

The Great Debate on Intellectual Property

On November 14 the Cato Institute and Forbes ASAP cosponsored the Fifth Annual Technology and Society Conference, “The Future of Intellectual Property in the Information Age.” Among the featured speakers were Tom W. Bell of Chapman University School of Law and James V. DeLong of the Competitive Enterprise Institute. Excerpts from their remarks follow.

Tom W. Bell: Arguments about intellectual property ultimately turn on questions of values, not merely questions of fact or quantitative measures.

However, since copyright and patent law purportedly aims to strike a “delicate balance” between public and private interests, the relevant quantitative data matter. The rationale for copyright and patent protection relies on a showing that lawmakers have at least roughly approximated such a balance. But copyright and patent law has not struck, and indeed cannot strike, a delicate balance of public and private interests. Lawmakers can, at best, achieve only a rather *indelicate imbalance* of those private interests that get a spot at the legislative table.

We need to reconsider state action protecting copyrights and patents. Copyrights and patents function as a federal welfare program of sorts for creators. As are other welfare programs, copyrights and patents are necessary evils at best, and thus subject to reform efforts.

Some people might object to the characterization of copyrights and patents as purely utilitarian devices for maximizing social utility and argue instead that those intellectual properties represent natural rights that vest in creators.

Cases, legislation, and commentary on copyright and patent law leave little room for natural rights, however. The Supreme Court has, for instance, described copyright as “the creature of the Federal statute”—the Copyright Act—and observed that “Congress did not sanction an existing right but created a new one.” In another case, the Supreme Court observed: “The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement,

to bring forth new knowledge.”

Of course libertarians often disagree with the Supreme Court. Some argue that copyrights and patents rely on a Lockean theory—that creators mix their efforts with their creations and thereby enjoy natural rights to their intellectual properties. That facially plausible extension of Locke’s theory does not withstand close scrutiny, however. Locke’s justification gives a creator clear title to only the particular tangible item in which he or she fixes his or her creative work.

So the author, sitting in his garret writing, wins clear title to only the piece of



Tom W. Bell: “Copyrights and patents function as a federal welfare program of sorts for creators.”

paper and pen with which he has mixed his labor. It does not follow that the author can walk out into the street and say, “Shut down the presses; that’s my work you’re copying.”

Locke himself did not try to justify intangible property rights. More pointedly, copyright and patent protections contradict Locke’s justification of property. By invoking state power, a copyright or patent owner can impose prior restraint, fines, imprisonment, and confiscation on others. Were I now to start singing a copyrighted song, for instance, I would thereby infringe on someone’s intellectual property rights. But it’s my throat; it’s your ears. Where does anyone get the power to tell us we can’t do that? It comes from the Copyright Act—not natural law.

Because they gag our voices, tie our hands, and shut down our presses and our machine shops, copyrights and patents violate the very rights that Locke defended.

At any rate, Locke’s theory of proper-

ty runs little risk of convincing contemporary legislators or courts to forsake the prevailing utilitarian view of copyright and patent. The language of the Constitution’s Copyright and Patent Clause settles the issue. That language speaks in a utilitarian voice, justifying the exercise of state power as necessary “to promote the progress of science and useful arts.”

The Copyright and Patent Acts, though designed to counteract market failure, have themselves fallen into statutory failure. We thus need to encourage market-based alternatives to copyrights and patents.

Copyright and patent law provides emergency shelter to creations that but for these special statutory protections would have fallen through the cracks of common law and been left wandering homeless through the market economy.

Just as commentators call the special treatment afforded influential commercial interests “corporate welfare,” we might call copyright and patent law “creators’ welfare.” We ought to withdraw copyright and patent protection when and if it proves redundant. It’s an emergency measure.

Clearly, however, copyright and patent law can lay just claim to being a fairly efficient means of giving creators incentives. The creation of fungible and divisible rights by statute law does tackle a difficult problem, one important enough that the Founders thought it worthy of being addressed in the Constitution.

Yet if we don’t need those protections, they become not necessary evils but just plain old evils, and therefore unjustified.

Copyright and patent policy almost certainly fails at striking a delicate balance between public and private rights. Political authorities cannot measure all the relevant economic, legal, technological, and cultural factors that go into a calculation of the optimal level of protection. And even if they could, politicians could not balance those incommensurable values.

Furthermore, even if such a balancing act were possible, politicians would listen most to the parties closest at hand. We thus see in the Copyright and Patent Acts not so much a delicate balance of public and private interests as an indelicate imbalance that reflects bare-knuckled politics and spe-

cial interests' jockeying. Those who lobby for greater copyright and patent protection benefit from the rhetoric of property, asserting that they aim only to protect authors and inventors from theft.

So, what should libertarians and classical liberals do about the overextension of copyrights and patents? They should first of all take care to conserve their rhetorical resources. As more and more rights win the label "property," property risks losing all significance.

We also need to keep a lookout for clear imbalances in intellectual property. Notwithstanding the impossibility of delicate balances, we can tell when copyright and patent fall seriously out of whack. Just as Soviet planners surely knew that one kopek for a tractor was too low a price, for instance, we can be sure that if Congress passes a bill mandating that people making copies of DVDs will suffer death and dismemberment, it has gone too far.

Finally, we need to think harder about "exit" options that can privatize intellectual property protections. If private markets can provide adequate incentives for the creation of expressive works and novel inventions, after all, we want to move toward those markets.

Thus framing the problem properly is crucial. It is not a problem of natural rights. It is today a problem of devising an efficient welfare program that gives creators sufficient incentives and leaves the door open to market-based reforms.

James V. DeLong: Here's a good way to liven up a dull day: walk down the hall at the Competitive Enterprise Institute or Cato and ask, "So, what do you think about Napster?" Instantly, you will have a fight on your hands.

I especially recommend that this be done at lunchtime, for reasons that those of you who recall the food fight scene in *Animal House* will quickly understand. And I might add that if you do not remember that scene, you can rent the film for \$3 at your local Blockbuster, thanks to our wonderful system of intellectual property.

An interesting dimension of discussions of intellectual property is that they are divorced from thought about tangible prop-



James V. DeLong: "It is difficult to see why intellectual property should be regarded as fundamentally different from physical property."

erty. In both academia and law practice, there appears to be little cross-fertilization between people involved in the two areas. I was recently at a gathering where a bunch of Hollywood types were bemoaning Napster and kids with no respect for intellectual property. After a while, unable to restrain myself any longer, I said: "Well, in every environmental context, such as wetlands or endangered species, you guys in Hollywood have favored looting private property. Don't you think maybe these people are just practicing what you taught them?" The Hollywood people were utterly baffled.

My own interest in intellectual property evolved from an interest in tangible property, particularly in connection with environmental issues. The core of many environmental disputes—over wetlands, endangered species, zoning, and land preservation—involves property. Governments are quick to take property without compensation as long as they can call it environmental protection.

Although there are important differences, the reasons for recognizing intellectual property really parallel the reasons for recognizing the more tangible forms of property.

Property is a fundamental part of all cultures. Occasionally one hears of noble savages who share freely. But I do not know of any of those anthropological legends that have survived real analysis. The general rule seems to be that if a resource is scarce, or requires labor to create or convert it into a useful state, then humans will attach property rights to it.

Harvard professor Richard Pipes notes

that discussions of property since the time of Plato have involved four themes: morality, economics, politics, and psychology.

First, morality: the general concept of Lockean justice is that ownership is derived from labor, because each person has the right to the fruits of his industry. There seems to me a strong argument that the creativity that goes into an intellectual product does indeed create Lockean title, not simply to the particular paper and ink with which one expresses an idea, but to the idea.

A second line of justification for property involves the utilitarian or incentive argument that Tom mentioned. People work hardest and produce the most when they produce for themselves; money matters. This is as true for artistic expression as it is for shoemakers.

Economic historian Douglass North has commented that the great leap of the Industrial Revolution was caused by societies' developing ways to protect interests in innovation—not just property rights but contract rights—so as to provide ways to make innovation pay and to create incentives. Property is necessary to produce investment. Who would forgo his current consumption unless he got some future benefit?

That leads to the third theme, the political. Property diffuses power and rewards efficient administration. Ownership is a way of decentralizing decisions rather than depending on planning authorities. If resources are not owned, they will be allocated not only inefficiently in an economic sense but politically.

Property ownership is also an important component of a democratic republic. People do need a stake in society to ensure that its politics does not run off the rails.

Pipes's last theme is psychology. He says that property enhances people's sense of identity and self-esteem. I would say that property enhances not just the sense but also the reality of personal autonomy and power, an important function of any social order.

Whether based on natural rights or on utilitarian concepts, Pipes's arguments are deeply conservative in the sense that they have evolved over several millennia in

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the context of many different societies.

Of course, identifying the basic justification for property does not answer all the questions, even in the context of tangible property. There are questions of public facilities, technology, and infrastructure. And there are commons problems, spillovers and externalities, and issues of technological change. For example, tangible property is regularly redefined because of technological change. A prime example is the old doctrine that if you own property on a waterfront you can build a pier. But if technological change makes it possible to build a square mile's worth of structures on pilings, suddenly your rights change. You can't fill up San Francisco Bay. People used to own their property from the center of the earth to the top of the sky. Then the airplane was invented. Property rights are subject to some reasonable limits, and to revision as technology changes.

The same revision in the light of technological change should and will occur with respect to intellectual property rights.

For example, many current copyright issues involve fair use, the doctrine that

one can make limited copies without paying or permission. That doctrine arose largely because of transaction costs. If the digital revolution reduces transaction costs so that permission can be obtained and copies made cheaply, then the need for the doctrine shrinks. (It does not disappear because there are still problems of parodies and other uses for which one might not want to require permission.)

Of course, one problem with the transaction cost approach is the lack of any current system for micropayments, necessary if providers of intellectual property are to make available their wares at prices that seem fair to the users. For example, it would be nice if songs could be made available for 25 cents a track.

But the most important point is that technological change does not eliminate the need to recognize the claims of intellectual property, and it is difficult to see why intellectual property should be regarded as fundamentally different from physical property.

For all those reasons, I really think that intellectual property is a sound institution, not a necessary evil but a necessary good, and it needs protection. ■

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ating fully funded private retirement accounts.

Guo Shuqing, deputy governor of the People's Bank of China, agreed that China should move toward fully funded individual private accounts to create a stable pension system.

Mao Yushi, director of the private Unirule Institute in Beijing, argued for "a return from social security to individual security." In the heart of the Middle Kingdom's communist stronghold, he declared, "The contributor himself should have the right of choice to determine in which financial institution to apply his contribution."

Without clearly defined private property rights—and thus stock shares that are fully transferable—there can be no real capital markets in China, said Dorn, vice president for academic affairs at Cato. Economic reform must come first, but, as Dorn reminded the audience, former Chinese leader Deng Xiaoping said in 1987, "Without political reform, economic reform cannot succeed."

Tanner, director of Cato's Project on Social Security Privatization, gave an update on the privatization effort in the United States and why that effort is so important for the future of freedom and prosperity.

China's capital markets can benefit from pension reform, said Fred Hu, managing director of Asia Pacific economics research at Goldman Sachs in Hong Kong. Creating individual accounts and allowing a range of investment options will increase investment returns and strengthen China's capital markets. The elderly will have a higher standard of living as a result.

Other speakers at the conference (funded, in part, by American Skandia Inc. and Aegon) included Ling Li of the Hong Kong Polytechnic University; Wang Yan, senior economist at the World Bank; David Hutton of the ING Pension Trust; John Greenwood, chief economist at Invesco Asia, Ltd.; and Francis T. Lui, director of the Center for Economic Development at the Hong Kong University of Science and Technology. ■



Cato's Mencken Research Fellow P. J. O'Rourke, author most recently of *The CEO of the Sofa*, spoke at Cato seminars in Chicago, Austin, Los Angeles, San Francisco, Denver, Houston, and Boston in October and November. Host for the Los Angeles seminar was the Ronald Reagan Presidential Library. At every stop Cato sponsors and other attendees lined up to get their books signed. O'Rourke is now writing a column for *Regulation* magazine, alternating with magician-commentator Penn Jillette and occasional guest columnists.

