

ISSUES FORUM

On the subject of intellectual property

By Wendy McElroy

The question of what can be the proper subject of ownership -- what is property? -- is an important theme of libertarianism. It arises in discussion of such diverse topics as slavery, pollution, animal rights and intellectual property. It is with intellectual property (by which is commonly meant, copyright and patent) that the question becomes unusually difficult, for what is being claimed is the ownership of intangibles, of ideas. The title of a recent book, **Who Owns What Is In Your Mind?**, concretizes a commonsense objection to intellectual property; most people would loudly declare, "no one owns what is in my mind!" Yet, if the information you have is a chemical formula which you accidentally glimpsed, do you have the right to market it as your own over the protests of the chemist who worked a lifetime to perfect it? Do you have the right to publish a book with characters named John Galt and Dagny Taggart? And if not, why not?

Intellectual property was the subject of intensive and unsurpassed debate within the pages of Benjamin Tucker's libertarian periodical **Liberty** (1881-1908). Because of this, the best presentation of this question is an overview of the debate. The citations which appear directly after quotations refer to the appropriate issue and page of **Liberty**.

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ting . . . let him do at his pleasure." (March 21, 1891,4)

So long as the monopoly of ideas was contractual, the opponents of intellectual property were content.

The point of contention was the claim that intellectual property was based on natural rights and, therefore, should be protected by law in the same manner that other property, such as land, was protected. Just as you did not require a contract in order to "monopolize" land you had homesteaded, neither did you need a contract to give you just claim

the key question and, because of this, it is more accurate to label the opposing forces as "extensionists" and "anti-extensionists" than as pro and anti-intellectual property.

Ultimately, the debate over non-contractual copyright and patents revolved around three core issues: What is property? What are the essential characteristics which enable something to be subject to ownership? What is an idea?

[There were also a number of interesting side squabbles which are interesting enough to mention. The

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to an idea. Both were products of labor and, by natural law principles, the property of their producer. It was the assertion and denial of this claim that formed the backbone of the debate.

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anti-extensionists (Tucker, Walker, J.B. Robinson, Wm. Hanson) attacked the Spencerian notion that such ownership, if it did exist, should have a time limit as embodied in the law. The extensionists (Yarros, Simpson, Wm Lloyd), though greatly influenced by Spencer, agreed that property rights should not expire. There was some debate on utilitarian grounds with extensionists claiming that, without a legal copyright, no one would write great literature. Tucker responded that Shakespeare had penned all his works a century prior to the first copyright law. He quoted

his own right," explained Wm. Hanson. "It is his property; but it is non-transferrable. No conceiver of an idea can transfer it bodily from his own brain to that of another, and thus deprive himself of it." (June 13, 1891, 6). Walker added: "The giver or seller parts with it [property] in conveying it. This characteristic distinguishes property from skill and information." (May 30, 1891, 3) The anti-extensionists considered transferrability to be a defining characteristic of property.

In response to the question "what is an idea?" the extensionists replied that it was a form of wealth and the product of labor. The egoist J.B. Robinson had a different approach. "What is an 'idea'?" he asked. "Is it made of wood, or iron, or stone? . . . the idea is nothing objective . . . that is to say, the idea is not part of the product; it is part of the producer. . ." (May 16, 1891,5) Robinson argued that ideas cannot be owned because they are part of a human being. They are the result of labor in the same sense that the muscles on an arm are the result of exercise. It was absurd, however, to say that either the muscle or the idea was a product independent from the producer. As part of the producer, they were not subject to ownership.

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accidentally glimpsed, do you have the right to market it as your own over the protests of the chemist who worked a lifetime to perfect it? Do you have the right to publish a book with characters named John Galt and Dagny Taggart? And if not, why not?

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Although it is usually contended that the intellectual property debate was over the ownership of ideas, this is not quite accurate. James Walker -- who wrote under the pseudonym of Tak Kak -- was a leading opponent of copyright and patent; he stated, "My thoughts are my property as the air in my lungs is my property . . ." (March 21, 1891, 4) Both sides of the debate agreed that each man owns his own thoughts which he is free to express or not, as he pleases.

Nor did the debate center around an individual's right to use and dispose of his property, of his own ideas. On this, Walker wrote: "If any person wishes to live by imparting his ideas in exchange for labor, I have nothing to say against his doing so and getting cooperative protection without invading the persons and property of myself and my allies. . . whatever he can do by contract, cooperation, and boycott

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The advocates of intellectual property believed that because a man was the first to discover an idea, he was entitled not only to the use of the specific instance of that idea, but also was entitled to prohibit others from similarly using it. Ownership extended from one's own instance of an idea to all instances of the idea. Spooner (the leading proponent of intellectual property) based this claim of extended ownership on the contention that ideas were the product of labor and that a man justly owns what his labor produces. In *The Law of Intellectual Property*, Spooner explains: ". . . the principle of individual property . . . says that each man has an absolute dominion, as against all other men, over the products and acquisitions of his own labor. . . ." To Walker and Tucker, however, the reward of the labor was the specific idea. More than this could not be claimed because, in the words of Henry George: "No man can justly claim ownership in natural laws, nor in any of the relations which may be perceived by the human mind, nor in any of the potentialities which nature holds for it. . . ." (July 7, 1888, 4) Whether ownership of ideas extended beyond one's own body was

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"What is property?" remained the central issue. The extensionists maintained that property was simply "wealth that has an owner" which ownership was acquired through discovery or labor. Tucker, however, asked the question in more fundamental terms; he asked why the concept of property existed at all. What was there in the nature of man and of reality that made such a concept necessary? He postulated that property arose as a means of solving conflicts caused by scarcity. Since all goods are scarce, there is competition for their use. Since the same chair cannot be used at the same time and in the same manner by two people, it becomes necessary to determine who should use the chair. Property arose as an answer to this question. "If it were possible," Tucker wrote, "and if it has always been possible, for an unlimited number of individuals to use to an unlimited extent and in an unlimited number of places the same concrete thing at the same time, there would never have been any such thing

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Although copyrights and patents are derivative issues from the question of ownership of ideas in general, most of *Liberty's* debate revolved around them. The debate concerning patents and copyrights began seriously in July, 1888 when Tucker reprinted excerpts from an article by Henry George published in George's periodical *The Standard*. "It cannot come from discovery." (July 7, 1888, 4) This distinction between discovery and production was crucial. The extensionists claimed that when a man discovered the law of electricity and mixed his labor with raw materials to express this natural law in the form of a generator, he had performed the labor of production and, thus, had title to the generator. The anti-extensionists, however, would counter that the act of discovery alone gave the man no more right to the principle of electricity than simply discovering a valley would give him right to that land. The discoverer, therefore, cannot prevent someone else from discovering -- five minutes or five years later -- the same principle of nature and from using that principle for his own benefit. To claim otherwise would be to say that the initial discoverer had ownership rights over an aspect of nature, of a physical relationship. Tucker believed that patents violated the libertarian theory of equal liberty. "From the moment a patent or copyright is granted," he wrote, "no man is free to acquire the same fact -- to elaborate from it, if he can, the same new idea

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Ideas, however, could be used at the same time and in the same manner by an infinite number of people. If one man discovers the principle of electricity and builds a generator on his own land, it in no way impedes another man's ability to discover electricity and build his own generator as well. Extended ownership, therefore, runs counter to the purpose of property, to the problem that the concept was meant to solve.

Furthermore, argued the anti-extensionists, copyright and patents contradict the essential characteristics of property, one of these characteristics being that the property be transferable, that it be alienable.

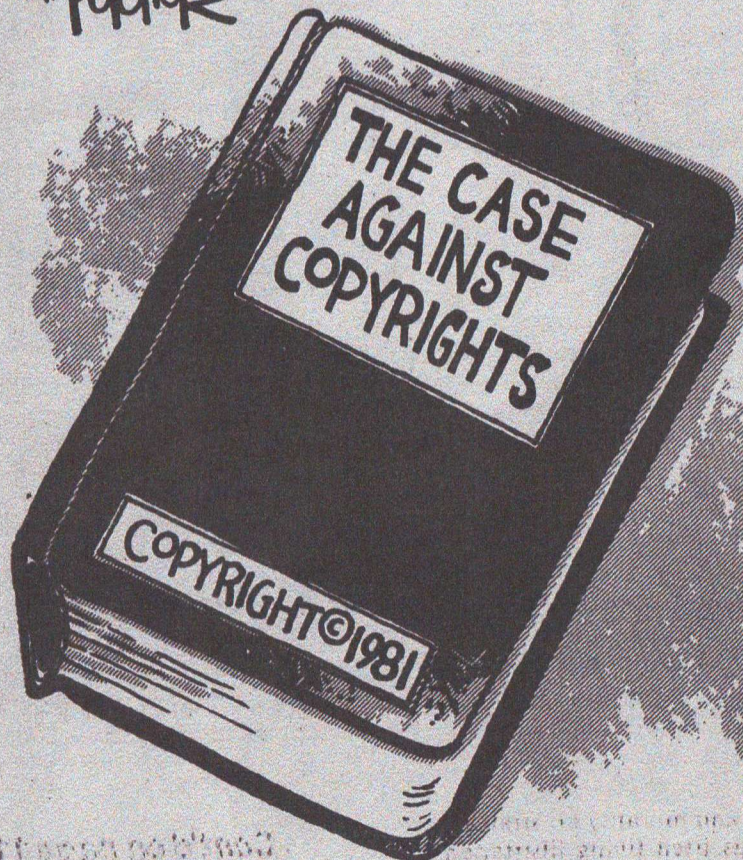
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When Victory Yarros offered the Spencerian contention that one would have the right to prove before a jury that one's instance of the idea was independently discovered, Tucker responded that such a reversal of proof -- the defendant would be guilty until proven innocent -- ran counter to all established methods of fair trial. He suggested that Spencer advocated this method because "to go to a jury on a question of independence of invention or authorship, with the burden of proof on the complainant. . . would be sure victory for the defendant. . . ." (Feb. 7, 1891, 4)

Copyrights were handled some-

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what differently than patents, which were generally viewed as discoveries of natural law or of physical relationships. The 1888 excerpts from Henry George which sparked the debate were criticized by Tucker due to George's acceptance of copyright. Tucker stated: "The same argument that demolishes the right of the inventor demolishes the right of the author." (July 7, 1888,4). Tucker, however, set the stage for the perceived difference between the two forms of extended ideas when he wrote: "The central injustice of . . . patent laws is that it compels the race to pay an individual through a long term of years a monopoly price for knowledge that he has discovered today although some other man. . . in many cases very probably would have discovered it tomorrow." (Dec. 27, 1890,4)

The issue that separated patents from copyrights in many people's minds was probability. Simultaneous inventions are not uncommon and there are many instances of several people "originating" the same theory independently. A commonly cited example is that of Menger, Walras and Jevons, who independently conceived of marginal utility at about the same time. Extensionists like Yarros, however, did not think it probable that two men would independently originate *Hamlet* or *A School for Scandal*. He claimed that copyright protected not an idea, such as marginal utility, but the particular form of expressing that idea, the actual pattern of words. He wrote: "Copyright would not prevent anyone's writing a book to express the same ideas that Spencer has

expressed; it would simply prevent the appropriation of the fruits of his toil." (Dec. 27, 1890, 4)

Tucker addressed both points. He agreed that it was extremely improbable that two men would write the same poem, but insisted that it was not impossible. Simply throwing letters randomly up in the air, he insisted, would eventually render a piece that began "Shall I compare thee to a summer's day. . ." As to the extreme improbability of this, he wrote: "To discuss the degrees of

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probability. . . is to shoot wide of the mark. Such questions as this are not to be decided by rule of thumb or by the law of chances, but in accordance with some general principle. . . among the things not logically impossible, I know of few nearer the limit of possibility than that I should ever desire to publish *Liberty* in the middle of the desert of Sahara; nevertheless, this would scarcely justify any great political power in giving Stanley a right to stake out a claim comprising that entire region and forbid me to set up a printing press." (Dec. 27, 1890,4)

As to the ownership of a form of expression, of a pattern of combining words, Tucker commented: ". . . the particular combination of words belongs to neither of us. . . the method of expressing an idea is itself an idea, and therefore not appropriable."

(July 7, 1888, 4) Walker added: "If the printer may not copy new books, of course the shoemaker may not copy new shoes. . ." (March 21, 1891,5) Here, Walker pointed out that all ideas (whether of shoes, poems, chairs, hairstyles, or clothing) have distinctive forms of expression, but only in the case of literary expression does the question of granting a legal monopoly arise. The consistent extensionist would have to admit that since speech is a product of labor and a form of expression, everyone should

those who pick it up are thereafter considered the rightful owners. . . Similarly a man who reproduces his writings by thousands and spreads them everywhere voluntarily abandons his right of privacy and those who read them. . . no more put themselves by the act under any obligations in regard to the author than those who pick up scattered money put themselves under obligations to the scatterer." (April 18, 1891,5)

Tucker expressed the core of this argument and of his position on intellectual property when he exclaimed: "You want your invention to yourself? Then keep it to yourself." (Feb. 21, 1891, 5)

That copyright and patent are useful social devices to achieve desirable ends was never questioned. It was the basis of copyright and patent that was questioned. The extensionists claimed that they were derived from natural law. The anti-extensionists argued that they could be justly enforced only through contract. Perhaps the most important aspect of the debate was its emphasis upon the question so fundamental to libertarianism -- what is property?

This debate has not been resolved in libertarianism. To the extent that such 'gray' areas are discussed and dissected, we will come closer and closer to fully defining what is 'property', what is a 'right'. In doing so, we will once again be standing on the shoulders of giants.

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STRATEGY FORUM
