibid. p.573-574

¹⁴³ See Chander & Sunder 2007

social fields (like I mentioned before in the discussion with Chicagoans regarding private property), where both parties have diverse ideas about fairness and equality.

5.2 Different approaches to intellectual property

Over the last decade, a group of theorists have developed a new, interesting approach to copyrights in a modern society. Its advocates believe that copyrights developed in such a way that we have ended up with an “extreme” IP system that has lost sight of its original goal. These legal theorists have the opinion that because of the complicated system and strict control of copyright, society misses opportunities in the development of culture and creativity (which is one of the goals of IP rights in the first place). Lawrence Lessig is one of these writers. He is the founder of a non-profit organization called *Creative Commons*, whose goal is to ‘increase the amount of creativity (cultural, educational, and scientific content) in “the commons” – the body of work that is available to the public for free and legal sharing, use, repurposing, and remixing.’¹⁴⁴

Lessig, who is known as a liberal, makes clear that he is not against intellectual property. He rather believes that the end does not justify the means anymore: ‘[I]ntellectual property is good. I am in favour of it. Why are we pro-IP? Copyright is essential to the creative process. I am wildly on the side of pro-IP, and piracy is bad. Is that clear? IP is good; piracy is bad. But here is that really innovative suggestion: so too is war bad.’¹⁴⁵ Lessig refers to the “war on piracy” that is going on in the field of his specialization: software and internet. He argues that society needs a balanced IP policy again:

‘A sensible policy (...) could be a balanced policy. For most of our history, both copyright and patent policies were balanced in just this sense. But we as a culture have lost this sense of balance. We have lost the critical eye that helps us see the difference between truth and extremism. A certain property fundamentalism, having no connection to our tradition, now reigns in this culture – bizarrely, and with consequences more grave to the spread of ideas and culture than almost any other single policy decision that we as a democracy will make.’

¹⁴⁴ ‘What is CC?’ available at <http://creativecommons.org/about/what-is-cc>

¹⁴⁵ Lessig 2007 p.42

In his attempts to explain how this extremism blocks culture, Lessig often draws a parallel with the use of text; words and language. In contemporary society, a teacher of English literature is allowed to take two famous pieces of texts and tell the children to mix them together and write an essay from them (freedom of text). However, the teacher is not allowed to do the same thing with the artwork of George Lucas and Hitchcock, because it is called piracy. ‘We cannot begin to teach this literacy in our schools, so the capacity, the potential, is destroyed because we call it illegal. That is the critical point.’¹⁴⁶

The comparison with text and words, which are completely in “the public domain,” reminds us of Epstein’s words that are quoted in chapter 4. In the end, everything has its own source, which makes it impossible to track down all the different influences of a mix, and allocate percentages of influence, and thus credit, to the sources. Acknowledging this, through Creative Commons, advocates of this form of open sourcing want to achieve “creative pools” from which everybody can use whatever pleases him, as long as his creation also will be made available in the pool. The creator can assemble his own package of IP rights, so it is not necessarily “thrown” in the pool for everyone to do as he pleases with it. Another aim of the open source-idea is a more understandable description of the rights, so that a lay person knows what to expect. The system produces a license that comes in three separate layers:

‘The first, most important layer perhaps, is a commons deed, which expresses in a human readable way what the freedoms are that go with this content. Second, is a lawyer-readable licence – which actually guarantees the freedoms that are associated with this content. Third, critically, a machine-readable expression of the freedoms, that makes it so computers around the world can begin to gather content on the basis of the freedoms. (...) These three layers together are crucial. We need to find a way to make the freedoms understandable, unchallengeable and usable in a digital age – understandable by ordinary people, unchallengeable by lawyers, and usable by computers. That is the objective.’¹⁴⁷

Lessig’s vision in light of this thesis gives no reason to conclude that he has a point of view that both pro- and anti-IP libertarians would disagree with. The approach deals with the practical side of IP, rather than the theoretical views we discussed earlier.

¹⁴⁶ Lessig 2007 p.43

¹⁴⁷ Ibid. p.45-46

The commons have a proper free market-structure in which contract is the basis for the creative pools, and nobody is forced to cooperate with this system.

Not everyone is happy with the open source-initiative, and not everyone agrees that this could fit in the libertarian body of thought. Microsoft chairman Bill Gates, stated that '[t]here is some new modern-day sort of communists, who want to get rid of the incentives for musicians and movie makers and software makers under various guises, they don't think that incentives should exist.'¹⁴⁸

I don't think it is necessary to assess whether this is indeed a "sort of communist" point of view. But is it indeed harmful that these rising ideas do not include the financial incentive for producers? We noticed in chapter 4 that on a theoretical level that is already a very tough discussion between utilitarians and IP-antagonists. However, especially in the field of internet and software, Lessig shows examples of projects that made incredible developments while sharing and remixing.¹⁴⁹

The discontent with the idea of open source from a libertarian point of view appeared in a debate between Epstein and James Boyle (present chairperson of Creative Commons) in the *Financial Times*. Epstein recognized the "open source movement" as a reaction to the question of how we produce IP in the first place, and expresses some problems with open source software.¹⁵⁰ First, it has not been tested, and is likely to be vulnerable because the apparent intention of the provision is to "infect" a new program so that all of its content becomes open source software subject to the General Public Licence (GPL). Second, the clause might only bind those people who know that they are using open source code. This argument points out the same problem as the issue of contract in chapter 4. Once the contract protection lapses after a few individuals pass the creation from one to another, the open source movement is left only to its copyright remedies, which are likely to prove far weaker. Epstein's third point is that the movement cannot scale up to meet its own successes. Epstein compares the commune with a company, and thinks the system might work well in the early days, but problems will rise when a given worker wants to quit. The danger of immense resentment 'can be ducked only by creating a capital structure that gives

¹⁴⁸ 'Gates taking a seat in your den' available at http://news.cnet.com/Gates-taking-a-seat-in-your-den/2008-1041_3-5514121.html?

¹⁴⁹ See Lessig 2008 chapter 6

¹⁵⁰ Epstein 'Why open source is unsustainable' available at <http://www.ft.com/cms/s/2/78d9812a-2386-11d9-ae55-00000e2511c8.html>

present employees separable interests in either debt or equity in exchange for their contributions to the company. (...) The bottom line is that idealistic communes cannot last for the long haul.’¹⁵¹

Boyle disagrees, and bases his answer on two guidelines: listen to the market, and assume judicial common sense. Regarding the first of these guidelines, Boyle thinks that with Epstein’s free market-view as a starting point, different conclusions should be drawn:

‘In his scholarship, Prof Epstein has pointed out eloquently that the market is the best information processing system we have: we should assume that it is incorporating all available information. If we apply his principle here, it indicates that the market has weighed his fears and found them wanting. In my view, the market is discounting Microsoft’s stocks moderately because of fears about the competitive challenge posed by open source, and discounting open source-reliant stocks mildly, because of fears about legal challenges to the GPL or software produced under it.’¹⁵²

As an example of a concurrent of Microsoft, Boyle names IBM (‘not known for investing billions of dollars into the businesses built on licences that are simultaneously vague and imperialistic’¹⁵³). Boyle and Epstein have different ideas about the combination of open source and free market. Boyle concludes his opinion regarding this topic by stating that ‘[t]hat does not mean that the free software movement will inevitably triumph. Nor does it imply that the GPL is seamless – no licence is. But every business has an element of legal risk, or contract-uncertainty; the GPL seems to me – and, so far as I can tell, to the market – less uncertain than most.’¹⁵⁴

Regarding the second part of Epstein’s disbelief in open source, Boyle denies that we can speak of a “commune,” holding tangible property in common and excluding the rest of us. He rather sees it as ‘a community, creating an offering to the entire world the ability to use, for free, non-rival goods that all of us can have, use and re-interpret as we wish.’¹⁵⁵ With regard to influence of government, the two are not

¹⁵¹ Epstein ‘Why open source is unsustainable’ available at <http://www.ft.com/cms/s/2/78d9812a-2386-11d9-aee5-00000e2511c8.html>

¹⁵² Boyle ‘Give me liberty and give me death?’ available at <http://www.ft.com/cms/s/2/78d9812a-2386-11d9-aee5-00000e2511c8.html#U101244209021g4>

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

that distinct. To the statement that if open source is less effective than proprietary software, that gap should not be ignored by positing some positive network externalities that come from giving it a larger base, Boyle answers the following:

‘Given that initial “if”, I think this is a reasonable point. If open source software is less effective, government should not be investing in it. (Some people assume it will always be superior: I do not.) The point, of course, is that most of the government recommendations to invest in open source are based on assessments that, for a particular task, open source is actually superior *and* that adopting open source has important benefits because of its design – including ease of modification, and ability credibly to pressure proprietary providers to lower their prices.’¹⁵⁶

I wish to stress again that this particular topic only deals with a small part of the complicated IP discussion between libertarians. However, it is an interesting aspect of copyrights and patents that shows the matter from a different angle than we are used to in this paper. Unlike Bill Gates, I think that the ideas of the open source movement have a lot in common with the libertarian body of thought. The way they are dealing with (mainly digital) IP is based on contract, free will and well-defined derivatives from property that does not interfere with the rights of other individuals. It rather is a practical approach to the “extremism” that the creative common advocates sense in today’s IP practice. This also appears from Epstein’s vision on the topic, which indicates that it is particularly the feasibility of these projects that he questions.

In the conclusion of *Free Culture*, Lessig shows how the IP extremism emerges in today’s society by detailing an example that deals with the AIDS problem in sub-Saharan Africa. In this example, Lessig shows that the main factor in the current undesirable IP system is the government. Patents make HIV treatment extremely expensive, and although Lessig is an advocate of a drug patent system, according to him, (because of intensive lobbies) the United States government is not acknowledging that they are dealing with a crisis and therefore too strongly and extremely protecting the patents of (in this case) drug companies.

‘The corruption is our own politicians’ failure of integrity. For the drug companies would love – they say, and I believe them – to sell their drugs as

¹⁵⁶ Boyle ‘Give me liberty *and* give me death?’ available at <http://www.ft.com/cms/s/2/78d9812a-2386-11d9-ae5-0000e2511c8.html#U101244209021g4>

cheaply as they can to countries in Africa and elsewhere. There are issues they'd have to resolve to make sure the drugs didn't get back into the United States, but those are mere problems of technology. They could be overcome. A different problem, however, could not be overcome. This is the fear of the grandstanding politician who could call the presidents of the drug companies before a Senate or House hearing, and ask, "How is it you can sell this HIV drug in Africa for only \$1 a pill, but the same drug would cost an American \$1,500?" Because there is no "sound bite" answer to that question, its effect would be to induce regulation of prices in America. The drug companies thus avoid this spiral by avoiding the first step.¹⁵⁷

What Lessig wants to make clear is that our society has lost the sense of balance; the insight between truth and extremism. 'A certain property fundamentalism, having no connection to our tradition, now reigns in this culture – bizarrely, and with consequences more grave to the spread of ideas and culture than almost any other single policy decision that we as a democracy will make.'¹⁵⁸

This is only one of Lessig's range of examples of where a strict appliance of IP legislation conflicts with desirable (cultural) situations. His solution does not contain one of the libertarian views we discussed in chapter 4, but rather aims at a practical stimulus within the current system.

5.3 Conclusion

Libertarians receive extensive critiques from theorists with a liberal point of view. Supporters of Rawls' "egalitarian" approach have problems with the general free-market views of libertarians because they deny the unfair situations of unequally divided talents and capacities. However, when we apply the Rawlsian view to the topic of IP theory, we find points of controversy that are similar to the discussion between libertarians themselves: the (possibility of having) knowledge of the determinations of individual success combined with the admissibility of welfare-redistribution on these grounds, and the measurability of benefits of IP rights in different economical and social fields.

The ideas of the open source movement have a different relation to the libertarian body of thought. They advocate an approach that for a small part criticizes

¹⁵⁷ Lessig 2004 p.260-261

¹⁵⁸ Ibid. p.261

the theory, but mainly focuses on the practical development of IP rights within the current system. Lessig, Boyle and their constituency are pro-IP, but foresee losses in culture and social welfare if governments keep on running the system in the extreme way they do today. It is not a clear-cut resistance to libertarianism. In fact, in my opinion, the ideas of libertarian antagonists of IP have a lot in common with the way the open source movement shapes and promotes creative commons. On the whole, we can conclude that amongst both (most) libertarians and open source advocates, there is a general discontent with the way IP regulations can and do effect the distribution of creativity and welfare in an undesirable way.

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Conclusion

Libertarians believe that through the means of a free market and private property, harmony and mutual benefit with regard to economy and society will be reached. In their opinion, political authority is not necessary – it is even undesirable – for the social cooperation that is essential for life. A commonly stated libertarian principle is that a stateless or minimal state situation encourages people to cooperate intensively, because they will find out that effectively, this is most beneficial. The main problem laissez-faire theorists express about government is the fact that the state is the only institution allowed to use coercion, which creates a conflict with individual freedom. In a free market-society there is room for state-like structures, but only on a voluntary basis.

The basic concept of property from a libertarian point of view is scarcity. Liberal founding father Locke introduced the theory of mixing labor in order to appropriate goods, which is still the most important approach within libertarianism. It is not surprising that the major dilemma concerns where a legal system should draw the lines to limit one person's use of his rights in order to protect the rights of another individual. That is the aspect of the theory that slightly separates libertarians. An important (Pareto) theory that stresses how private property stimulates prosperity is the idea that, motivated by the desire of increasing (individual) social welfare, owners will transfer appropriated goods if they are convinced that what they acquire has more value to them than what they give up. Liberal (Chicagoan) critics of this view do not agree with the libertarian system of first appropriation combined with the Pareto-efficiency. Chicagoans generally prefer a way of financial allocation to maximize wealth and value of production. In this discussion, I have more understanding for the libertarian view that it is scientifically impossible to redistribute welfare in such a way, and that it just increases arbitrariness, which is immoral and undesirable due to its inability to determine situations in advance.

Intellectual property theories that are used by libertarian writers can be divided into utilitarianism and natural rights. According to utilitarians, society benefits from created works and inventions. Mill's happiness principle, holding that as long as an intellectual work does not hurt society, it is beneficial and the system should stimulate creators, is the historical basis for the utilitarian view. The natural theory comes in

forms based on personhood (introduced by Hegel) and based on labor (introduced by Locke). Probably because Hegel's theory is too undefined towards utilitarians or Locke's labor theory for libertarians to base their views on it, libertarian natural rights advocates use Locke as a starting point. This means "mixing labor" is their basis, instead of reward, will and personhood.

Libertarian proponents rooted in utilitarianism focus on rewarding inventors by offering exclusivity against third parties in order to improve innovation, and have the opinion that this effect is demonstrably positive. The reason that antagonists disagree (because of arbitrariness and lack of measurability) follows the common libertarian argumentation that is a response to virtually all attempts to redistribute welfare and re-address prosperity fairly. Regarding the doctrine of the use of contracts to protect works, both utilitarians and antagonists agree about the inability to protect creations in such a way. The difference is that utilitarians think this is a problem regarding innovation and prosperity, while antagonists consider it harmless. Antagonists state that the artificial monopolies are unacceptable, for they are illegitimate privileges due to state intervention. Utilitarians, however, think that a copyright or patent is only one aspect of competition and is therefore barely influential. Again, this raises the antagonist answer that the law exists not for wealth maximization, but rather only for justice. For natural rights theorist and antagonists, the discussion goes back to property, scarcity and creation. Antagonists claim that the outcome of Locke's proviso actually contradicts his justification of property. IP rights are exceptions to the free society. Natural rights theorists acknowledge that society's "common pool" of resources asks for a compromise that exists in an IP rights system. Again, arbitrariness is one of the main complaints about this solution. Antagonists do not accept this rationale, and strongly disagree with the statement that creation is a source of property rights. In their opinion, natural scarcity is the one and only basis for property. I believe that the practical view on resources in a *res commune* way (rather than *res nullius*) is a valid one that actually makes the plea for compromise deliberate and adjective.

Though there is much debate and criticism amongst Libertarians, there are also critical remarks by other (liberal) theorists. An important contribution is the Rawlsian "egalitarian" approach, which disagrees with the general free-market views of libertarians because of its denial of the unfair situations of unequally divided talents

and capacities. Just as within the libertarian discussion, the (possibility of having) knowledge of the determinations of individual success combined with the admissibility of welfare-redistribution on these grounds, and the measurability of benefits of IP rights in different economic and social fields, is the skeptical answer of libertarians to the Rawlsian alternative.

Advocates of open source commons express the realization that the theories might not be the problem, but rather find fault with the extremism with which people adhere to the chosen path. They support an approach that for a small part criticizes the theory, but mainly focuses on the practical development of IP rights within the current system. While advocates of IP regulation, these writers foresee losses in culture and social welfare if governments continue to run the system in the extreme way that they do today. One should realize that this is not a resistance to libertarianism, but rather creates possibilities for overlap and mutual concessions that can lead to desirable solutions that could have best of both (utilitarian and natural rights) worlds.

Antagonists of intellectual property are probably the theorists who apply the general libertarian thought most strictly to IP rights. Lack of possibilities to measure, predict and regulate lead to arbitrariness. However, in the broad range of things, and given circumstances and context of society today, there is a need for concessions. Concessions that acknowledge that when it comes to creation, everything is relative since there are innumerable, untraceable influences that a creator uses with or without even knowing it. Concessions that leave space for contracts that make use possible, whether it is free or paid. Concessions which are designed to follow the theory with prosperity as a goal, but yield when the end does not justify the means any longer.

Bibliography

Primary sources

Agreement of Trade-Related aspects of Intellectual Property Rights

United States Code Title 35

Secondary sources

‘An Interview with Hans-Hermann Hoppe, Austrian Economics Newsletter, Vol.18 No.1, Austrians and the Private-Property Society’ available at http://mises.org/journals/aen/aen18_1_1.asp

Bastiat, Frédéric ‘Ce qu'on voit et ce qu'on ne voit pas’ available at <http://bastiat.org/fr/cqovecqonvp.html>

Bell 2002

Bell, Tom W. ‘Indelicate Imbalancing in Copyright and Patent Law’ in Adam Thierer and Wayne Crews (eds) *Copy Fights: The Future of Intellectual Property in the Information Age* (2002) CATO Institute, Washington DC.

Blair and Cotter 2005

Blair, Roger D. and Cotter, Thomas F. *Intellectual Property Economic and Legal Dimensions of Rights and Remedies* (2005) Cambridge University Press, Cambridge UK.

Block 1977

Block, Walter ‘Coase and Demsetz on Private Property Rights’ 1 *Journal of Libertarian Studies* 111 (1977)

Boyle, James ‘Give me liberty and give me death?’ available at <http://www.ft.com/cms/s/2/78d9812a-2386-11d9-ae5-00000e2511c8.html#U101244209021g4>

Chander and Sunder 2007

Chander, Anupam and Sunder, Madhavi ‘Is Nozick Kicking Rawls’s ass? Intellectual Property and Social Justice’ *UC Davis Legal Studies Working Paper No.108* (2007)

Cwik 2008

Cwik, Paul F. ‘Is There Room for Intellectual Property Rights in Austrian Economics?’ *Austrian Scholars Conference* March 13-15 2008, Auburn, Alabama, available at <http://mises.org/journals/scholar/cwik3.pdf>

Epstein, Richard A. ‘Why open source is unsustainable’ available at

<http://www.ft.com/cms/s/2/78d9812a-2386-11d9-ae5-00000e2511c8.html>

Epstein 2004

Epstein, Richard A. 'Liberty versus property? Cracks in the Foundations of Copyright Law' *John M. Olin Law & Economics Working Paper No.204 (2nd Series)* (2004)

Epstein 2008

Epstein, Richard A. *Supreme Neglect: How to Revive Constitutional Protection From Private Property* (2008) Oxford University Press, New York.

Fisher 2001

Fisher, William 'Theories of intellectual property' in S. Munzer (ed) *New essays in the legal and political theory of property* (2001) Cambridge University Press, Cambridge UK.

Franck 1995

Franck, Murray "Intellectual and Personality Property" 5 no.3 *Institute for Objectivist Studies Journal* 7 (1995)

Friedman 1994

Friedman, David 'Standards as intellectual property: an economic approach' 19 *University of Dayton Law Review* 1109 (1994)

'Gates taking a seat in your den' available at http://news.cnet.com/Gates-taking-a-seat-in-your-den/2008-1041_3-5514121.html?

Hayek 1944

Hayek, F.A. *The Road to Serfdom* (1944) George Routledge & Sons, London.

Hazlitt 1946

Hazlitt, Henry *Economics in One Lesson* (1946) Harper & Brothers, New York and London.

Hegel 1821

Hegel, G.W.F. *Philosophy of Rights* (2001) Batoche Books, Kitchener.

Hindley 2006

Hindley, Brian 'The TRIPS agreement: the damage to the WTO' in Meir Perez Pugatch (ed) *The Intellectual Property Debate, Perspectives from Law, Economics and Political Economy* (2006) Edward Elgar, Cheltenham.

Hoppe 1989

Hoppe, Hans Hermann *A Theory of Socialism and Capitalism* (1989) Kluwer Academic Publishers, Boston.

Hoppe 1993

Hoppe, Hans-Hermann 'The Ethics and Economics of Private Property' in Enrico Colombatto (ed) *Companion to the Economics of private property* (2004) Edward Elgar, London.

Hughes 1988

Hughes, Justin 'The Philosophy of Intellectual Property' 77 *Georgetown Law Journal* 299 (1988)

Kelley 1995

Kelley, David "Reply to N. Stephan Kinsella, 'Letter on Intellectual Property Rights'." 5 no.3 *Institute for Objectivist Studies Journal* 13 (1995)

Kinsella 2001

Kinsella, Stephan N. 'Against Intellectual Property' 15 *Journal of Libertarian Studies* 1 (2001)

Kitch 1977

Kitch, Edmund 'The Nature and Function of the Patent System' 20 *Journal of Law and Economics* 265 (1977)

Kitch 1986

Kitch, Edmund 'Patents: Monopolies or Property Rights?' 8 *Research in Law and Economics* 31 (1986)

Kymlicka 1990

Kymlicka, Will *Contemporary Political Philosophy: An Introduction* (1990) Oxford University Press, Oxford.

Lessig 2004

Lessig, Lawrence *Free Culture* (2004) The Penguin Press, New York.

Lessig 2007

Lessig, Lawrence *Remix* (2008) Bloomsbury, London.

Lessig 2008

Lessig, Lawrence 'The Vision for the Creative Commons: What are We and Where are We Headed? Free Culture' in Brian Fitzgerald *Open Content Licensing: Cultivating the Creative Commons* (2008) Sydney University Press, Sydney.

Locke 1689

Locke, John 'Two Treatises of Government' in Steven M. Cahn (ed) *Political Philosophy, the Essential Texts* (2005) Oxford University Press, New York.

Mackaay 1990

Mackaay, Ejan 'Economic Incentives in Markets for Information and Innovation' 13 *Harvard Journal of Law and Public Policy* 867 (1990)

Menell 2000

Menell, Peter S. 'Intellectual Property: General Theories' in Boudewijn Bouckaert and Gerrit de Geest (eds) *Encyclopedia of Law and Economics, vol.: Civil Law and Economics* (2000) Edward Elgar, Cheltenham.

Mill 1863

Mill, John Stuart *Utilitarianism* 7ed (1879) Longmans, Green, and Co., London.

Moore 1997

Moore, Adam D. 'A Lockean Theory of Intellectual Property' 21 *Hamline Law Review* 65 (1997)

Narveson 1988

Narveson, Jan *The Libertarian Idea* (1988) Temple, Philadelphia.

Nozick 1974

Nozick, Robert *Anarchy, State and Utopia* (1974) Basic Books, New York.

Palmer 1989

Palmer, Tom G. 'Intellectual Property: A Non-Posnerian Law and Economics Approach' 12 *Hamline Law Review* 261 (1989)

Palmer 1990

Palmer, Tom G. 'Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects' 13 *Harvard Journal of Law and Public Policy* 817 (1990)

Posner 2005

Posner, Richard A. 'Intellectual Property: The Law and Economics Approach' 19 *The Journal of Economic Perspectives* 57 (2005)

Rand 1966

Rand, Ayn *Capitalism, The Unknown Ideal* (1966) New American Library, New York.

Rawls 1971

Rawls, John *A Theory of Justice* (1971) Oxford University Press, London.

Rawls 1996

Rawls, John *Political Liberalism* (1996) Columbia University Press, New York.

Rothbard 1973

Rothbard, Murray *For a new liberty, the libertarian manifesto* Revised Edition (2002) Macmillan Publishing Co., New York.

Rothbard 1980

Rothbard, Murray 'Myth and Truth About Libertarianism' 24 *Modern Age* 1 (1980)

Skoble 2008

Skoble, Aeon *Deleting the State* (2008) Carus, Peru Illinois.

'Swedish Pirate Party Sails to Success in European Elections' available at <http://www.guardian.co.uk/technology/2009/jun/11/pirate-party-sweden>

'What is CC?' available at <http://creativecommons.org/about/what-is-cc>