Are Libertarians For Intellectual Property?: Comment on David Koepsell's "Why I Believe Gene Patenting is Wrong"

by Stephan Kinsella on August 26, 2009

in AgainstMonopoly.org Blog Posts, Intellectual Property

My comment on the debate between Randy Mayes and David Koepsell on human gene patents at the IEET was posted in "Are Libertarians for Intellectual Property?" (*Institute for Ethics & Emerging Technologies*, Aug. 26, 2009:

Mr. Koepsell,

I read with interest your comments above criticizing IP from a self-professed libertarian perspective. I am a libertarian and a practicing patent attorney and I too oppose patent rights (one of the few patent attorneys who dare to)–patents are, as you say, unnatural and artificial privileges granted by the state at the expense of real property rights. My website contains various articles, books, and speeches on this topic, including *Against Intellectual Property*, and my recent speech "Intellectual Property and Libertarianism." I'm also affiliated with the Mises Institute, so I suppose Mr. Mayes has my work in mind when he unfairly, uncharitably, and falsely disparages and dismisses us as "idealogues."

I heartily agree with you when you write that you are "consistently confused by "libertarians" who support a government-sponsored monopoly of any kind" and that patents "are the grant by a government of an artificial monopoly of the practice or sale of a useful art or product."

Given that you recognize this, it is not clear why you seem to draw back (at least in this post; I have not yet read your book, which I intend to do) from a more sweeping critique of patents in general. E.g., you write, "IP laws only conflict with notions of justice when they impinge on some other, grounded right, as I argue they do with the genetic commons." IP laws always impinge on property rights. That is their purpose and nature.

I must say I sympathize with your comments about conflicts of interest on the side of IP advocates–isn't it striking that almost every patent lawyer or big company that benefits from this state monopoly is in favor of the practice? You are right: the patent industry benefits patent lawyers, so of course they tend to mindlessly repeat the state propaganda that supports their profession's existence.

As for Mr. Mayes's comments, he writes:

> "Your confusion related to libertarianism and what libertarians think is probably due to several reasons. What libertarians think is not universal. Libertarians at the Ludwig von Mises Institute are ideologues. They do not want the state involved period, so this provides an argument against patenting DNA for them. Civil libertarians are complaining about freedom of speech restrictions from patenting DNA, which is a week argument.
>
> "Pragmatic or mainstream libertarians housed at the Cato Institute and CEI are interested in IP as an extension of individual rights. Ayn Rand regarded IP as the base of all property rights: a man's right to the product of his mind. In the process, freedom of speech issues arise as well as the monopoly issue which create the confusion. Since the right to own property is the most fundamental right for mainstream libertarians, this overrides the speech and monopoly issues."

Well, as for free speech, I grant you that it is more endangered by another state-granted pattern-privilege, patent law's cousin, copyright (see my post Book Banning Courtesy of Copyright Law). Some Cato scholars support IP rights, but not all (see the work of Tom Palmer, for example–are they idealogues too, now?). Ayn Rand's defense of IP was seriously confused, and she would never have granted that IP so important that it "overrides" "speech and monopoly issues." IP rights are not an extension of property rights; they quite obviously undercut and invade property rights–a patent gives a right to its holder to legally force someone else not to use their own property as they see fit.

As for the repeated claims by various defenders of IP and critics of Mr. Koepsell to the effect that patent protection is "needed" to "incentivize" various forms of innovation–Mr. Holman in his review refers to "the important role gene patents have played in incentivizing the development of life-saving therapeutics" as if this is obvious and uncontroversial–this is the same old bankrupt utilitarian reasoning that is triply flawed. First, as I point out in *Against Intellectual Property*, utilitarianism is morally flawed–you could justify all sorts of horrible policies, including legalized theft, this way; and it is methodologically flawed since it is based on the unscientific notion that utility can be cardinally measured and interpersonally compared (the insights of Austrian economics shows that this is not the case).

But even if we ignore the ethical and other problems with the utilitarian or wealth-maximization approach, it is bizarre that utilitarians are in favor of IP *when they have not demonstrated that IP does increase overall wealth*. They merely assume it does (or say they assume it does) and then base their policy views on this assumption. It is beyond dispute that the IP system imposes significant costs, in money terms alone—not to mention liberty costs. The argument that the incentive provided by IP law stimulates additional innovation and creativity has not even been proven. It is entirely possible—even likely, in my view—that the IP system, in addition to imposing billions of dollars of cost on society, actually reduces or impedes innovation, adding damage to damage (see my post What are the Costs of the Patent System?).

But even if we assume that the IP system does stimulate some additional, valuable innovation, no one has established yet that the value of the purported gains is *greater* than the *costs* of the system. If you ask an advocate of IP how they know there is a net gain, you get silence (this is especially true of patent attorneys). They cannot even point to any study to support their utilitarian contention; they usually point to Art I, § 8 of the Constitution, as if the back-room dealings of politicians two centuries ago is some sort of evidence. In fact, as far as I've been able to tell, virtually *every* study that attempts to tally the costs and benefits of copyright or patent law either concludes that these schemes cost more than they are worth; or that they actually *reduce* innovation; or the study is inconclusive. There are no studies showing a net gain (see my post "Yet Another Study Finds Patents Do Not Encourage Innovation"; and, in this connection, I also highly recommend Boldrin and Levine's *Against Intellectual Monopoly* and their blog Against Monopoly, to which I contribute).

Instead, we hear repetitions of propaganda trotted out by the state to justify its artificial legislative schemes. But the truth is that anyone who accepts utilitarianism should, based on the available evidence, be *opposed* to IP. That they are not is telling–it is like those who claim to be environmentalists or fret about "global warming" but never advocate nuclear power, the obvious solution to the "problems" they pretend to be worried about.

Update: Interesting, I noticed you quoted one of your correspondents as having written "I spoke before the Pennsylvania Bar Association IP Section in Philly in 2007 and introduced them to the ontology of IP and social reality (used computers and software to make my points) and was greeted as a Galileo"–

I lived and worked in Philly in the late 90s and was a member of the IP section of the Pennsylvania Bar Association an indeed Founding editor (1997) of the *PBA IP Law Newsletter* (and Editor-in-Chief till 1999), I published in that journal an article entitled "Is Intellectual Property Legitimate?" (Winter 1998, later republished in the Federalist Society's newsletter).

Update II: A patent attorney who gets it!

[Against Monopoly cross-post]

{ 1 trackback }

Comment on Koepsell's "A methodical response to Chris Holman's 'review'"
August 26, 2009 at 11:25 am

{ 4 comments… read them below or add one }


1 Dale B. Halling August 26, 2009 at 9:22 am

It is a myth that patents are inconsistent with a free market. The basis for this point of view is the "scaricty theory of property rights". This scarcity theory is incorrect both historically and factually – see http://hallingblog.com/2009/06/22/scarcity-—does-it-prove-intellectual-property-is-unjustified/


2 Stephan Kinsella August 26, 2009 at 10:42 am

Mr. Halling writes, "It is a myth that patents are inconsistent with a free market." This type of "argument" is symptomatic of the positivism instilled by modern education. Mr. Halling does not seem to realize there is a distinction between fact and value, between description and prescription, between is and ought. A "myth" refers to a factually false proposition or belief. But the contention that patents are (or are not) is not a factual issue but a normative one. It cannot be a "myth" even if it were flawed (which it is not).

And, of course, this legal positivism, this scientism and empiricism (which any intelligent person could see is self-refuting–see e.g. Hans-Hermann Hoppe's In Defense of Extreme Rationalism and Economic Science and the Austrian Method), is what lies behind the confused morally bankrupt attempt to justify the normative validity of legislative schemes by appeal to brute facts.

In short, Mr. Halling is completely confused and in error. The free market denotes a system of institutionalized respect for property rights–which means property rights allocated in accordance with the Lockean first-use appropriation rule (see my What Libertarianism Is). The state is inherently

criminal and the decrees of its legislative sub-gang are not genuine law but merely edict enforced by the state–artificial law which is really just privilege, a way of benefitting the recipient at the expense of certain victims.

I explain in detail in my IP writing and lectures, such as *Against Intellectual Property*, "Intellectual Property and Libertarianism" (audio), "The Intellectual Property Quagmire, or, The Perils of Libertarian Creationism" (Powerpoint; PDF version, audio; video; Google Video), and There's No Such Thing as a Free Patent, why patent are not compatible with private property rights. Mr. Halling has not even attempted to address these arguments, nor is there any reason to believe he is sincerely interested in doing so. He is doing what most patent lawyers do: defending their gravy train and repeating the bromides they heard in law school, or read in Posner or Supreme Court cases, or that are monotonously repeated without question at IP lawyer CLE luncheons.

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Re Mr. Halling's opposition to the notion of scarcity as a foundational concept in property rights: as Hoppe notes in his withering retort to a critical review by Loren Lomasky (p. 411 of *Economics and Ethics of Private Property*):

> Like most contemporary philosophers, Lomasky gives no indication that he has grasped the elementary yet fundamental point that any political philosophy which is not construed as a theory of property rights fails entirely in its own objective and thus must be discarded from the outset as praxeologically meaningless moonshine.

3 Dale B. Halling August 26, 2009 at 11:43 am

Mr. Kinsella is incorrect that the statement "It is a myth that patents are inconsistent with a free market" is normative. A normative statement is a judgment that cannot be proven by facts. Free market principles are definable. From these principles it is possible to determine if certain systems are consistent with these principles as a matter of logic. Once the principles of a free market are defined then it can be factually determined if "a patent system is consistent" with a free market.

I have shown that the "scarcity theory of property rights", which Mr. Kinsella has used as one of his arguments against patent is flawed both logically and factually. See my posts Scarcity – Does it Prove Intellectual Property is Unjustified? http://hallingblog.com/2009/06/22/scarcity-–-does-it-prove-intellectual-property-is-unjustified/
Scarcity and Intellectual Property: Empirical Evidence for Invention http://hallingblog.com/2009/06/25/scarcity-and-intellectual-property-empirical-evidence-for-inventions/
Scarcity and Intellectual Property: Empirical Evidence of Adoption/Distribution of Technology http://hallingblog.com/2009/06/25/scarcity-and-intellectual-property-empirical-evidence-of-adoptiondistribution-of-technology/.

These posts show that the empirical evidence does not support the scarcity theory of property rights. The posts also show that the "scarcity theory of property rights" does not explain how property is to be allocated, how property rights in an object or idea are created, why slavery is wrong, why murder is wrong, etc. While the labor theory of property rights explains this and more. Trading the scarcity theory of property rights for the labor theory of property is like trading the theory that "what goes up must come down" for Newton's Law of gravity. The fact of the matter is that the proponents of scarcity have confused cause with effect. A system of private property results in efficient allocation of resource, but it is not the reason for private property – it is the effect of private property.


4 Stephan Kinsella August 26, 2009 at 12:28 pm

Mr. Halling writes:

> Mr. Kinsella is incorrect that the statement "It is a myth that patents are inconsistent with a free market" is normative. A normative statement is a judgment that cannot be proven by facts. Free market principles are definable. From these principles it is possible to determine if certain systems are consistent with these principles as a matter of logic. Once the principles of a free market are defined then it can be factually determined if "a patent system is consistent" with a free market.

One hardly knows where to begin with this … homegrown reasoning. Apparently whether something is "factual" or not has something to do with whether it is "definable." I am afraid Mr. Halling, in thrall to positivism, is utterly confused.

The truth is that "free market principles" means normative ideas such as property rights. The question is then whether, assuming the norms that underlie property rights are valid, patent rights are compatible therewith. In other words, if property rights are just (not a factual question), are patent rights? They are clearly not.

> I have shown that the "scarcity theory of property rights", which Mr. Kinsella has used as one of his arguments against patent is flawed both logically and factually. [] These posts show that the empirical evidence does not support the scarcity theory of property rights.

Once again, Mr. Halling provides a nice example of the intellectual straight jacket that positivism and scientism imposes on the minds of engineers (see Engineers' Syndrome). He is of the mind that "empirical evidence" is the touchstone of even normative theorizing; and that if it does not rest on this, it's "merely normative" (i.e., not real science). He does not realize that such monism-scientism is self-defeating since it rests on assumptions that themselves cannot be subjected to experimental testing.

> The posts also show that the "scarcity theory of property rights" does not explain how property is to be allocated, how property rights in an object or idea are created, why slavery is wrong, why murder is wrong, etc.

It certainly does, as is made clear in my articles What Libertarianism Is, How We Come To Own Ourselves, and What It Means To Be an Anarcho-Capitalist. What is Mr. Halling talking about?

> While the labor theory of property rights explains this and more.

Labor theory is confused for a number of reasons–both economically (Smith and Marx were wrong) and ethically.

> Trading the scarcity theory of property rights for the labor theory of property is like trading the theory that "what goes up must come down" for Newton's Law of gravity.

Again, Halling is confused. *All* property theories are about how to allocate property rights in scarce resources, as I explain in What Libertarianism Is. The libertarian is the one who believes in assigning these rights in a fair way and so as to permit conflict-free use of such resources.

> The fact of the matter is that the proponents of scarcity have confused cause with effect. A system of private property results in efficient allocation of resource, but it is not the reason

for private property – it is the effect of private property.

Mr. Halling is probably a fine patent attorney, but comments like these indicate the need for more homework.

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