

Rethinking Intellectual Property: History, Theory, and Economics

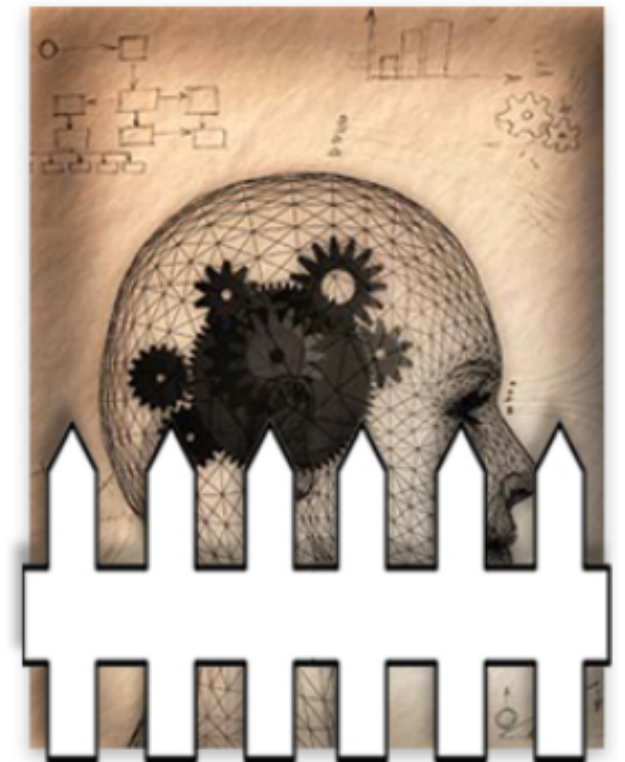
Lecture 6: Proposed Reforms; Imagining a post-IP world; the future of open vs. closed

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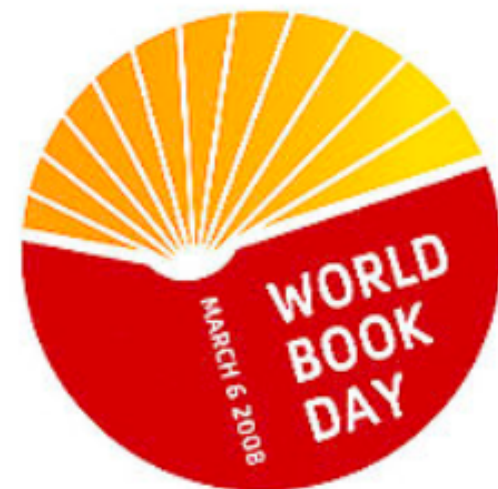


Outrages/News of the Week (older)

- FINAL EXAM to be posted shortly
- See recent www.C4SIF.org posts
- [Brazil's Largest Newspaper Sues Parody Blog For Making Fun Of It](#)
- [Copyright Lawyers Sued by Copyright Infringers](#) (inverse outrage :)
- [Common Misconceptions about Plagiarism and Patents: A Call for an Independent Inventor Defense](#)
- [A "Patent Stimulus" to End the Recession?](#)
 - [Obama Transition Team Member on "Optimizing" the Patent System](#)
- [Are anti-IP patent attorneys hypocrites?](#)

Other News--current

- [Tourists, beware: proposed law would make it crime to buy knockoffs in NYC](#)
- [Intellectual property: an unnecessary evil](#)
 - Jock Coats, Adam Smith Blog
- [The Evils of Real-World IP](#)
 - Nate-m comment on Mises blog
- [Happy World Book and Copyright Day](#)
 - And today is Happy IP Day!
- [Da-da-da-da-da ... CHARGE, says cor](#)
 - Compose sues sports teams for playing this tu
- [Copyrights as Incentives: Did We Just Imagine that: by Diane Leenheer Zimmerman](#)



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Other News--current

- [Cordato and Kirzner on Intellectual Property](#)
- [Summary of Microsoft v. i4i Oral Argument \(“Clear and Convincing” Standard for Patent Invalidity\)](#)
- [Apple sues Samsung over Galaxy products](#)
 - [Samsung strikes back at Apple with ten patent infringement claims](#)
 - Cartelizing effect of patents (barriers to entry)

Overview of Course: Revisit

1. History and Law: overview of modern IP law. Historical Origins of copyright and patent. Overview of justifications for IP
2. Property, Scarcity, and Ideas (the nature of property rights, role of scarcity, and the function of the market)
3. Examining the Utilitarian Case for IP
4. Examining Rights-Based Arguments for IP: creation as a source of rights
5. Integrating IP Theory with Austrian Economics and Libertarian Theory
6. TODAY: The Future: Proposed Reforms; Imagining a post-IP world; the future of open vs. closed

Other issues...

- Perversity of artificial scarcity of information and knowledge
- Diluting effect of new rights
 - Negative and positive rights
 - Welfare rights as trespass
 - Four Freedoms
 - Inflation analogy
 - IP rights as positive right
 - Redistribution of rights
 - Recall origin in monopoly privilege and censorship



Implications for Libertarianism and Austrian Econ.

- Austrian economics

- Mises

- Kinsella, "[Mises on Intellectual Property](#)"

- Hayek

- Tucker, "[Misesian vs. Marxian vs. IP Views of Innovation](#)"; Tucker, "[Hayek on Patents and Copyrights](#)"

- Rothbard

- [Knowledge, True and False](#)

- [Man, Economy, and State and Power and Market](#), Scholars Edition, pp. liv, 745-54, 1133-38, 1181-86

- Three essential aspects

- Cooperation (and division of labor)

- *Emulation* and learning

- Importance of recipes

- Knowledge as guide to action

- Competition

Implications for Libertarianism and Austrian Econ.

- Libertarianism

- Reputation Rights part of IP
- nature of contracts as transfers of title
 - Has implications for inalienability issues
 - Debtor's prison
 - [A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability](#), pp. 30-33
 - Block and Rothbard on debts

Implications for Libertarianism and Austrian Econ.

- Libertarianism

- Homesteading and nature of property rights

- Property rights in scarce resources only

- Information not ownable

- Danger of metaphors

- Rothbard's emphasis on rights as property

- Other "rights" like freedom of speech are derivative, not independent

- Property acquisition from original appropriation (homesteading) or by contract *only*.

- Creation is *not* an independent source of ownership

- Rothbard, Rand, Mises, Hoppe: we create **wealth** by **rearranging** already-owned scarce resources.

- Kinsella, [Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and "Rearranging"](#)

Implications for Libertarianism and Austrian Econ.

- Rothbard, Rand, Mises, Hoppe: we create **wealth** by *rearranging* already-owned scarce resources.
 - Rand: “The **power to rearrange the combinations of natural elements** is the **only creative power** man possesses. It is an enormous and glorious power—and it is the only meaning of the concept “creative.” “**Creation**” **does not** (and metaphysically cannot) mean the power to **bring something into existence out of nothing**. “Creation” means the power to bring into existence **an arrangement** (or combination or integration) **of natural elements** that had not existed before.”
 - Rothbard: “Men find themselves in a certain *environment*, or *situation*. It is this situation that the individual decides to change in some way in order to achieve his ends. But man can work only with the **numerous elements that he finds in his environment**, by **rearranging them** in order to bring about the satisfaction of his ends.”

Implications for Libertarianism and Austrian Econ.

- Rothbard, Rand, Mises, Hoppe: we create **wealth** by *rearranging* already-owned scarce resources.
 - Mises: “The first is the **widespread misconception** of the **nature of production**. There is a **naive view of production** that regards it as the **bringing into being of matter that did not previously exist, as creation in the true sense of the word**. From this it is easy to derive a contrast between the creative work of production and the mere transportation of goods. This way of regarding the matter is entirely inadequate. In fact, **the role played by man in production always consists solely in combining his personal forces with the forces of Nature** in such a way that the cooperation leads to some particular **desired arrangement of material**. No human act of production amounts to more than **altering the position of things in space** and leaving the rest to Nature.”

IP and Contract

- Rothbard's example of the mousetrap
- See *AIP*, pp. 45-55
- Good on patents
- Good on state copyright
- Good on contract theory
 - Title-transfer theory of contract
- Used “contractual copyright” to cover inventions (and presumably artistic works)
 - Implicit presumption that information is owned
 - We do not live by permission
 - Third parties are not part of any contract
 - Do not need any “right to make a mousetrap”

Reputation, Trademark, and Communication

- See my [“Reply to Van Dun: Non-Aggression and Title Transfer,” pp. 59-63](#)
 - Rothbard burger example
 - RothbardBurger, or R-Burger, and LachmannBurger, or L-Burger
 - Me: “under libertarianism, trademark law should give *consumers*, not trademark *users*, the right to sue trademark pirates”
 - Van Dun: “it is . . . difficult to see how trademark piracy could violate the consumer’s rights if it was not a violation of the trademark holder’s right.”
 - Social interaction and property exchanges presuppose the ability of the parties to communicate with each other.
 - “It need only be possible for the customer to adequately identify what the condition is.”
 - “Van Dun’s implicit assumption here is really that communication and identification of individuals or entities is literally impossible in the absence of trademark rights”

Proposed Reforms

- See my [“Reducing the Cost of IP Law”](#)
 - Patent
 - Reduce the Patent Term
 - Remove Patent Injunctions/Provide Compulsory Royalties
 - Royalty Cap/Safe Harbor
 - Reduce the Scope of Patentable Subject Matter
 - Provide for Prior-Use and Independent-Inventor Defenses
 - Instantly Publish All Patent Applications
 - Eliminate or Restrict Enhanced Damages
 - Working/Reduction to Practice Requirement
 - Provide for Advisory Opinion Panels
 - Losing Patentee Pays
 - Expand Right to Seek Declaratory Judgments
 - Exclude IP from Trade Negotiations

Proposed Reforms

● Copyright

- Radically reduce the term, from life plus 70 years to, say, 10 years
- Remove software from copyright coverage (it's functional, not expressive)
- Require **active registration** and periodic re-registration (for a modest fee) and copyright notice to maintain copyright (today it is automatic, and it is often impossible to determine, much less locate, the owner), or otherwise make it easier to use "[orphaned works](#)"
- Provide an easy way to dedicate works to the public domain — to abandon the copyright the state grants authors
- Eliminate manifestly unjust provisions of the [Digital Millennium Copyright Act](#) (DMCA), such as its criminalization of technology that can be used to circumvent digital protection systems
- Expand the "[fair use](#)" defense and clarify it to remove ambiguity [\[49\]](#) Provide that incidental use (e.g., buildings or sculptures appearing in the background of films) is fair use
- Reduce statutory damages

Proposed Reforms

- Trademark

- Raise the bar for proving "consumer confusion"
- Abolish "antidilution" protection
- Abolish the entire [federal trademark law](#) (Lanham Act), as it is unconstitutional (the Constitution authorizes Congress to enact copyright and patent laws, but not trademark law)

Possible Reforms

- Right Direction—but minor

- [UK copyright laws to be reviewed, announces Cameron](#)
- [Supreme Court Poised To Move In The Right Direction On IP](#)
 - Lower threshold to invalidate a patent in some cases
 - [Supreme Court Prepares to Chop Down “Clear and Convincing” Standard for Proving Patent Invalidity](#)
 - Trademark: eBay’s responsibility to police counterfeit jewelry
 - Bad: copyright notices on CDs served as notice for digital download
 - barred “innocent infringer” defense
 - \$27,750 damage award against 16 year old girl
- [Progress on ACTA](#)
 - Some egregious provisions watered down
- [IP: Divided Congress May Create Perfect Storm for Patent Reform](#)
 - Patent Reform Act of 2010 provides guidance on patent damages, raises the bar for finding willful infringement, discourages forum shopping and eliminates false marking suits where the plaintiff cannot show competitive damage. Seen as “pro business”

Possible Reforms

- Wrong Direction

- ACTA
- COICA
- [Doctorow: Handicapping the horse-race for Canada's new copyright bill](#)
 - DRM clause
- Fashion, Food Recipe
 - [Bartenders Looking For Greater Intellectual Property Protection For Drinks](#)

Innovation in a Post-IP World

- Innovation viewed as public good
 - Fallacious: See Hoppe, [*The Economics and Ethics of Private Property*](#), ch. 1, “Fallacies of the Public Goods Theory and the Production of Security
- Entrepreneurs job to figure out how to profit in the face of varying conditions
 - Means of exclusion
 - Costs of exclusion
 - Movie speaker example
 - *AIP*, note 67
 - *The law’s function is to define and protect property rights, not to solve the entrepreneur’s task for him by protectionist monopoly grants*
- [Innovations that Thrive without IP](#)
- [Funding for Creation and Innovation in an IP-Free World](#)

Innovation in a Post-IP World

- Why do people blog?
- Why do scholars write articles?
- Dance routines and choreography
 - [Copyrighting Dance Steps–The Death of Choreography](#))
- Write open source software?
- Contribute to Wikipedia articles?
- Physicists investigate causal laws of nature?
- Mathematicians come up with algorithms and proofs?
- Perfume companies make and sell perfume?
- Fashion designers come up with new clothing designs?
- Chefs new recipes?

Innovation in a Post-IP World

- Shakespeare's plays—pre copyright
- Gutenberg's Printing Press
- Pre-copyright classical music
- Why did publishing flourish under no-copyright Germany more than in copyright England?
 - [No Copyright Law: The Real Reason for Germany's Industrial Expansion?](#), By Frank Thadeusz (Jeff Tucker, [Germany and Its Industrial Rise: Due to No Copyright](#))
- Grateful Dead allows bootlegging
 - Doug French, [Secrets of the Most Successful Touring Band of All Time](#)
- Newspapers free on the Internet?: ads
- TV shows broadcast for free?: ads

Innovation in a Post-IP World

- Reputation, Networking, Gratification, Ads
 - Singers: advertising for live concerts
 - Novelist:
 - Cory Doctorow: “For me — for pretty much every writer — **the big problem isn’t piracy, it’s obscurity.**”
 - reputation for career
 - subscriptions for sequels
 - consulting for films
 - speaking
 - Inventions
 - Producers: First mover advantage; competition
 - Producers: Reputation, goodwill (Tylenol; Black & Decker)
 - Individuals: Reputation; get a job; networking; learning
 - Painters and photographers: reputation; advertisement for commissioned work
 - Newspapers online; broadcast television: free; ad revenues; premium services

Innovation in a Post-IP World

- Creator-endorsed mark
 - [The Creator-Endorsed Mark as an Alternative to Copyright](#)
- Movie theater experience
 - Innovations like 3D
- [Kickstarter](#), “a new way to fund creative ideas and ambitious endeavors....”
 - Scott Wilson’s [use of the service](#) to raise funds to sell watchbands for use with the new iPod nano (which has a clock interface). They set a goal of having \$15,000 committed; as of the date of this post they have had almost \$500k pledged. This guarantees enough funding and demand for the product to get off the ground.



Innovation in a Post-IP World

- [IndieGoGo](#) allows projects to be funded
 - low budget documentaries
- [Quirky.com](#) – site that enables “social product development.”
 - lets you outsource various parts of engineering or manufacturing or product development to others, and give them a cut of profits.
- Micropledging service The Point, used recently by Austro-libertarians Bob Murphy (to [challenge Paul Krugman](#) to a debate—\$56k pledged so far) and Vijay Boyapati to raise almost \$20k for the Mises Institute—see Jeff Tucker’s [The Age of Micro-Patronage](#)).

I've enjoyed this course! You've been a great class!

