CHAPTER 2

Intellectual Property Rights and the Principle of Self-Ownership

Most efforts at redefining rights of ownership and assessing intellectual property rights have been based on an assessment of the consequences. It is an evaluation of consequences that determines the fairness and legitimacy of the claim for intellectual property rights or its critique. A consequentialist defence or critique is therefore a contingent one and one that is heavily dependent either on evidence or continued prevalence of those consequences for the furnishing the burden of proof. Often termed as an ‘instrumental’ approach, it interprets property in terms of their instrumental capacity to produce or secure ethical goods, such as social welfare, personal liberty or economic growth. Another approach is to treat property of an entity as an ontological question: whether something can be considered as property depends on the possession of certain key traits or characteristics or upon being an entity of a particular kind. The utilitarian approach defends intellectual property on instrumentalist grounds. Natural law and labour theories are ontological approaches to the definition of property. This chapter proposes to examine the claim from intellectual property rights from the perspective of Self-ownership (s-o), a theme which emerges strongly in the writings of Locke and Nozick as discussed in chapter 1. The premise is that knowledge, interpreted as a part of the self that ‘owns’ the knowledge, is employed to create property. Can the self be owned and if so, then in what sense and what kinds of rights does it yield? Can the Lockean proviso, which is taken as a measure that grants legitimacy to property rights, hold good when employed to test IPRs? Can Knowledge be treated as self-created property? These are some questions that are analysed in this chapter.

The classical conception of property did not exhibit the same identifying characteristics as property does today. Contingencies and contexts have brought about discernable changes, not only in who the legitimate property holder is but also in what comprises property. The beginning of upheavals in the conception of property began when the feudal notion of ‘dominion’ separated so that sovereignty and property consolidated themselves into separate domains. Separate bundles of political and economic rights were generated. Liberal-democratic revolutions, rise of constitutional liberalism counter-posed an absolutist definition of property to an absolutist

definition of sovereignty. It was this displacement which led to the first reification of the concept of property.

Medieval conceptions of property had private rights co-existing with communal rights. This gave way, as noted by C.B. Macpherson, to an early idea of private individual ownership, which included life, liberty as well as estate, to be narrowed once again into a right to alienate as well as use material things. Until 17th C property was still considered a right in something rather than the thing itself. A great bulk of property was in land and was limited to certain uses, often excluding the right to free alienation. Property also consisted in corporate charters, monopolies, tax-framing rights, political and religious offices etc. All of them were rights, albeit shared, limited or delegated, rather than tangible things. The first reification was represented by the physical externality and materiality of the object owned.

It was the growing capitalist market that made the individuation of property complete. Limited rights in land, revenue or office gave way to absolute ownership rights in freely disposable goods. Property moved from being a subject of ownership and right to being the subject of production and exchange. "The concentration of property rights in post-feudal West was thus doubly predicated upon the individuation of the owning subject and the extension of the scope of ownership itself, which came to include not only rights of use and benefit, but also of rights of transfer by bequest and sale". As Macpherson comments, previously unsaleable rights in things were now saleable. The liberal conception of thing-ownership got consolidated. Allocation of transfer rights was an important step towards the gradual reification of property into a concept of thing-ownership. There was a shift from rights as residing in a person, over things, to ownership of the thing itself.

This divide emerged in Locke’s writings that affirmed that rightful property resulted from the mixing of an individual’s labour with unclaimed nature, thereby making the object his own, to use, dispose, and transfer. Pocock argues that this distinction gradually cemented, and that property instead of being a mere prerequisite to political relations between persons became a legally defined relationship between persons, and things or between persons through things. From

---

3 Dick Pels, Property and Power in Social Theory (London: Routledge, 1998), 33 -34
4 MacPherson, 1973, 128
5 J.G.A. Pocock, Virtue, Commerce and History: Essays on Political Thought and History Chiefly in the 18th C. (Cambridge: CUP, 1985), 104
an 'immaterial' relationship between people about things, a subject-subject relationship, property became an institution and a concept which described the relationship between the subject and material object. In the 17th and 18th C property acquired a thing like status, expressed as a shift from rights in *personam* to rights in *rem*. The democrats used the separation of property from personality and made latter alone the sufficient and necessary condition of the extension of political right.  

17th C divided the world of goods or resources into material goods and resources which could be owned and become property, and immaterials (other individuals, skills, knowledge, human rights...) which could not, a divide which was contingent upon the reification of ownership relations. However the reverse could also be true. A thing like status could also readily be conferred upon all items that fulfilled the criteria of 'sovereign completedness', alienability, etc. As per the language of the natural rights philosophy it was possible to own one's self, even when subjective rights were considered innate and inalienable. It was possible to alienate one’s self temporarily in exchange for a wage, or by mixing one’s labour with a ‘thing’, which was amenable to physical alienation. *Thus there existed, as per the earlier theories of property, no logical or ontological association between property and things. Physical tangibility or intangibility is, therefore, of no great consequence: the nature of property is to be found in institutionally defined rights, not in the physical externality of the subject. That this reifying tendency is not restricted to only material objects is confirmed by examples of slavery and intellectual property. Two examples of what can comprise property, though historically apart, affirm that a thing like status can be conferred on any item that fulfils the criteria of *separatendedness, excludability and alienability*, albeit differently in different cases. For example ideas are not separable from the self in the same as a car is; manifestations of the idea are separable but not the idea itself. The lines demarcating what is separable, alienable, or excludable, what is amenable to human appropriation and what is not, is a contested one and one which is constantly being redrawn in different historical and moral contexts.  

20th century saw the ontological connection between property and things break down with property like status being attributed to knowledge, ideas and other 'mental' outputs. *The extension of property rights to intangibles like intellectual property represents the second reification of the concept of property*. A thing like status has been conferred on knowledge, which

---

6 Ibid., 119-20.
7 Dick Pels, *Property and Power in Social Theory*, 34.
as long as can be demonstrated as 'exclusive' and 'alienable' can be accorded the status of property, which is tradable. This is, to some extent, related to the emergence of modern science in the 17th c. In more recent times science has increasingly enmeshed itself with other social institutions, raising new questions about intellectual property, especially in the domain of science. These questions been accompanied by efforts both to redefine the rights of ownership and to extend them to new claimants, generating conflicts about the rights and responsibilities of property owners and the extent to which they are observed in practice.

A fundamental reason for scepticism about the legitimacy of establishing property rights in the products of the mind is that consideration of IP tends to be divorced from thought about tangible property. This is evident in the legal profession, where both academicians and practitioners regard "property" to mean real property and other tangible goods, and "intellectual property" as distinct topics, with little cross-fertilization. The distinction seems to hold in economic discussion as well and in general public discourse. The roots of this division go back to the different origins of the different types of property in England, where tangible property was a creature of common law and copyright largely a creature of statute. It is clear that "property" in tangible form has a legitimacy that predates the charters and statutes that made property an institution, which was under legal protection.

HISTORICAL OVERVIEW OF INTELLECTUAL PROPERTY

Although there are references of chefs being granted year long monopolies over culinary delights in Greek colonies, and references in Roman law dwelling upon the problem of piracy of artistic work, these references are atypical for there were no known institutions of or conventions of intellectual property protection in ancient times. The first patent institution, in its modern form, was a patent statute passed in the Venetian Republic in 1474 meant to protect inventions and discoveries of ingenious devices. For most part though, the institution of IP protection derives itself from the English system that began with the Statute of Monopolies (1624) and the Statute of Anne (1709). The subject matter of intellectual property is largely codified in the Anglo American copyright and patent and trade secret law and in the moral rights granted to authors and inventors within continental European doctrine. These systems encompass much of what is thought to count as intellectual property.

---

2 Ibid, 12.
By about 1800s, with the expansion of international commerce, a number of European governments had negotiated a network of bilateral agreements protecting copyrights. British authors complained of the widespread piracy of British books abroad, Charles Dickens’ being one of them, which the government realized was robbing them of potential profits and a major export market. Thus grew a demand for an international codification of regulatory copyright practices. Similarly Inventors, particularly the American and German inventors widely recognized as very innovative, raised similar concerns about the protection of their inventions within foreign countries. When the Empires of Austria and Hungary invited several countries to participate in an international exhibition of inventions held in Vienna in 1873, many countries refused to display their inventions fearing inadequate legal protection.

This incident had a far-reaching impact. The Congress of Vienna for patent reforms was convened in 1873, to discuss the prospects of an international patent system. Following this an international congress on industrial property was convened in Paris in 1878. A final draft proposing an "International" union of laws was prepared by France and sent to other countries with an invitation to attend the international conference in Paris in 1880. 'The Paris Convention' as it was called concluded in 1883. The main principles of the Paris Convention state that nationals, of any country, which is a signatory to the convention, will enjoy the same treatment (with respect to "industrial property" laws) in other countries, as if they were nationals of the respective countries. The Paris convention did not include the term "intellectual property" but only "industrial property". This necessitated an international Convention to curb rampant piracy in the area of literary and artistic works. The Berne Convention for the protection of literary and artistic works was adopted in the year 1886 with an objective to facilitate uniformity in the level of protection granted in all the member countries. Since then, both the Conventions have been subject to several revisions. In 1967 in Stockholm, the last revision was made to the Paris Convention by which an international organization was formed to administer and promote intellectual property on an international level – the World Intellectual Property Organisation (WIPO). States have responded by adopting national legislations on the basis of two conventions, the Paris Convention (1883) for protection of industrial property (covering patents, trademarks, and industrial designs), and the Berne Convention of 1886 for copyrights.

---

These conventions reflected a consensus among member states that was legitimated by domestic laws already in place. 11 There were no substantive changes made in the content of the laws. It was left to Trade Related Intellectual Property Rights (TRIPS) agreement to do that. The Uruguay Round of the GATT (1994) negotiations ushered in a new era in multilateral trade policy, of which protection of IP rights was a vital aspect. The Uruguay round was unusual in so far as this agenda of new issues was driven almost entirely by the private sector, particularly by the activist elements of the US business community. 12 The TRIPS agreement became obligatory for all the states who wished to join the WTO, and is part of the common institutional framework established under the WTO. The agreement covers all IP rights, patents, trademarks, copyrights, trade secrets, including several new rights such as semiconductor chip rights. It adopted the Berne convention and the Paris Convention but substantially added additional copyright and patent protection. Patents are extended to virtually all subject matter – plant varieties, pharmaceutical products, chemicals, pesticides, software, sui generis (special or more specific) protection for semiconductor chips etc. Countries are expected to provide adequate and effective protection mechanisms for TRIPS enforcement. Failure to comply can lead to ‘cross sectoral’ or bi-lateral retaliation for non-compliant states. 13

Susan Sell divides the history of IP protection into three broad phases: national, international and global. 14 The Paris and the Berne convention marked the beginning of the international period, while TRIPS signals the launch of the global period. In the international era, she writes that the territorial bases of IP rights were preserved while being extended beyond the ‘jurisdictional confines through ‘contractual device of treaty making’ 15 The system was more flexible permitting variations in scope and duration. For example, it was not considered a contravention of the treaty when many countries denied patents to pharmaceutical products to contain the medicine costs and prices. States had considerable autonomy in designing the patent laws, which were in consonance with their level of economic development. By contrast, she argues that the TRIPS agreement is far less flexible. It is prescriptive in nature, prescribing a universal standard of patent laws for countries at varying levels of development. States are required to extend patentability to virtually all fields of technology recognized in developed patent systems. These

12 Susan K. Sell, Private Power, Public Law, 7.
13 Ibid, 9
14 Ibid, 10-17
new regulations reach deep into national territories in requiring respect for intellectual property from products destined for domestic markets such as pharmaceuticals, processes internal to production such as chemicals, and practices in local agriculture, medicine and education which were outside market relations. Furthermore TRIPS requires states to adopt civil and criminal procedures for IP rights infringement. The 'old' system, which recognized inherent variations in the development of various countries, has made way for a more universalistic, binding and less flexible regime.

The development of IP protection has had enormous implications for changes in the very conception of property; not merely who the property holder can be and ought to be but also in what counts as property. The kinds of works to which copyright law may apply has also grown enormously. For example in 1884, the Supreme Court concluded that photographs could be copyrighted. In 1971, Congress decided that musical recordings (not just musical compositions, but recorded performances thereof) should be shielded from copying. Twenty years ago, computer software was added to the list of protectable works. The most recent major addition was architectural works. Like copyright, patent law was gradually extended over the course of the 19th and 20th centuries to an increasingly wide array of inventions. In 1842, hoping to provide "encouragement to the decorative arts," Congress extended the reach of the patent statute to cover "new and original designs for articles of manufacture." Recently a wide array of "ornamental objects" -- from eyeglass display racks to containers for dispensing liquids -- have been deemed protectable. Until the early twentieth century, plants were considered products of nature and hence unpatentable. The Plant Patent Act of 1930 overrode this principle, extending a modified form of patent protection to new plant varieties of asexually reproducing plants. In 1970, Congress went even further, reaching new and "distinct" sexually reproducing plant varieties. Until the Second World War, the Patent Office took the position that "the methods or modes of treatment of physicians of certain diseases are not patentable." In the 1950s, it abandoned this categorical rule, but the continued wariness of the courts combined with doctors' qualms concerning the monopolization of potentially life-saving processes kept the number of

18 See Donald S. Chisum, Patents (1992), Quoted from W. Fisher, Ibid, 4
such patents low. 20 Recently, however, the rate has increased sharply. The Patent and Trademark Office now typically grants over a dozen medical procedure patents each week. 21

The law, it appears, evolved so as to serve the changing needs of the global economy. The advocates of increased intellectual property protection have consisted, for the most part, businesses interested in protecting their trademarks, patent portfolios, or trade secrets. Most have had strong financial interests in statutory reform that would protect them against non-permissive use of their "property". The interests of persons who would benefit from reduced intellectual-property protection, by contrast, have tended to be more diluted. The result is that lobbying efforts have repeatedly been biased in favour of the expansion of intellectual property.

The resurgence of IP rights in the 1980s saw a relaxation of formerly stringent anti-trust law in the US. Throughout the 1980s the anti-trust law increasingly asserted that IP rights, including patent rights do not necessarily 'confer monopolies or even market power in any relevant market'. 22 IP licensing was removed from anti-trust scrutiny. It was believed that any propensity to induce monopolies by IP rights was offset by the advantages that accrued from increased economic incentives and advantages. IP rights became the legitimate means to extract full economic benefit from innovations. Thus gradually over the course of American history, the discourse of anti-trust and competition was supplanted by the notion that rights to control the use and dissemination of ideas, information and knowledge are forms of "property" and therefore, are exclusive to the holder. 23

A significant feature in the expansion of IP rights has been a gradual shift in the terminology used by lawyers to describe and discuss those rights. In the eighteenth century, lawyers and politicians

---

23 (This transition can be seen most clearly in the context of trademark law. Until the middle of the nineteenth century, legal protection of trademarks was justified on the basis of the need to protect innocent sellers against "fraud." In other words, the law in this field was understood to be a branch of (what was gradually coming to be called) tort law, not property law. Tort and property concepts coexisted uneasily in the many subdivisions of the law of trademarks and unfair competition. But slowly, property discourse took precedence.
were more likely to refer to patents and copyrights as "monopolies" than they were to refer to them as forms of "property". Today, property is a standard term lawyers and law teachers use to refer to the field. Specifically, the use of the term "property" to describe copyrights, patents, trademarks, etc. conveys the impression that they are fundamentally "like" interests in land or tangible personal property -- and should be protected on similar grounds. There has thus been a "propertization" of the field. The earlier usage of the term 'monopolies' was based on the view that IP rights created monopolies and therefore conflicted with anti-trust laws in the US. In so far as IP rights confer monopoly privileges, there is a natural tendency between competition, or anti-trust policy, and IP rights. As Cornish suggests, 'exclusive rights to prevent other people from doing things are at least monopolistic in a legal sense, if not necessarily in an economic one'.

Comparing Tangible ("old") Property and Intellectual ("new") Property

The intangible nature of IP does create some real and significant differences between it and "old property". The most obvious distinctions go under the rubrics of 'non-exclusivity', 'non-exhaustion' and 'separability'. Non-exclusivity means that possession and use of intellectual property are not limited to one person at a time. Only one entity can own a plot of land or drive a car at any point in time and multiple ownerships would result in irreconcilable conflicts. If I sing a song, on the other hand, you can be singing it somewhere else at the same time without interfering with my "use". If I build a machine based on a novel idea, your construction of a similar machine based on the same idea does not at all affect mine. Non-exhaustion means that the resource is not depleted by use. Even land, the quintessential symbol of permanence, loses its capacity to support crops and must be replenished. Depletion and exhaustion of natural resources leading to scarcity and scarcity after all was the motivation for the Lockean proviso. This depletion does not affect intellectual property because an idea can exist forever and there is an infinite source of ideas. Your singing my song does not wear out the tune. Nor does your use of the idea underlying my patented invention destroy the idea. In other words use neither depletes nor exhausts an idea. The intangibility of ideas also means that they are easily transferred and concurrently used, without diminishing the resources of the other users.

25 Refer Ch.1
Penner presents a qualitative difference rights in one’s body, tangible (limbs, kidney, eyes etc.) and intangible (ideas, intellect, talents) and rights in ‘things’ or objects. He uses his “separabilty thesis”, or the ‘thinghood’ of objects of property, to determine what things can be treated as property. ‘Separability’, for him, is a conceptual criterion for a thing to be held as property. According to him we must not conceive of property as an aspect of ourselves. He contends that every aspect of value that a person ‘possesses’ cannot be regarded as property. His thesis embodies two propositions. First, that some idea of ‘separability’ informs our understanding of what things can be property. The difficulty, in ascribing all things the status of property, lies in the fact that there are things that cannot be deemed to be separable from us in any straightforward way. “We do not trade our talents, give away our personalities, licence our friendship to others or pay taxes with our eyesight”. Property for him denotes a right and a title in a ‘thing’. It is through law that a title in a thing is conferred on a person. The law enables us to show, through our title, something that is only contingently mine i.e. it might well not have been mine. ‘What distinguishes a property right is not just that they are contingently ours, but that they might just as well be someone else.” This cannot be said about things ‘with necessary links with particular persons’, like our talents, personalities, our body parts etc. They are not ours to hold or possess through a legal contract; they are ours in any case. He restricts the application of property to those items in the world which are contingently related to us, and this contingency will change with surrounding circumstances, personal, cultural as well as technological.

Over years there has been growth in forms of personal or ‘self-owned’ properties, and so new divisions have arisen. The most important one is the division between tangible and intangible property. This distinction is sometimes framed as the difference between ‘chooses in possession’ and ‘chooses in action’: things one owns because they can be physically held and things one owns only because one has a right to prosecute a legal relation by bringing a court action against some other person/persons. Choses in possession denote rights in rem and choses in action denote rights in personam, held against specific individuals. Intellectual property rights are akin to choses in action because they are abstract legal rights. The holder of IP does not have actual right in any specific property, but he is granted a notional value on the use of his idea or

27 Ibid., 126
28 Ibid., 111-112
29 Ibid., 112
30 J.E. Penner, The Idea of Property in Law, 107
31 Although again it is in a different category than other choses of action like debts, bonds].

82
knowledge, which can be conceived of as specific property. It will therefore be useful to understand what constitutes IP rights and how they relate to tangible property.

**IP rights and Tangible Property**

Intellectual property is generally characterized as non-physical property that is a product of cognitive processes and whose value is based upon some idea or collection of ideas. The res, or the object of IP just is an idea or a group of ideas. Typically, rights do not surround the abstract non-physical entity; rather, IP rights surround the control of physical manifestations of expressions. IP rights protect ideas by protecting, through rights, the physical manifestations or instantiations of those ideas.

Intellectual Property is a broad concept that covers several types of legally recognized rights arising from some type of intellectual creativity, or that are otherwise related to ideas. IP rights are rights to intangible things — to ideas, as expressed (copyrights), or as embodied in a practical implementation (patents). Tom Palmer explains that “Intellectual Property rights are rights in ideal objects, which are distinguished from the material substrata in which they are instantiated.” As one commentator noted, “Intellectual Property may be defined as embracing rights to novel ideas as contained in tangible products of cognitive effort.” In today’s legal systems, IP typically includes at least copy rights, trademarks, patents, and trade secrets. Copyright is a right given to authors of “original works,” such as books, articles, movies, and computer programs. Copyright gives the exclusive right to reproduce the work, prepare derivative works, or to perform or present the work publicly. Copyrights protect only the form or expression of ideas, not the underlying ideas themselves. While a copyright may be registered to obtain legal advantages, a copyright need not be registered to exist. Rather, a copyright comes into existence automatically the moment the work is “fixed” in a “tangible medium of expression,” and lasts for the life of the author plus seventy years, or for a total of ninety-five years in cases in which the employer owns the copyright.

A patent is a property right in inventions, that is, in devices or processes that perform a "useful" function. A new or improved mousetrap is an example of a type of device which may be patented. A patent effectively grants the inventor a limited monopoly on the manufacture, use, or sale of the invention. However, a patent actually only grants to the patentee the right to exclude (i.e., to prevent others from practicing the patented invention); it does not actually grant to the patentee the right to use the patented invention. Not every innovation or discovery is patentable. The U.S. Supreme Court has, for example, identified three categories of subject matter that are unpatentable, namely "laws of nature, natural phenomena, and abstract ideas." Reducing abstract ideas to some type of "practical application," i.e., "a useful, concrete and tangible result," is patentable.

A trade secret consists of any confidential formula, device, or piece of information which gives its holder a competitive advantage so long as it remains secret. An example would be the formula for Coca-Cola. Trade secrets can include information that is not novel enough to be subject to patent protection, or not original enough to be protected by copyright (e.g., a database of seismic data or customer lists). Trade secret laws are used to prevent "misappropriations" of the trade secret, or to award damages for such misappropriations.

A trademark is a word, phrase, symbol, or design used to identify the source of goods or services sold, and to distinguish them from the goods or services of others. For example, the Coca-Cola mark and the design that appears on their soft drink cans identifies them as products of that company, distinguishing them from competitors such as Pepsi. Trademark law primarily prevents competitors from "infringing" upon the trademark, i.e., using "confusingly similar" marks to identify their own goods and services.

IP rights, at least for patents and copyrights, may be considered rights in ideal objects. It is important to point out that ownership of an idea, or ideal object, effectively gives the IP owners a property right in every physical embodiment of that work or invention. Consider a copyrighted book. Copyright holder A has a right to the underlying ideal object, of which the book is but one example. The copyright system gives A the right in the very pattern of words in the book; therefore, by implication, A has a right to every tangible instantiation or embodiment of the book—i.e., a right in every physical version of the book, or, at least, to every book within the jurisdiction of the legal system that recognizes the copyright. Thus, if A writes a novel, he has a copyright in this "work." If he sells a physical copy of the novel to B, in book form, then B owns
only that one physical copy of the novel; \( B \) does not own the "novel" itself, and is not entitled to make a copy of the novel, even using his own paper and ink. Thus, even if \( B \) owns the material property of paper and printing press, he cannot use his own property to create another copy of \( A \)'s book. Only \( A \) has the \textit{right to copy} the book (hence, "copyright"). Likewise, \( A \)'s ownership of a patent gives him the right to prevent a third party from using or practicing the patented invention, even if the third party only uses his own property. In this way, \( A \)'s ownership of ideal rights gives him some degree of control—ownership—over the tangible property of innumerable others. Patent and copyright invariably transfer partial ownership of tangible property from its natural owner to innovators, inventors, and artists.

Following Hohfeld, the root idea of a right can be expressed as follows: "To say that someone has a right is to say there exists a state of affairs in which one person (the right holder) has a claim on act of forbearance from another person (the duty bearer) in the sense that should the claim be exercised or in force, and the act or the forbearance not been done, it would be justifiable, other things being equal, to use coercive measures to extract either the performance required or competition in lieu of that performance."\(^{36}\) Extending the root idea of a property right to intangibles however poses its own set of problems. There is no question that the differences between tangible and intellectual property and the manifestations of intangible property in tangibles have an impact on the basic arguments that support property rights as an institution in general and IP rights in particular. Discussed below are some premises of s-o that are frequently employed to yield property rights in intellectual output. The attempt is to evaluate whether the premises that hold good for tangibles also hold good for intellectual goods in their classification as 'property'.

**THE PRINCIPLE OF SELF-OWNERSHIP AND IP RIGHTS**

**Self-Ownership and Body Rights**

Most libertarians support rights in one’s own body. These rights are called rights of "self-ownership". Libertarians universally hold that all tangible scarce resources, or our very bodies—are subject to rightful control, or "ownership," by specified individuals. According to the natural-rights view of IP held by some libertarians, creations of the mind are entitled to protection just as

tangible property is. Both are the product of one's physical or mental labour. Because one owns one's labour, one has a natural law right to the fruit of one's labour. Under this view, just as one has a right to the crops one plants, so one has a right to the ideas one generates and the art one produces. This theory depends on the notion that one owns one's body and labour, and therefore its fruits, including intellectual "creations", are owned by the creating self. An individual creates a song, a sculpture, by employing his own labour; he is thus entitled to "own" these creations, because they result from other things he "owns".

The analogy of property to the relation one has with one's body is grounded in the fact that both involve exclusive use. One has the freedom and the exclusive right to determine what one will do with one's body and talents, as one does with respect to those things that are one's property. The distinction between the two is that the owner is not necessarily connected to, but is separable from, the things he holds as (tangible) property. The owner exercises absolute control over tangible property and can rid himself of a thing he holds as property. This is not the case with property rights that we exercise over our bodies. Our body parts, intellect, talents are very much a part of that which defines our self. In fact while one could argue that, subject to technology, moral and social conventions (the latter determining which of our body parts are separable—hair is, leg is not), those body parts that are tangible entities, can physically be 'separated'. Clearly there are other moral issues involved in regarding one's kidney or one's limb as property merely because they are technically 'separable'.

Munzer distinguishes between rights that person may have with respect to their bodies and body rights. Body rights confer on individuals the right to use their body as they wish to (subject to basic prohibitions and moral norms— you cannot, for example consent to assault on your self; sell body parts; commit suicide etc.), so long as they do not harm others. But this, according to Munzer does not suggest that people have property rights in their bodies. Body rights are what Munzer terms, 'personal rights' that protects interest or choices other than the choice to transfer. Property rights in body, therefore by implication, are rights that protect the choice of transfer. For example the right to donate an organ on death, right to sell blood etc are those body rights that protect the choice of transfer and hence yield property rights. But these property rights are neither

so numerous nor so central to suggest that people “own” themselves.\textsuperscript{39} Too many incidents are lacking to say that persons own their bodies. Restrictions on transfer and the absence of the liberty to consume or destroy, for example, indicate that persons do not own their bodies in the way that they own automobiles or desks.\textsuperscript{40} Debate over this issue manifests itself in differences over the issue of inalienability and with respect to the law of contract, i.e., can we “sell” or alienate our bodies in the same manner that we can alienate title to property in house? The issue is obviously contested. Self-ownership, therefore, does not unambiguously lead to property rights in one’s self.\textsuperscript{41}

As we move away from the tangible body parts (corporeal) towards the intangibles of the ‘body’ (e.g. Intellect) matters become fuzzier. Rights to reputations, defamation laws and against blackmail, for example, are rights in very intangible types of things. Some libertarians oppose laws against blackmail, and many oppose the idea of a right to one’s reputation. Also disputed is the concept of intellectual property. Debate over these issues invariably manifests themselves in a debate over differences between bodies and things and over the issue of inalienability – can we “sell” or alienate our bodies/aspects or parts of our bodies in the same manner that we can alienate title to tangible property? The ambiguity increases when we ascribe the status of property to that which is inseparable in all senses. Intellect clearly belongs to the domain that is unambiguously a non-separable entity. It is sometimes held that one owns one’s entire body and it follows that one is the ‘owner’ of one’s talents and knowledge. However in the case of ideas, knowledge and other mental faculties ownership cannot be unproblematically ascribed to a single being. Ideas cannot be said to belong only to ‘one body’. It can co-exist in many bodies simultaneously. In that case then, self-ownership alone does not guarantee ownership of the body or the idea that it houses; ownership here reflecting the right to exclusive use with a right to exclude others.\textsuperscript{42}

\textsuperscript{39} Ibid, 57
\textsuperscript{40} Ibid, 43.
\textsuperscript{42} One of the elements in the analysis of a right is the specification of the conditions under which a right-claim may be said to be sound. Intellectual property rights are what can be regarded as ‘claim rights’ in the Hohfeldian conception of rights. The existence of a claim right in one person entails the absence of a right on someone else’s part to interfere. IP rights are ownership rights that are ‘negative’ claim rights with a right to exclude others from the thing owned, thereby going beyond simply the right to use.
Self-Ownership and Knowledge Rights

A powerful way of asserting the principle of individual liberty is to claim that every individual has full property rights over her body, skills and labour. John Locke (1690), along with later libertarians, held that agents are self-owners in the sense that they have private property rights over themselves in the same way that people can have private property rights over inanimate objects. An astrophysicist and a radical IP proponent, Andrew Joseph Galambos believes that man has property rights in his own life (primordial property) and in all "non-procreative derivatives of his life."43 Since the "first derivatives" of a man's life are his thoughts and ideas, thoughts and ideas are "primary property". Since action is based on primary property (ideas), actions are owned as well; this is referred to as "liberty". Secondary derivatives, such as land, televisions, and other tangible goods, are produced by ideas and action. Thus, property rights in tangible items are relegated to lowly secondary status, as compared with the "primary" status of property rights in ideas.44

The relationship between ownership of knowledge and property rights over it is complex, both in theory and practice. The question of can ownership rights be asserted over knowledge would entail an examination the social constituency of knowledge and the difficulty thereof in establishing a rights claim over it. Far from being the achievement of a few men of genius, scientific knowledge is a result of a long, complex irregular social process. Knowledge, and the capabilities arising thereof, is constituted both socially and culturally. It emerges out of a process of social interaction and is essentially a product of encounter and fusion of horizons. It must, therefore be looked at relationally. The creation of an idea has an unmistakable social and historical component. Invention, writing and thought do not happen in a vacuum. Edwin Hettinger argues that 'intellectual activity is not creation ex nihilo.'45 Ideas, knowledge and thoughts of a person are crucially dependent on ideas and thoughts of the preceding generation. Ideas are therefore fundamentally intergenerational with a social component. Thus even if we assume that the value of a product is entirely the product of human labour, this value is not attributable to any person or a group of persons who have ostensibly lent their labour to the

44 Even Ayn Rand elevated patents over mere property rights in tangible goods, in her notion that "patents are the heart and core of property rights." Ayn Rand, "Patents and Copyrights," in Capitalism: The Unknown Ideal ed. Ayn Rand (1967), 69-71
product. Separating the inventor from this social and historical component is not easy. Hence if we assume that the labourer is entitled to a market value of the resultant product then this market value ought to be shared by all contributors to the resultant product. The fact that most contributors may not be identifiable or even present is no reason why the entire market value to the last contributor.\textsuperscript{46} To what extent individual labourers should be allowed to receive the market value of their products is a question of social policy.

A characteristic of intellectual objects is that the same knowledge can be used and \textit{possessed concurrently} by many people, without diminishing or hindering personal use. Earlier when you bought rice you could eat it, throw it or plant it to generate a rice crop. You could use the "idea" of rice embodied in it to develop better rice varieties or to invent instant rice cereal. Current law and the IP rights regime allow producers of genetically modified seeds and plant varieties to take away this freedom. A person's right to prohibit and exclude others from using it can be only justified on grounds that it is necessary for this person's own unhindered use. No such justification is available for exclusive possession and use of intellectual property. The concurrent or simultaneous use of an idea by more than one person does not inflict any limitation on any person. In fact an attempt to prevent free use of ideas restricts the unhindered use of ideas by people who possess them. It infringes their rights of freedom of thought and expression. The fundamental value that our society places on freedom of thought and expression creates a difficulty for the justification of intellectual property. It may be argued that the person who originated the information deserves ownership rights over it. But information is not a concrete thing an individual can control; it is \textit{universal}, existing in other people's minds and other people's property, and over these the originator has no legitimate sovereignty. You cannot own information without owning other people or curtailing the ownership of other people.

Intellectual property is built around a fundamental tension: ideas are non-exclusive, non-separable but creators want private returns (world ownership to use Cohen's phrase) for their use. To overcome this tension, a distinction developed between ideas and their expression. Ideas could not be patented or copyrighted but their expression could. This peculiar distinction was tied to the idealized notion of the autonomous creator who somehow contributes to the common pool of ideas without drawing from it. This package of concepts apparently justified authors in claiming

\textsuperscript{46} Ibid, 38
residual rights - namely patents and copyright - in their ideas after leaving their hands, while not giving manual workers any rationale for claiming residual rights in their creations.\textsuperscript{47}

An essential feature of IP rights is that intellectual agents must use natural and tangible resources to create patentable expressions of an idea. Munzer (1990)\textsuperscript{48} counts materiality as an essential feature of intellectual property. Property must, \textit{at some point}, involve material objects. The qualification, 'at some point', is crucial. This feature does not mandate that all property be material or that all property rights be in material things. Knowledge rights are a point in case. However what this feature does assert is that at some stage property in intangibles has to manifest itself in material or physical objects. At some stage the IP right, for example, will involve the claim for ownership of a patented machine or process. Also the power to exclude would not be effective unless there could be rules pertaining to physical manifestations of tangible things. Self-ownership therefore, \textit{on its own, has no substantive implications}. It is only when combined with assumptions about how the physical world is owned (and the consequences of violating those property rights) that substantive implications follow. Self-owned labour, when deployed in the physical world yields intellectual property rights in the tangible component that labour produces. The worker is said to deserve, as a reward, the physical object that results from his labour. Underlying the theory of intellectual property, and emanating from the principle of self, is the principle of desert.

\textbf{IP Rights and the Principle of Desert}

A major argument for property is based on the desert-labour principle. Here labour means the exercise of effort in order to make or physically appropriate something. Desert means worthiness of some compensation because of the labour exerted or undertaken. The argument is that people \textit{deserve} property rights because they employ their self-owned labour. This brings up the general issue of what people deserve, a topic has been analysed and debated at length by philosophers. Most contemporary proposals for desert-bases fit into one of three broad categories.\textsuperscript{49}


\textsuperscript{49} Drawn from Julian Lamont, "Distributive Justice," in, \textit{Handbook of Political Theory} ed., Gerald F. Gaus and Chandran Kukathas (New Arizona University: Sage, 2004), 228
1. Productivity: People should be rewarded for their work activity with the product of their labour or a value thereof. (Miller 1989, Riley)\(^{50}\)

2. Effort: People should be rewarded according to the effort they expend in contributing to the social product.\(^{51}\)

3. Compensation: People should be rewarded according to the costs they incur in their work activity. (Feinberg 1970, Lamont 1997)\(^{52}\)

It is commonly argued that a fitting reward for labour should be proportionate to the person’s effort, the risk taken and moral considerations. Hettinger\(^{53}\) argues that while this may sound all right, it is important to note that in effect the labour reward is proportionate to the value of the results of the labour, assessed through markets or by other criteria. In other words the value of intellectual work is affected by things not controlled by the worker – *market, luck and natural talent*. Hettinger contends that a person who is born with extraordinary natural talents, or who is extremely lucky, *deserves* nothing on the basis of these characteristics.\(^{54}\) Rawls (1971) and Dworkin (1981) both lay emphasis on the arbitrary nature of natural talents and deny that each person should be the sole owner of his talents. They refute the claim that a person should have all the rights to differential income due to his productive skills and talents. At the core of Rawls argument is that distribution of traits, skills or talents, is morally arbitrary. Natural talents, like social circumstances, are matters of brute luck, and people’s moral claims should not depend on brute luck. From a moral standpoint the two seem equally arbitrary.\(^{55}\) A musical genius like Mozart may make enormous contributions to society. But being born with enormous musical talents does not provide a justification for owning rights to musical compositions or performances. Taking the argument further what about a situation where one person works hard at a task and a second person with less talent works harder? Which of the two workers deserve more reward? Property rights do not provide a suitable mechanism for allocating rewards. The market can give great rewards to the person who successfully claims property rights for a discovery, with little or nothing for the person who just misses out.


\(^{54}\) Ibid., 42

According to Lawrence C. Becker (1977) the root idea of a labour-desert principle is a poor choice as a fundamental principle for yielding property rights. The obvious covering principle is that labourers deserve *something* for their labour. Lawrence Becker calls ‘recipient rights’. A bearer of such a right is entitled to some reward for their creativity, but it is problematic to determine the form of this reward and specifically identify the duty-bearers. In this case the right bearer is entitled to some reward because creation of a certain amount of intellectual property is necessary to reach maximal social utility, and an incentive system is a requisite means in attaining this end. The principle of desert may in some cases justify recognizing a property right in the thing laboured on. In other cases it may not; it could simply be fee for the labour or even simply recognition, admiration and gratitude of the people.

Becker argues that that the ambiguity and the contested nature of IP rights illustrates the point that all exercise of labour cannot be expected to yield property rights. For example, he says that it is a matter of debate whether people should have property in their ideas, in the form of patents and copyrights. It is also generally agreed that patents and copyrights should lapse after a period of time, while ownership of land would not be expected to. All expenditure of labour therefore need not unequivocally lead to a property claim. Labour, he says is a necessary condition for property but not a sufficient one. All one can claim for expenditure of labour is compensation, which is to say that one deserves ‘something’. Whether property is the only form of desert for labour is a matter of debate. Becker argues that labour argument gives no unequivocal grounds for private ownership of the things produced unless there is no substitute for it acceptable in terms of the goals of labour. Labour theory for him therefore does not provide sufficient justification for private ownership of things produced. It further needs to be argued whether granting property rights is the only way for compensating efforts or evaluating desert of the innovator.

Stephen Munzer presents a qualified justification for property rights founded on desert by labour. He combines the labour desert principle with the effects that property rights based on desert might generate for society, both together constructing grounds for property rights claim. In his theory desert based on labour is still the anchor of prima facie moral property rights. He however qualifies it compendiously by restrictions, two of which are:

---

57 Lawrence Becker, *Property Rights: Philosphic Foundations*, 47
58 Ibid., 52
59 Ibid., 54
60 Stephen Munzer, *A Theory of Property*, 283

92
1) if everyone has a right to life, and if workers have a duty not to waste, spoil, or accumulate beyond their needs, then their rights in the products of their labour are qualified. 

2) Property rights are justifiable only if the net effect on others during the process of acquisition is justifiable.\textsuperscript{61}

The restrictions imposed by Munzer turns a highly individualistic desert of the initial labour theory into a socially qualified desert. A salient feature of his revised labour theory is a concern with the consequences of the exercise of 'liberty' and 'rights' on others. 'Similarly the full social context that gives rise to the labour-desert principle attends to the impact of work and worker on others.'\textsuperscript{62} Labour desert principle therefore, by itself, may not be sufficient ground for property rights claim, specifically for intellectual property rights claim. They have to be judged for the effects that they generate for other people and their rights, an analysis of which has been undertaken in Chapters 5, 6, and 7 of this study. It suffices to state here that as a stand-alone conception it does not yield sufficient grounds for intellectual property claim. The principle of desert is totally inapplicable to cases in which gains are gotten by violating or unjustifiably overriding the claims and rights of others. If IP regime grants property rights to the 'first knower' it thereby reduces total opportunities or welfare and disadvantages the rest of the players.

The patent monopoly, according to Benjamin Tucker 'consists in protecting inventors against competition for a period long enough to extort from the people a reward enormously in excess of the labour measure of their services, in other words, in giving certain people a right of property for a term of years in laws and facts of Nature, and the power to exact tribute from others for the use of this natural wealth, which should be open to all.'\textsuperscript{63} The fact that the exercise of IP rights severely diminishes and curtails the similar exercise of these rights by others, the fact that these rights are not 'compossible' makes IP rights, as a claim right, (in the Hohfeldian sense) difficult to fit into a socially or individually qualified desert.

The self-owning labourer, who can claim compensation for the product he has created, cannot morally claim IP rights, in the form of patents, over his intellectual property for two reasons. Firstly because the patent claimed by the labourer has the potential to deny another of his right to self-ownership. To enforce patent laws and the like is to prevent people from making peaceful use of the ideas/information they possess. Private intellectual property restricts the methods of

\textsuperscript{61} For a full summary see p284

\textsuperscript{62} Ibid., 288

\textsuperscript{63} Benjamin Tucker, \textit{Instead of a Book, By a Man Too Busy to Write One: A Fragmentary Exposition of Philosophical Anarchism} (New York: Tucker, 1893), 13.
acquiring ideas, the use of ideas and the expression of ideas. These restrictions militate against the very notion of individual autonomy that IPRs set out to protect. IPRs are difficult to fit into any system of composable rights, owing to their tendency to conflict with other’s rights (the rights of the non patent holders) and other rights in the system (e.g., rights of subsistence, livelihood, community knowledge rights etc.)

Knowledge Rights as Control Self-Ownership

John Locke (1690) along with some contemporary libertarians have held that agents are self-owners, in the sense that they have private property rights over themselves in the same way that people can have private property rights over inanimate objects. This private ownership is typically taken to include 1) control rights over the use of their persons i.e. the power to grant and deny permission for what things are done to them 2) rights to transfer, the rights they have, to others by sale, rental, gift, or loan. The property rights in question are moral rights, and need not be legally recognized. Thus, a country that allows involuntary slavery fails to recognize the moral self-ownership of the slaves.

Self-ownership, like private ownership in general, is a bundle of rights that can vary in strength. Full self-ownership (which is how self-ownership is usually understood) involves a maximal set of property rights over oneself comparable to the maximal set involved in the private ownership of tangible objects. Partial forms of self-ownership leave out some of these rights. Ownership is commonly conceived as a bundle of rights, liberties, powers, immunities and so on. A.M. Honore, in his influential essay on this subject, lists no fewer than eleven "standard incidents," or constituent elements, of ownership. Some of these incidents, however, are more essential than others, as Honore notes, are ‘cardinal features’: “no doubt the concentration in the same person of the right ... of using as one wishes, the right to exclude others, the power of alienating and an immunity from expropriation is a cardinal feature of the institution [of ownership].”(Ibid: 113) As applied to the ownership of the self, this conception yields a version of self-ownership that has been called "control self-ownership".

---

At the core of self-ownership is control self-ownership, the right to control the use of one's person (but not necessarily any right to transfer this right to others). Something like control self-ownership is arguably needed to recognize the fact there are some things (e.g., various forms of physical contact) that may not be done to a person without his/her consent, but which may be done with that consent. Full-self ownership is sometimes thought to guarantee that the agent has a certain basic liberty of action, but this is not so. For if the rest of the world (natural resources and artefacts) is fully owned by others, one is not permitted to do anything without their consent (since it involves the use of their property). The protection that self-ownership affords is a basic protection against others doing certain things to one, and not a guarantee of liberty.

It is often supposed that full self-ownership gives one property rights in ones' products, but this is so only if the products are part of oneself (e.g., an improvement in one's ability to do mental arithmetic). For any products that involve natural resources involve materials that may belong to others, and a person who makes something from materials owned by others may not legitimately own the product. Again, it all depends on how the rest of the world is owned. Hence, if the rest of world is owned by others, then anything one does without their consent violates their property rights, and as a result of such violations one may lose some or all of one's rights of self-ownership.

John Christman tries to reconstitute the debate with regards IPRs in terms of the distinction between 'control rights' and 'income rights', and asserts that while s-o may lead to control rights in intellectual property it would not lead to income rights which forms the crux of the operations and conflicts with regard to IPRs. Christman uses Honore’s discussion of the incidents of ownership to divide the concept of s-o into two major classes that require separate justifications. Control s-o is the right to decide what you will do; it has to do with your autonomy and volition. Income self-ownership is the right to the income you are capable of securing by selling your abilities. Christman argues that control self-ownership (CSO) is part of the core of human liberty and self-determination, but that income s-o is not. These are the four incidents of ownership - the rights of use and exclusion, the power of transfer, and immunity from expropriation - that Christman terms as “control incidents” or, more loosely, “control rights.” To have control rights

---


over an object is to possess final authority regarding the disposition of that object and to be free from interference in the exercise of that authority unless, of course, the rights of others are being threatened. It is in effect to enjoy a kind of sovereignty over the owned object vis-à-vis other citizens. Another way of expressing this is to say that the owner has, with respect to a material object, the "primary functional control" which is the "right to use, possess, manage, modify, alienate, and destroy". Control self-ownership consists of the rights of use and exclusion, the power of transfer, and an immunity from expropriation with respect to one’s own body and labor power, with these incidents being held permanently and in rem (i.e., against the world). They are ‘aspects of the person’s independent powers over the thing owned; that is ‘these rights are not conditional on the consent of others, except perhaps the recipient to whom one alienates something or any other persons with whom one wants to use one’s property’.69

Income rights or the right to income from assets forms the other class of property right. For example an income, which is derived from the sale of a thing, or from the income by way of interests and dividends on shares and trusts, or from patent royalties, which accrues to the holder of the intellectual property by virtue of transfer of ‘use’ rights. The right to income is therefore, states Christman, contingent on two things: one, that it is an increased income accruing from a holding by virtue of the productive use of that holding, involving, most centrally, trades; two, that it is contingent on the prevalent institutions, systems and market conditions. It is the adopted or prevalent price systems, systems of remuneration, trading laws which will determine the income right that emanate from a particular holding. Therefore, Christman argues that, there is nothing inherent in the structure of property rights that implies that income rights are an implied and a moral outcome of the principle of s-o. Income rights do not inhere in a person but in the state or some other entity that devises the terms of transfer. 70

An alternative approach to defining a right to income is to think about this right as being a direct implication of a seller’s power of transfer (one of the ‘cardinal’ incidents of ownership listed by

---

68 Christman 1994, 125-146
69 Christman, 1991, 29; Such a view of property is also supported by Brenkert (George G. Brenkert, “Self-Ownership, Freedom, and Autonomy,” Journal of Ethics, No. 2 (1998): 50) who defines ownership of property as a "purely instrumental relation" between an individual and material objects. To own something is here "to have the rights to sell, use, control, manage or even destroy what one owns".
Honore and recognized by Christman as an incident of CSO). After all, if the seller has the power to transfer a product, service, or factor to a buyer, then does he not, as a necessary consequence, have a right to the fruit of that transfer, that is, to the price (income) paid by the buyer? Robert Taylor argues that 'the answer, somewhat surprisingly, is no'. The price that a seller receives in an economic exchange is, strictly speaking, independent of his power of transfer; rather, it is dependent on the buyer's power of transfer. The seller's right to income is directly implied by the buyer's power of monetary transfer. In other words, all that a seller needs, to have a secure right to the income from the sale of some item, is the protection of the power of potential buyers to transfer money to him.

**Control self-ownership (CSO) constitutes the core of the libertarian conception of self-ownership.** It has a host of radical implications for personal liberty issues, implications that are decidedly libertarian in flavor. As per Christman's thesis, control rights can be justified through a reference to 'individualist interests' such as liberty, autonomy, and self-determination; source of justification for income rights, however, will necessarily be principles that govern the pattern of distribution of goods in the economy, consideration which are not reducible to individual interests. Drawing upon Mill's reference to 'self-regarding' and 'other regarding' activities, it can be argued that private transactions of property, i.e. self-regarding, can be defended on grounds of self-ownership and hence protection of individual liberty, but a public sale of a thing for profit or trade is a social act which affects the interests of other persons and of society in general. The grounds on which personal consumption and control of a resource must be justified are significantly different from those that are needed to justify income rights from trade.

Christman draws out important distinctions between control rights and income rights, distinctions which have important implications for our analysis of IPRs. Firstly he argues, control rights need not be "distribution specific". An agent's right to control property is essentially a manifestation of his free will, a function of his preferences and can be specified without reference to the distribution of resources or to the prevailing political and social structures. On the other hand the value of income rights is purely conditional on the contingencies of the market sector, in particular other's endowments. For example, the potential income that a patent holder can draw

---

72 Christman 1991, 30
74 Christman 1991, 40
is based on several market and market related factors: the absence or the presence of other traders and their bargaining capacities; the terms of trade available to the patent holder and to their competitors or transacting partners; the presence of obstacles, barriers and costs etc. Favourable trades are a function of the terms of trade, barriers and costs faced by other actors participating in the market. The structure of income rights recognized in an economy serves to distribute the surplus generated through trading activities. It follows therefore that of income rights are directly tied to the distribution of resources both by the fact they determine the direction of the resource flows (who gets what) and they presuppose and reinforce the distribution already in place.

Income rights are conditional in another way. To have control rights is to imply that others have a duty not to interfere with my possessions and use of the resource. This element of ownership can be understood to be held in *rem* (against everyone). However income rights cannot be considered as a right held in *rem*. Although the sale of a commodity yields an income, over which the seller has exclusive rights, no one has a duty to supply him with an income. He might have the commodity for sale but nobody has a duty to buy it; nobody need buy it if they do not want to. The seller does not have a claim against anyone in such a situation. It is thus, as Christman concludes, not an unconditional right but a contingent right - contingent upon a) the presence of rules that govern exchange and b) stable rules of cooperation. This is not the case with control rights where the consumption of my property is independent of others. “In this way the right to possess and manage are a direct extension of the self control expressed by the liberty or autonomy of the agent’... right to income, on the other hand, imply not only self-control, but “other control…””75 Christman argues that autonomy is only preserved through granting “control rights” of property, limited to a quantity sufficient for “autonomous living.” He concludes, ‘individuals have a right to exercise their talents freely, but not to retain a profit from the use of those talents’.

It is possible therefore to have, like Christman, a much narrower conception of self-ownership than the libertarian one. Libertarians face a difficult, perhaps insuperable, challenge in getting the various elements of their conception of self-ownership (namely, the control rights and the right to income) to cohere. Jeremy Waldron’s assertion that “there is no sense to the idea that there is a natural phenomenon called ‘reaping the benefits of one’s talents’ which is understood apart from the social arrangements and institutions that define one’s relationships to other people” becomes more intelligible.76 John Christman, in various essays and in his book *The Myth of Property*:

75 Christman 1991, 34.
Toward an Egalitarian Theory of Ownership argues that property rights can be "unbundled" and that "income rights," i.e., rights to profits, can be not only conceptually but also legally separated from "control rights" and that the these "income rights" should not or need not be privately owned in order to satisfy moral requirements of autonomy.

A variety of potential incidents of ownership have been referred to in this section including the rights of use, exclusion, and income, the power of transfer, and immunity from expropriation. It is important to note that the right to income is the odd man out: the right of use, the power of transfer, and an immunity from expropriation form a coherent grouping with the right of exclusion (which serves a justificatory role for them), while the right to income stands apart due to its derivation from an entirely different source—namely, the (monetary) transfer powers of other people. This separation of control rights and a right to income can be implicitly exploited in the context of the ongoing debate to argue that IPRs belong to the domain of income rights and are therefore lack the moral force that self-ownership as a principle assumes. On Christman's view, talents are fully and individually owned with respect to decision-making (control rights), but the associated income rights that accrue to an individual/corporation as rent. Loyalities, licensing fees, profits and such like, are not. They are governed by political and market forces and therefore not an extension of rights emanating from self-ownership.

At first glance IPRs and s-o would appear to be a good match. The simplest possible justification—and the one that probably motivates its adherents – is a desire to protect individual autonomy and, more narrowly, the inviolability of the person. This chapter seeks to argue that control rights protect the domain of the liberty and autonomy of intellectual-labour-expending individual but income rights that TRIPS guarantee are actually violative of others' control rights. The specific motivation behind self-ownership involves the strong interest that a person has in running his own life; an individual’s rights to control himself; to no intervention in use of one’s talents. The principle of self ownership does not yield therefore the currently used form of intellectual property rights which are a form of monopoly rights granted protect a domain of exclusive use and transfer, to the exclusion of others who might want to exercise their self-owned rights in the protected domain. Self-ownership not only fails to provide a basis for intellectual property rights but actually can be pressed into service to argue that intellectual property rights are violative of self-ownership rights of those outside the domain of intellectual property protection. If the state or other entity (WTO, for instance) tells a person when and where he must
utilize his abilities -forcing him to, or preventing me from producing, something deep and fundamental is sacrificed.77

ISSUES IN A LOCKEAN READING OF INTELLECTUAL PROPERTY

This chapter seeks to argue that intellectual property rights fail where tangible property rights succeed. This failure is because the Lockean theory fails to defend the premises of IP rights in the same way as it protects tangible property. Any recognisance of justificatory premises of property, of any nature, begins with Locke for the simple reason that Locke constructed a defence of property on libertarian premises but added, what seemed to be, an egalitarian ‘proviso’ in the state of nature. *The more egalitarian its purpose in the state of nature, the less it would seem able to justify unequal property rights under conditions of scarcity.* Locke examines the natural law justifications for property in one's own person and in tangible objects. He moves from self-ownership to absolute rights in the appropriation of the commons, with a proviso that ‘enough and as good’ should be left for the others. Variously interpreted, as an ‘egalitarian condition’ (James Tully) to a Paretian optimal condition (Nozick), one can assume it to mean that unrestricted appropriation of the natural world is a natural right of the self-owners provided nobody is left worse off. The underlying rationale of Locke’s proviso is that if no one’s situation is worsened, then no one can complain about another individual appropriating part of the commons. It is thus a Lockean way of testing the legitimacy of a property system.

The principle of self-ownership is a difficult point to negotiate for the egalitarians. While they cannot deny the moral force of the principle they also do realize that an application of the principle to differential skills and talents in society will eventually lead to vast material inequalities. Two largely egalitarian perspectives respond to the principle differently. While left libertarians like Rawls and Dworkin (Rawls: 1971; Dworkin: 1981) deny the principle of s-o, in order to combat the moral arbitrariness of differential skills, and recommend public ownership of skills, theorists like Christman and Taylor78 try to resolve the impasse between s-o and equality by making the outcome of property rights more egalitarian, even while retaining the principle of s-o. Hillel Steiner and Peter Vallentyre start from the premise of s-o but recognise the difficulties

in justifying unequal appropriation of the initially unowned world and so accept nationalization and equalization of natural resources, or compensation for those left propertyless.\textsuperscript{79}

So far the principle of self-ownership has been retained to see if it yields claim rights in intellectual property. The attempt here is to see, while retaining the principle of s-o (in the Lockean vein), whether the appropriation sanctioned by IP rights stands the test of the Lockean 'proviso'. Intuitively, stealing a car seems to be a bigger crime than copying expensive software without paying for it. The reason perhaps lies in the distinction drawn earlier between real property (tangibles) and intangible property (ideas). My use of your intellectual property does not interfere with your use of it, whereas this is not the case for tangible goods. My stealing your software still allows your unhindered use of your software; however my stealing your car prevents your use of it. Justifying or critiquing intellectual property in light of this feature raises deep questions about 'self-ownership', 'labour mixing' and the rights emanating from them and therefore makes a Lockean reading of intellectual property rights imperative, even though the dilemmas posed by Locke have led many to abandon a philosophical reading of intellectual property rights through Locke, in favour of incentive based utilitarian theories.

In one respect the intangible nature of IP makes the Lockean case for recognizing it stronger than the case for recognizing physical property. Lockean philosophy has trouble with a world in which natural resources are scarce and not unlimited. Locke recognized that the moral claim for absolute property rights is limited by the situation in which there is "enough and as good" of the natural endowment left for others to mix their labour with and appropriate. Subsistence of mankind was conditioned on the availability of sufficient resources left for the non-appropriators to mix their labour with. Obviously, this is not a problem for IP. "The physical resources used to create it are not limited in any meaningful sense—there is no shortage of paper and ink, and much of the raw material of IP is itself IP, such as alphabets and systems of musical notation."\textsuperscript{80} Thus the enough-and-as-good dilemma does not exist. The realm of ideas and knowledge is not limited in the same way as the world of physical resources.

This point has been highlighted by Adam Moore who argues that, because intellectual works are 'non-rivalrous', they can be used concurrently by many individuals at the same time and cannot


be destroyed; my possession and use of an intellectual work does not preclude your possession and use of it. *This is to say that the original acquisition of intellectual property does not necessitate a loss for others.* In fact such acquisitions benefit everyone.81 Secondly, the frontier of intellectual property is practically infinite; it can only be for a situation of scarcity or potential scarcity that the dilemma of 'enough and as good' can possibly hold. Not only does intellectual property not entail a loss for others but the creation of intellectual property may bring about greater wealth and opportunities for the rest, compensating for any loss of opportunities that may have arisen.

The underlying rationale of Locke's proviso is that if no one's situation is worsened, then no one can complain about another individual appropriating part of the commons. Moore terms it as 'weak Pareto superiority', which permits individuals to better themselves so long as no one is worsened.82 This 'no harms no foul' principle for Moore is a plausible moral principle which leaves 'little room for rational complaint'.83 The structure of Moore's argument is as follows:

1. If the acquisition of an intangible work satisfies a Paretian-based proviso, then the acquisition and the exclusion are justified.
2. Some acts of intangible property creation and possession satisfy a Paretian based proviso.
3. So, some intangible property rights are justified.

In the broadest terms Moore's goal is to justify rights to intellectual and intangible property, both at the level of acts and at the level of institutions. *At both level his argument is based on the two features of intellectual property – its non-rivalrous and its infinite character.* He argues that intellectual property rights are not state created entities—they are prior to and independent of governments and social progress; in a sense he gives them the status of natural rights.84 Its non-rivalrous and infinite character ensures that the Lockean proviso is not violated; "enough and as good" is still left for the rest of the humanity.

---

81 Adam Moore, Intellectual Property, 86.
84 He discards the utilitarian defence of intellectual property which tries to argue the case because it provides incentives necessary for social progress – society ought to maximize social utility therefore rights to intellectual works should be granted.
James W. Child argues that Locke’s concern with appropriation of property in the state of nature is not egalitarian but Paretian. Locke could not have meant by ‘enough’, that an equal amount is left for B (and for the rest of humanity) after A has appropriated. The question rather is – is B better off or same after A appropriates, or does A’s appropriation make B worse off? So long as latter is not the case Locke’s proviso is taken care of. Child opines that Locke is not concerned with the question – does B have as much as A? This conclusion, according to Child, bears powerfully on arguments that use the force of the proviso outside the state of nature. Transposing the argument to the realm of ideas and intellectual property Child argues that even though the ownership of a particular idea precludes others’ ownership, or use of that idea, it is not to say that there are fewer ideas out there that I now can think up, appropriate by patent, and then use. All forms of intellectual property share the characteristic that while I can exclude you from using mine there is not thereby a smaller amount upon which you can draw to use or own. “Moreover as with Locke’s real property in the state of nature, you have only to mix your labour with it (here, the mental labour of thinking) to appropriate it. It is otherwise free, as it should be if there is an inexhaustible supply presently unclaimed”. Because there are an infinite number of new ideas that can be thought of and appropriated, a zero-sum condition is not met in the case of patented ideas. While I exclude you from the use of my idea and its expressions, there is not thereby a smaller amount upon which you can draw upon which you can draw to use or own. According to Child you are not deprived as long as you remain able and willing to exert mental labour.

If the crucial point is whether IPRs and the appropriations worsen the position of others then as Ingram suggests, then why are we to assume a Nozickean premise, which Moore adopts, and restrict the range of comparison to conditions before and after a given appropriation. This, she argues, arbitrarily silences the complaints of those who would have been better off under an alternative appropriation. G.A.Cohen insists that any appropriation will make someone worse off, for no other reason than that someone will no longer be able to appropriate the now-appropriated item: “It is clear beyond doubt that an appropriation of private property can contradict an individual’s will just as much as levying a tax on him can”. If contradicting one’s will is the criterion for a theory that is supposed to be based on liberty, then, according to Cohen,

---

86 Ibid., 69.
87 Ibid., 69.
88 Attracta Ingram, A Political Theory of Rights (1994), 58
no private appropriation could meet the requirements of a suitably formulated Nozickian proviso. As Cohen argues, "Nozick disallows objectively paternalist use of people's private property. But he permits objectively paternalist treatment of people in other ways. For, since he permits appropriations that satisfy nothing but his proviso, he allows $A$ to appropriate against $B$'s will when $B$ benefits as a result, or, rather, as long as $B$ does not lose."\(^{90}\) According to Cohen $B$ does not seek a 'not-worse-than-before' situation for himself. He seeks an improvement in his assets. As long as any appropriation prevents him from potentially improving his assets, he is rendered 'worse off' in the Lockean sense.

Why is there an assessment of who is rendered worse off only against Paretian optimality? Each off us can be left worse off than we would be under a different selection. Besides even if a person is not rendered worse off, how does that compensate for a loss of liberty to freely use a patented idea? Ingram goes a step ahead and argues that even if you were to benefit from a privatization of an object (or an idea), "how can your loss of that liberty and the consequential risks to your independence in other areas be set against the benefit you enjoy?"\(^{91}\) Even Nozick's interpretation of the Lockean proviso required a non-interference with the 'like liberties of others'. For him, 'worsening the position of others' referred to the curtailment of rights. If we were to remove the baseline condition for comparison as before and after the appropriation, then the Lockean proviso, and Nozick or Moore’s interpretation of it, would not be complied with.

The issue needs to be addressed from another point of view, i.e. one idea and two (or more) claimants to its ownership. On what moral grounds is the legitimacy of an ownership claim to be decided? Who is to be legitimately granted rights of appropriation and use, with a right to exclude the other from a claim of ownership? By limiting the frontiers of ownership of ideas, through patent, copyrights, and preventing their concurrent use, one party is made absolutely worse off while the other party is made absolutely better off. Property created in this way, and following Locke's proviso, denies ownership rights to other creators thereby rendering them worse off than they would have been, had they been granted to concurrently use their ownership rights. The enough and as good condition is meant to protect Locke's labour justification from any attacks asserting that property introduces immoral inequalities. This condition is not met with thereby rendering a Lockean defence of intellectual property rights problematic. Even if we were to interpret the condition as an 'equal opportunity provision', there is a denial of equal opportunity

\(^{90}\) Ibid., 89
\(^{91}\) Ingram, A Political Theory of Rights, 58.
to exercise the right to own and use that which my mental labour has created, on grounds that the rights to intellectual property has been claimed, on a 'first-come-first-served' basis, by someone else. Although ideas are theoretically 'available' to people in their own thoughts even though the ideas have already become someone else's property these ideas cannot take the form of tangible expressions. And as pointed out earlier, Intellectual property rights are not so much rights over ideas as rights over their tangible expressions and instantiations.

It is important to point out that ownership of an idea effectively gives the IP owners a property right in every physical embodiment of that work or invention. Not only are ideas patented but also the physical expressions and manifestations of it. If A patents a particular kind of plough, then the prohibition on my use of it, constrains my actions on my own land. If intellectual property is an otherwise legitimate form of property, then the fact that its recognition inhibits uses of other property may present difficult practical problems of defining rights. A fundamental objection arises when I, realizing the merits of a plough, decide to design a plough of my own. But because plough number 1 was patented by A it curtails my right to own and use the product of my labour, the plough, even when it does not interfere with the A's right to own and use his plough. A's ownership of a patent gives him the right to prevent a third party from using or practicing the patented invention, even if the third party only uses his own property. In this way, A's ownership of IP rights gives him some degree of control-ownership over the tangible property of innumerable others. Patent and copyright invariably transfer partial ownership of tangible property from its natural owner to innovators, inventors, and artists. Opponents of IP may say that they fully recognize your right to use the products of your labour, whether these products are physical or mental. However only in the case of physical property does my ownership right entail or require that others be excluded from using my property. Given that only one person can use physical property, the creator has the superior claim. A normative interpretation of labour theory (as against the instrumental justification of property which believes that we must provide rewards to get labour) says that labour should be rewarded. In the case of intellectual property all creators of an idea can be argued to have an equal claim. I am as much an employer of self-owned labour as you are and therefore can logically claim equal rights. My ownership of an idea is consistent with your ownership of the same idea for it does not preclude you from your ownership rights. Intellectual property does not share the zero-sum characteristic of 'real property'. The relative

---

positions of parties, with respect to real property, are not equal for as one has gained the other has, of necessity, lost.

The intangible nature of IP generates a complex dilemma. On the one hand it could constitute a direct infringement of rights of self-ownership. I may not be able to exercise ownership rights over that which I have created because it violates some patent claim. For Intellectual Property, multiple uses are possible, so recognizing the right of the creator to the fruits of his labour does not require that others be excluded. The labourer, after all, still has his creation undiminished. The creator has lost nothing. If it does indeed violate, as was the case with the manufacturer of the second plough, then it is in violation of the principle of s-o, the very principle so assiduously guarded by the libertarians. 93 The accumulation of property through intellectual labour by one person, in a patent regime, requires the denial of rights, of use and accumulation of property, through the use of the same intellectual labour by another person.

How do you employ Nozick’s principle of ‘just initial acquisition’ to a realm of ideas and knowledge where the frontiers are not limited and where, thereby every idea can be held to be justly acquired? A Nozickean principle of justice in acquisition is an account of how people came to initially own the things or what people create through the exercise of their self-owned powers and what is justly acquired can be freely transferred. My holding the same idea as you does not affect your holding or your right of free transfer. Nozick contends that fidelity to Locke’s theory would mandate two limitations on the inventor’s entitlements. First, persons who subsequently invented the same device independently must be permitted to make and sell it. Otherwise the assignment of the patent to the first inventor would leave them worse off. Second, for the same reason, patents should not last longer than, on average, it would have taken someone else to invent the same device had knowledge of the invention not disabled them from inventing it independently. 94 The current conception of IPRs disallows this. Even on Nozickean grounds intellectual property rights, in their present garb, seem problematic. In fact one can employ the Lockeian labour theory to argue that recognizing your dominion over an idea may curtail my s-o rights i.e. the rights that I exercise over that which my mental labour creates. Recognizing your dominion over an idea can inhibit my use of my physical property or what I could potentially

93 One of the most famous statement of this view is a quotation from Thomas Jefferson: “He who receives an idea from me receives instruction himself without lessening mine—as he who lights his taper at mine, receives light without darkening me.”
94 Robert Nozick, Anarchy, State and Utopia (1974),182
make my property. And this, in no uncertain-terms, leaves me worse off than I would or could have been.

CONCLUSION

The purpose of this chapter was to re-canvass the defences around s-o, that can be made for intellectual property. The principle of s-o was retained in evaluating the rights claim of IP rights because of its powerful moral appeal. The natural law justifications for property in one's own person and intangibles, like ideas and knowledge were examined. The various implications that the principle of s-o had for intangible properties, body rights, knowledge ownership were evaluated in order to assess whether s-o has substantive implications for IP rights. To test the validity of the natural law premise of IP rights further, a more egalitarian interpretation of the Lockean proviso was employed to suggest that IP rights conflict with the base libertarian values of liberty. In dealing with this issue, it is important to note that within the Lockean tradition, the function of law is to protect the lives, liberties and estates of the individuals. The more important claim within this clause is the parity between liberty and property that needs to be maintained both in law and by implication in political values.

Some commentators, such as James DeLong and Adam Mossoff, see a good connection between natural law and intellectual property. But their's is perhaps a minority position. There are many people who think that the current scope of the IP laws sets up intellectual property in opposition to human liberty of speech and expression. Thus, Tom Bell, a devoted natural rights Lockeian, writes, rather critically: "More pointedly, copyright and patent protection contradict Locke's justification of property. By invoking state power, a copyright or patent owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of their tangible property." There is also a strong undercurrent of discontent about the protection of intellectual property interests among those who purport to treat individual freedom as the highest good. Further, Lawrence Lessig and others

---

97 Tom W. Bell, Indelicate Imbalancing in Copyright and Patent Law, in Copy Fights. Published Paper. PDF format http://www.tomwbell.com/writings/Indelicate.pdf. Some believe the creation of the copyright and patent monopoly is one of the factors that prevents the proportionate return to labor. For an explanation see John Christman, Entrepreneurs, Profits and Deserving Market Shares, 6 Soc. Phil. & Policy 1 (1988).
98 The free software and the free copyright models show that there is much that unites the libertarian right with the socialist or libertarian left.
have also echoed this sentiment with their calls for the recognition and promotion of the "creative commons." 99

This yoking together of liberty and property has an obvious appeal for individuals who operate within the classical liberal tradition and view private property in its various manifestations as consistent with a regime of personal liberty (freedom to own and dispose of property being a variant of the freedoms that comprise liberty). Self-ownership as a principle is one that seeks to establish parity between liberty and property. Self-ownership consequently has become one of the abiding principles in libertarian thought. However the correspondence between the two is often uneasy. For example the ostensible parity between liberty and property is difficult to establish when we deal with property in the tangible realm. 100 The doubts about the parity between the two are, if anything, even more insistent in the realm of intellectual property. The project of liberal theory has been, since the time of Locke, to mitigate the inherent tension between liberty and property. While there is an uneasy alliance between the two in the case of tangible property, the notion IP rights end up placing liberty in opposition to property. There is basic tension between IP rights and freedom of speech and expression and, to use a Nozickean phrase, the like liberties of others. The foundations of intellectual property law in general are shaky if it is assumed that liberty and autonomy are of a higher order than property or, as in the Rawlsian scheme of things, enjoy a lexical priority over property.

G.A. Cohen asserts the principle of self-ownership leads to a principle of 'world ownership'. Since the principle of s-o, in the case of intellectual property, attaches itself to the manifestations in the material world, the logical implication of s-o is private ownership of the material world. Self-ownership and the derivation of rights to external objects from self-ownership are vigorously criticized by G. A. Cohen. Cohen 101 argues that the union of Self-ownership and private ownership readily leads to inequality of condition, on any view of what constitutes equality of condition. Such inequality of condition, Cohen alleges, is morally protected by the principle of s-o, particularly in its Nozickean reading. Cohen's project is thus to divorce self-ownership from private ownership. Even if one were to concede rights in one's own person, this would not justify


100 Property enjoys an easy alliance with a negative conception of liberty but not with a positive one.

what he terms "capitalist inequality" or inequities in 'world ownership'. World Ownership Cohen asserts, is not an extension of the principle of self-ownership. Cohen attempts to establish the case for equality of condition by combining private ownership of our internal resources (self-ownership) with public ownership of external, worldly resources (world ownership). In that case, for Cohen formal s-o should give way to substantive self-determination that really matter to us.¹⁰²

This chapter argues that in a world of people with different measures of talent, self-ownership is hostile to autonomy, for, in such a world as Cohen puts it "... the self-seeking authorized by self-ownership generates propertyless proletarians whose life prospects are too confined for them to enjoy the control of a substantial kind over their lives that answers to the idea of autonomy."¹⁰³ Once we start concerning ourselves with the value that incidents of ownership have for individuals (for instance, in their ability to enhance autonomy), we must eventually face the question of how value is to be distributed across individuals. In this regard IP rights face a daunting challenge in getting the conception of self-ownership to cohere with a notion of individual autonomy and liberty, as values distributed across individuals.