

AGAINST AGAINST INTELLECTUAL PROPERTY: A SHORT REFUTATION OF MEME COMMUNISM

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(As the text indicates in various places, a version of this essay is now a chapter in a book: Lester, J. C. 2016. *Arguments for Liberty: A Libertarian Miscellany*. Buckingham: The University of Buckingham Press.)

Introduction

This essay is intended to be a refutation of the main thesis in *Against Intellectual Property*, Kinsella 2008 (hereafter, K8). Points of agreement, relatively trivial disagreement, and irrelevant issues will largely be ignored, as will much repetition of errors in K8. Otherwise, the procedure is to go through K8 quoting various significantly erroneous parts as they arise and explaining the errors involved. It will not be necessary to respond at the same length as K8 itself.¹

This text uses the new libertarian paradigm that is non-morally liberty-based, ultimately pre-propertyarian, and critical-rationalist: that is, of liberty as the absence of interpersonal proactive impositions, of their minimisation in the event of clashes, and the explicitly conjectural nature of this theory and its desirability in practice.² This clashes with the old libertarian paradigm, which is mainly rights-based, ultimately (physical-)propertyarian, and justificationist; as is found in the essay being criticised here.

The errors and their correction

K8 states that intellectual property (IP) rights “at least for patents and copyrights, may be considered rights in ideal objects” (14). And that seems to be clear enough. But then K8 goes on to assert that

A’s ownership of ideal rights gives him some degree of control—ownership—over the tangible property of innumerable others. (15)

This is a fundamental confusion. To own an “ideal object” (or abstraction, or meme) is to have control over its use. If someone tries to use that “ideal object” in some way (such as by making goods based on it) without its owner’s consent, then a defence of its ownership may ensue. That defence is not asserting any kind of “ownership—over the tangible property of innumerable others.” By analogy, if someone has ownership of his own body, or land, or any physical thing, then he might defend that ownership from other people using their own bodies or external properties to use it without his consent. And neither is that defence asserting any kind of “ownership—over the tangible property of innumerable others.” Despite explicitly referring to “intellectual property”, K8 is implicitly presupposing that only physical things

¹ A general explanation of the position taken here is explained in Lester [2000] 2012, pp. 95-105. A concise but in some ways more precise and detailed explanation is in the entry on intellectual property in Lester Forthcoming and online here: <http://thelibertarianalliance.com/2014/09/06/thoughts-on-intellectual-property/>

² As found, for instance, in Lester [2000] 2012, 2011, 2014, and Forthcoming. The exact form of words does not matter, but it must be possible to express interpersonal liberty (in the intuitive sense of ‘people not initiating constraints on each other’) in some adequate form of words, as the old paradigm fails to do. The formula chosen here is intended to reflect the idea that the relevant constraints must be somehow initiated (rather than defensive or neutral) and must lower the want-satisfaction (or preference utility) of the recipient.

can really be property and that any so-called IP is really about imposing limits on, or interfering with, ‘real’ physical property (PP).

However, there is a grain of truth in what K8 states, and it is this: to make anything into private property (whether physical, including self-ownership, or intellectual) is usually thereby to proactively impose at least very slightly on some other people: being denied free access can be a new disutility. But if we assume that such ownership is universalised, then those other people, in their turn, are also able to enjoy the benefits of private property. And in this way it is a lesser proactive imposition (i.e., a lesser interference with liberty) to allow (imposition-minimising) private property (whether physical or intellectual) than it is to deny it. Therefore, it is mistaken to view such private property (whether physical or intellectual) as “invasion” (36) or “trespass” (47) when it exists solely in order to minimise these things. K8 partly perceives and greatly magnifies the minimal imposition in IP but does not see any of the similar minimal imposition in PP. This is because K8 has adopted a purely physical-propertarian view as inherently ‘libertarian’ without having any explicit theory of liberty to explain this.

K8 immediately repeats this error but goes on to add more when it states that

Patent and copyright invariably transfer partial ownership of tangible property from its natural owner to innovators, inventors, and artists. (15)

The idea of a “natural owner” is some sort of appeal to natural law. Perhaps natural law exists, and perhaps it is libertarian. But to cite it appears to be to adopt a natural law theory rather than an explicitly libertarian theory, i.e., a theory that explains the relationship to interpersonal liberty. Moreover, if there is a “natural owner” for some “tangible property” (by whatever explanation), then there ought also to be a “natural owner” for ‘intangible property’ (by a parallel explanation). And who must any “natural owner” be if not one of the “innovators, inventors, and artists” that produced it? Again, K8 is expressing a mere physical-propertarian presumption.

K8 goes on to assert that “Pro-IP arguments may be divided into natural-rights and utilitarian arguments” (16). What K8 overlooks here is that “Pro-IP arguments” can also include explicitly *libertarian* arguments: arguments that relate to liberty as such. And by asserting that “Libertarian IP advocates tend to adopt the former *justification*” (16, emphasis added) K8 is also overlooking the critical rationalist epistemology that can put IP as a libertarian conjecture for explanation and defence from criticism rather than any futile attempt at a “justification.” This is because a putative justification implicitly and erroneously presupposes that it is possible to give epistemological support to a theory in a way that transcends a web of assumptions (or conjectural framework).³ Hence, while there is no justification, it is still possible to conjecture and explain that there can be liberty-based IP, that it can promote ‘utility’ or general welfare (and libertarian ‘natural rights’ too), and then consider any criticisms that purport to show that it does not. But K8 is only arguing here that there are “fundamental problems with *justifying* any right or law on strictly utilitarian grounds” (20, emphasis added). As justifications are not possible, K8 is right, but not for the reasons it advances.

In the later discussion about “Property and Scarcity” K8 tells us that

as libertarians recognize, following Locke, it is only the first occupier or user of such property that can be its natural owner. Only the *first-occupier* homesteading rule

³ For further explanation of critical rationalism and its application to libertarianism see, for instance, Lester 2011 ch. 23; Lester [2000] 2012 pp.135-142; Lester 2014 pp. 74-76 and 107-109; and relevant entries in Lester Forthcoming.

provides an objective, ethical, and non-arbitrary allocation of ownership in scarce resources. (30)

This, again, seems to be referring, without any theoretical explanation, to natural law in its reference to a “natural owner”. So it seems to be about natural lawyers that merely, and mysteriously, self-identify as “libertarians”. In fact, the “first occupier” rule does approximate to what is libertarian. But in order to see this one needs to have a theory of interpersonal liberty, such as ‘not being proactively imposed on’. Then it follows that allowing the “first occupier” to have a property claim will slightly proactively impose on non-“first occupiers” who now have to go elsewhere (and might also be resentful, or envious, etc.). However, it would usually proactively impose more on people generally to not allow “first occupier” property claims: people would lose any investments they had made in the property and productive activity would be undermined. So “first occupier” ownership is proactive-imposition minimising (i.e., liberty maximising) as a strong *ceteris paribus* libertarian rule. But, in unusual or emergency situations, it is possible that “first occupier” ownership needs to be either completely waived or at least temporarily reduced. For instance, merely to be the first person to reach the sole natural water supply would not be enough to become its sole owner—as that would severely proactively impose on later-arriving people. And in the event of some natural disaster that meant that people needed to flee across other people’s land, then a “first occupier” claim would not be enough to bar their way—as that would severely proactively impose on would-be escapees. This is because in both cases we have a pre-existing resource and not a benefit that the “first occupier” had created and was merely withholding access to. Thus this theory of liberty provides a better “objective, ethical, and non-arbitrary allocation of ownership in scarce resources.” (Strictly speaking, of course, what the liberty-maximising option is remains a factual matter; while affirming that option’s desirability is a, completely separate, moral or value matter.)

K8 continues:

property rights ... are applicable only to scarce resources. Were we in a Garden of Eden where land and other goods were infinitely abundant, there would be no scarcity and, therefore, no need for property rules; property concepts would be meaningless. The idea of conflict, and the idea of rights, would not even arise. (31)

This cannot be entirely correct, if only because people would still want to own themselves (even if they were one of “infinitely abundant” clones). And there would probably also be value attached to particular examples of things (“This is the very locket she gave me on that day”). So it is not clear that “property concepts would be meaningless” just because “goods were infinitely abundant” in a physical sense. Such reservations aside, scarcity is a good explanation of the desirability of property rules: those rules can maximise liberty (by minimising proactive impositions) with all the advantages of so doing.

However, it is another fundamental error to go on to assert that “The problem with IP rights is that the ideal objects protected by IP rights are not scarce” (31). This is an error because each ideal object is a particular thing. There is only one ideal object that is Pythagoras’s Theorem, the number six, and Mahler’s second symphony (which is not to imply that all these should be IP). And there is a finite supply of *valuable* “ideal objects” that currently exist; often with no close substitute for a particular one. K8 is not taking the theory of “ideal objects” seriously as particular “objects”. Infinitely more than one physical use or physical instantiation of an ideal object might be possible. But that does not show that there is more than one ideal object of that kind. It makes sense to say that there is an ideal object that is a particular poem. But there cannot be two or more ideal objects that are this same poem.

They conceptually collapse into the same one ideal object. What K8 really means, of course, is simply that the physical use of an ideal object does not deprive other people of that ideal object's use in any way. But that is false as well, because one very important use for an ideal object just is to own it, and that ownership implies that the owner has control over its use.⁴ K8 is advocating the non-ownership (or communism) of ideal objects. But that non-ownership will cause a 'tragedy of the commons' as regards many ideal objects: people will be less likely to attempt to produce (including by discovery) some ideal objects if they cannot own (exclusively control) them once they are produced.

Consider a physical analogy. Suppose I build a machine that can produce widgets using air and natural light. The machine is also powered by air and natural light and never needs repairing. I switch on the machine and in seconds I have a month's supply of widgets to sell in the nearby market. When I am not around, you come along and use the machine to make the same number of widgets and you promptly go and sell them in the market yourself. Furthermore, you intend to continue repeating the procedure because I am, somehow, unable to guard the machine adequately and you can always, somehow, beat me to the market. You assert that I have lost nothing, because I still have access to my machine, and to the widgets I made, and to as many more widgets as I want. However, I didn't produce the machine or the widgets for my personal use. I produced them solely in order to have something to sell. And now you have prevented that. Therefore, it is clearly false to claim that I have lost nothing and that my incentive to make such machines has not been undermined. And this appears to be sufficiently analogous with the position of many people who produce "ideal objects" with the intention of claiming them as IP. Perhaps this is generally fairly obvious and convincing to most people who consider such matters. Confusion mainly arises if we allow the crude and false, and 'mutually reinforcing', assumptions that only physical things can really be property, that there is no scarcity involved with valuable ideas, and that both any alleged IP "justice" (20) or consequentialist need to "encourage the production of creative works and inventions" (21) must to be "justified" (passim)—which must not, in any case, constrain 'real' PP.

K8 then makes a further error in asserting that "such property rights are not, and cannot be, allocated in accordance with the first occupier homesteading rule" (31-32). In fact, the first inventor or discoverer of an intellectual object could be regarded as a "first occupier homesteading" it. The only problem would be the even greater crudeness of that rule in this case. For, in order to avoid being a positive nuisance to (i.e., proactively imposing on) other people, it is necessary to time-limit the (sole) ownership to likely (or actual) independent invention or discovery. Some sort of legal procedure involving experts would probably be required to approximate the non-proactively-imposing length of a claim, and any claims would likely always be liable to later appeals. Any real second party, etc., would then share the IP. Otherwise, it would eventually revert to the public domain once there were only hypothetical further parties.

One example K8 then gives us is this:

If I invent a technique for harvesting cotton, your harvesting cotton in this way would not take away the technique from me. I still have my technique (as well as my cotton). Your use does not exclude my use; we could both use my technique to harvest cotton. There is no economic scarcity, and no possibility of conflict over the use of a scarce resource. Thus, there is no need for exclusivity. (32)

⁴ Even if we suppose that ideal objects are somehow multiple, that multiple supply is still scarce in the sense that there are limited ownership rights of that supply: either particular people own it or it is not owned at all.

Bearing in mind what has now been explained—and taking the possibility of IP seriously—this can more accurately and relevantly be reworded thus: If I invent a technique for harvesting cotton [intending to own that technique], your harvesting cotton in this way [without my consent] would [~~not~~] take away the [ownership of the] technique from me. I [do not] still have my [IP] technique (as well as my cotton). Your [non-contractual] use does [~~not~~] exclude my [IP] use; we could both use my technique to harvest cotton [but I have lost the IP in the technique]. There is [~~not~~] economic scarcity [in both the ownership and in the general supply of useful ideal objects], and [~~not~~] thereby a possibility of conflict over the use of a scarce resource. Thus, there is [~~not~~] need for [IP] exclusivity.

Or consider this remark in K8:

Ideas are not naturally scarce. However, by recognizing a right in an ideal object, one creates scarcity where none existed before. (33)

As we have seen, there is both a “natural” scarcity of valuable ideas generally and also a scarcity with a particular idea in that a denial of (proactive-imposition-minimising) producer-ownership does deprive the producer of the intellectual asset he has created, and thereby a considerable part of the incentive to produce valuable ideas. Hence to deny such producer-ownership is to exacerbate scarcity (in opportunity cost terms) among valuable ideas. Of course, in the very short term the abolition of IP would in some sense reduce scarcity. But this is relevantly and sufficiently similar to the way that a reduction in scarcity would occur if factories, warehouses, and shops were denied ownership of their physical products: any immediate increase in supply would very soon turn into greater scarcity than would otherwise have existed.

It is unnecessary to continue further with K8. The remainder of the text contains more repetition, plus quotations from texts expressing similar views, or material that is irrelevant to the main argument.

Conclusion

In its advocacy of “ideal object” (or meme) communism, K8 makes various significant errors throughout. The two main errors are assuming that only physical things can really be property, and that there is no scarcity involved with ideal objects. Many of the errors might have been avoided if only K8 had an explicit, non-moral, theory of interpersonal liberty by which to assess what is libertarian. In other words, K8 would not have had to resort to the old gallimaufry of dubious ad hoc assumptions presented as “libertarianism” if only it had taken liberty more seriously—as the new libertarian paradigm does.

Bibliography

Kinsella, N. Stephan. 2008. *Against Intellectual Property*. Auburn, Alabama: Ludwig von Mises Institute.

Lester, J. C. 2011. *Arguments for Liberty: a Libertarian Miscellany*. Buckingham: The University of Buckingham Press.

—— [2000] 2012. *Escape from Leviathan: Libertarianism without Justificationism*. Buckingham: The University of Buckingham Press.

—— 2014. *Explaining Libertarianism: Some Philosophical Arguments*. Buckingham: The University of Buckingham Press.

—— Forthcoming. *A Libertarian Dictionary: Explaining a Libertarian Theory*.