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 Dagney 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 is an overview of the debate. The citations which appear directly after quotations refer to the appropriate issue and page of Liberty.

Although it is usually contended that the intellectual property debate was over the ownership of ideas, this is not quite accurate. James Walker, 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.

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 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 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 Goethe: "We shall all die, but not our work." 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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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 boycot

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

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 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 George Bernard Shaw: "...the cry for copyright is the cry of men who are not satisfied with being paid for their work once, but insist upon being paid twice, thrice, and a dozen times over." (January 10, 1891, 6)

"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 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 a part of a human being. They are the result of labor in the same sense as 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.

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 than the principle of electricity than simply discovering a valley would give him right to that land. The discovery is 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.
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 not satisfied with being paid for their work once, but insist upon being paid twice, thrice, and a dozen times over." (January 10, 1891, 6) "What is property?" remained the central issue. The expansionists 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 as the institution of property." 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. He who conceives an idea has it in his power to put it into practice when he chooses. Copyrights were handled some-
what differently than patents, which were generally viewed as discoveries of natural law or of physical relationships. The 1886 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 demystifies the right of the inventor demystifies 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 ideas 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 (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 be entitled to legal protection for every sentence they spoke so that no one thereafter could speak that sentence without consent. Spooner does, in fact, come very close to this position.

Another argument used by the anti-extensionists was that to publish and sell a work without a contract to protect its contents was, in effect, to abandon it. This was counter to Spooner’s contention that the law must presume a man wishes to retain control over his property so long as it has any value to him. Thus, if an idea is valuable, to publish it does not decrease its value, and it remains legally protected property. Needless to say, Tucker analyzed it differently. He wrote: “If a man scatters money in the street, he does not thereby formally relinquish title to it... but 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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