



AN INDIVIDUALIST ANARCHIST CRITIQUE OF 'INTELLECTUAL PROPERTY':

THE VIEWS OF BENJAMIN TUCKER (1854-1939)

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An Ongoing Libertarian Debate: Some Say Yes, Some Say No

The rightness of the idea of intellectual property – patents and copyright – is a matter of some debate amongst libertarians and classical liberals. Some support it, others do not. Moreover, both sides advance a number of reasons in defence of their views, reasons that often stand in isolation from each other.

To take but one example of each side. The Centre for the New Europe (CftNE), a pro-EU organisation (CftNE, 2002[a]) that nevertheless claims to be 'liberal' and which features a link to the Libertarian Alliance's website (CftNE, 2002[b]), recently promoted a report by Dr Merrill Matthews Jr. entitled 'Patent Protection for Me, But Not for You' (Pollard, 2002; Matthews, 2002). This report, whilst covering slightly wider issues, is essentially a defence of intellectual property in, amongst others, the pharmaceutical industry on the grounds that, without the limited duration protection that patent laws afford to those who bear the cost of scientific research, few would engage in such research and that both the companies concerned and those who might be helped by any new drugs would be the losers.

On the other hand, in his famous essay, *The Intellectuals and Socialism*, we find Friedrich Hayek (1949: pp. 12-13 and 27) both doubting claims that the cause of, in this case, literature would be harmed in the absence of protection by

copyright laws, and, more profoundly, suggesting that the additional income earned via the copyright laws had played a major role in artificially creating and sustaining that class of individuals, the 'intellectuals', who were the target of his critique.

Benjamin Tucker and the Individualist Anarchists

Benjamin Tucker (1854-1939), particularly through his journal, *Liberty* (1881-1908), was one of the most important and best known of the mainly USA-based individualist anarchists. It is not the place here to examine thoroughly the similarities and differences between individualist anarchism and (so-called) capitalist anarchism: there are examples of both. However, a study of Tucker and his associates makes it plain that they certainly belong within the general family of thought we call 'libertarian'. Anyone wishing a more complete look at the life and times of Tucker, along with a history of individualist thought in the USA more generally, might like to read James Martin's (1953) *Men Against the State* and David DeLeon's (1978) *The American as Anarchist*.

It was a central part of the views of Tucker and many of his associates that amongst the main causes of poverty and huge disparities of wealth were a number of State-derived 'monopolies'. Tucker highlighted four in particular. His criticism of the first two would also usually be accepted by capitalist anarchists and even mainstream classical liberals:

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FOR LIFE, LIBERTY AND PROPERTY



the State's (or its proxies') monopoly on the issuing of currency, and tariffs and barriers to foreign trade. The third monopoly is undoubtedly where individualist anarchists and capitalist anarchists part company: the absentee ownership of land and rents derived from the same. Tucker – rightly or wrongly depending upon whether one is an individualist anarchist or capitalist anarchist – regarded the illegitimacy of these first three as self-evident. However, he accepted that the case against the fourth of these monopolies, what we now call 'intellectual property', was less obvious.

The following is intended to be no more than a brief rationalisation and introduction to Tucker's thoughts on the topic of intellectual property. It has been distilled from a variety of Tucker's own writings, particularly from *Instead of a Book By A Man Too Busy To Write One* (1897) and his essay 'The Attitude of Anarchism Toward Industrial Combinations' (1899: pp. 30-33), and also from Frank Brooks' (1994: pp. 165-180) *The Individualist Anarchists: An Anthology of Liberty* (1881-1908).

Its Supporters Don't Seem to Believe in It

The first 'criticism' is not so much a criticism as a commentary on the very odd nature of intellectual property in the late 19th century and which pertains to this day. Tucker, opposed to State socialism and communism, believed passionately in private property as a necessary requirement for human liberty and progress. According to his philosophy, there were only certain legitimate means of obtaining title to property: commerce, gift, or inheritance. Similarly, someone could only relinquish title to property by the same methods. Title to property was not something bestowed by the State, nor could it be taken away by the State. Either something was legitimately one's property until one decided otherwise, or it was not. (Tucker, of course, being an anarchist, did not believe in 'the State' at all. However, it is difficult to avoid using such terminology.)

Tucker – amongst others – remarked upon something very strange about intellectual property as the concept was operationalised: it tended to be of only a limited duration with the legal protection of a copyright or patent being only for a finite number of years. He argued that it would seem very odd indeed if, by some legitimate means, one acquired title to an item of mundane property only for the State, enforced if necessary by its agencies, to decree that after an arbitrary number of years anyone could come along and use it. If property rights could be said to inhere at all to intellectual property then, to be consistent with mundane property, they ought to be of unlimited duration until title is voluntarily relinquished in some manner, the new owner then gaining enduring property rights identical to those of the former owner.

In addition, Tucker noted that, whereas the thieves of mundane property were considered criminals and often jailed, the 'thieves' of intellectual property were only arraigned in civil courts, often with much difficulty, and even if found guilty only punished by fines.

Tucker suggested that this limited duration feature of intellectual property, and the very different punishment meted out to those who transgressed it, suggested that many of those who publicly upheld the notion were, at least intuitively, in fact unsure as to its validity.

(To show that the debate over the legitimacy of intellectual property was to be found even amongst the individualist anarchists, a frequent contributor to *Liberty*, Victor Yarros, having for various reasons decided that intellectual property was a legitimate concept, then agreed with Tucker on this particular element of the issue and declared that such rights as protected by patents and copyright should indeed be permanent. This, of course, meant that Yarros's conclusions on the subject ended up as the exact inversion of Tucker's. See Brooks (1994: pp. 165-180) for more details.)

Not A Requirement for Remuneration

Probably the main defence of intellectual property rights – indeed this was the rationale behind the example cited at the top of this essay – is that it is required to ensure that those who have invested heavily in time and money (in terms of absolute outlay, deferred consumption, and opportunity costs) in bringing a product to the market can be sure of adequate compensation for their efforts, protected for a sufficient length of time by intellectual property laws from competitors who would otherwise merely copy the product without ever having borne the development costs.

As far as literary, artistic, and musical works were concerned, Tucker, as a publisher and writer himself, said that it was simply a matter of observable truth that it was wholly implausible to imagine that the creators of such works would cease their toil in the absence of the protection afforded by copyright. He also noted – and which again is surely demonstrably true – that in many cultural (in its widest sense) pursuits, the primary motivation to the writer or artist came not from the instrumental hope of financial success but from the expressive desire to create.

Moving on to 'industrial' production, at least somewhat presciently when we look at the trend in the Western world towards the service sector and the increasing affordability of the sort of training and equipment needed, Tucker predicted that that there would be a move away from giant industrial combines and instead towards small and medium sized enterprises that would not require at any point in their economic functioning the same degree of capital commitment. (It was a criticism from State socialists and communists of the day that Tucker and his associates, for all their rhetorical and theoretical commitment to the working class, actually comprised a 'bourgeois' movement aimed at the artisan and smaller entrepreneur.)

However, that still leaves industries like the pharmaceutical industry noted above where considerations of the size and complexity of the undertaking, and related matters concerning the lengthy time scale and the cost of R & D, would *appear* to lend support to the concept of intellectual property. Although not directly addressed by him, from a further reading of Tucker we might present three arguments still hostile to the notion of intellectual property, all of which, at least in part, would be, or at least could be, shared by both individualist anarchists and capitalist anarchists.

First, Tucker held that most of the ills of the world were because of what modern capitalist anarchists would call Statism and what he would have thought of as 'invasion': i.e. the reification of the concept of 'the State' and its (*sic*) use of coercion against individuals in pursuance of 'the common good' or some such. Since by Tucker's reckoning, for the other reasons summarised in this essay, intellectual property

was an inherently Statist concept, then it should be swept aside for that reason alone.

Second, Tucker believed that, if left truly unfettered, the demands of the market and the competing solutions that arose to meet them would be able efficiently to solve – or at least more efficiently and more justly than Statist ‘solutions’ – economic and social problems and requirements. Quite rightly, individualist anarchists – like capitalist anarchists – did not presume to predict what these possible future solutions to hypothetical future problems would be. The removal of the protection of intellectual property rights may well lead to the sort of difficulties that the defenders of intellectual property rights so portentously predict. However, this would only be for the short term until entrepreneurs in the market have had the chance to develop and produce new solutions. Given the financial stakes involved, it is unlikely that there would be a shortage of effort to this end.

Third, individualist anarchism – for utilitarian reasons: see below – contained within it a measurement of the justness of social interaction. This they called ‘The Law of Equal Liberty’: the maximum freedom for each individual commensurate with the same freedom for others. (In some formulation or other, this can be found in almost all libertarian and ‘true’ liberal thinking.) Particular actions which transgressed the Law of Equal Liberty, even if they seemed to have immediately beneficial results, where in fact harmful since it was only in full and enduring commitment to the more general Law of Equal Liberty that maximum utility could be found. In other words, although it may well be the case that certain individuals and organisations profited from the protection afforded by intellectual property rights, society generally – the aggregate of human beings, not an entity in its own right – would in the long run be the loser.

Finally, modern writers in the individualist anarchist tradition (e.g. Carson, 2001: pp. 12-15) have – amongst many other things such as the marketing advantages of being first on the market – noted or argued that survey research indicates that even many large companies do not actually regard patent protection to be a significant factor in their R & D considerations, and that even when they do stress the importance of patent protection – and here again the pharmaceutical industry seems to be something of an odd-one-out – this may well be somewhat disingenuous given the substantial amount R & D costs that are actually ultimately borne by the State, i.e. the taxpayer.

A Hindrance to Competition

Tucker was an ardent believer in thoroughgoing *laissez-faire*, believing it to be both synonymous with co-operation and a requirement for human material progress. The greater the scope and intensity of genuine *laissez-faire*, the better.

In furtherance of this, he argued that, if a producer was no longer protected for even a limited time by State-enforced monopolistic ownership of the ideas behind a product, the abolition of intellectual property would instil in its former beneficiaries a much greater fear of competition, this in turn leading to a more sure and constant process of innovation, improvement, and price-cutting.

A Means to Perpetual Slavery

Given the normally limited duration of patent and copyright noted above, this next criticism did not and does not in re-

ality fully apply, although a hazy realisation of what would entail if it *did* may be one of the reasons for this particular oddity of standard intellectual property rights – their very impermanence – compared to mundane property.

Nevertheless, Tucker argued that if the two forms of property *were and always had been* treated alike – i.e. title in intellectual property was regarded as being exactly the same kind and just as enduring as title to mundane property – then by the time that he was writing much of the wealth in the world would have been owned by heirs of the first inventor of the steam engine. Even more bizarrely – and Tucker noted this purely to illustrate *how* bizarre it was – he argued that almost the entire population of the civilised world would by then be virtually the slaves of whoever invented and patented the Roman alphabet.

A Misapplication of the Concept of Property Rights

However, over and above the preceding objections, Tucker’s most interesting assertion was that the notion of intellectual property rights was an inherently invalid one brought about by a misunderstanding – or perhaps it might be fairer to say a non-understanding, since he argued that the problem was that few had thought about the matter – of why the very idea of property rights had arisen in the first place. (It also illustrates Tucker’s disavowal of ‘natural rights’ as a justification for anarchism, for he regarded such a thing as crypto-religious and lacking in empirical validity. Instead, Tucker made it repeatedly clear that he was an anarchist because he believed that anarchism was the social system most conducive to material prosperity and the quest for personal happiness.)

Tucker argued that if all physical products could be available to all people, in all places, in unlimited amounts, with one person’s possession and use of something in no way impinging on another’s possession and use of it, then the whole notion of property would be utterly absurd. Indeed, for those few things that *do* display these features such as the air that we ordinarily breathe, he noted that no one yet seriously proposed to assign property rights to it. However, given that for most things this is obviously *not* true, i.e. that to take a concrete possession from an individual is necessarily to deprive that person of its use, and also given that it had long been held – even by non-libertarians to some degree, and certainly by individualist anarchists (and, of course, by capitalist anarchists) – that prosperity rested on personal initiative and security in possession of the means towards, and fruits of, the same, the idea of property in concrete things came quite rightly to be understood and agreed upon.

So far, so good. However, he argued that people had come to make a fetish out of ‘property’ and worshipped it for its own sake rather than for its socially useful attributes. This had resulted in property rights being assigned to things that did not justify their application. Tucker argued that property in ideas was an invalid use of the more general concept of property rights since, in contrast to concrete possessions, abstract entities such as the ideas and discoveries protected by laws pertaining to intellectual property could indeed be available to all people, in all places, in unlimited amounts, with one person’s possession and use of the idea or discovery in no way impinging on another’s – including the discoverer’s – possession and use of it.

In short, that the very idea of property rights only arose because of the realities of the limits of the physical world as

they impinged upon the requirements of social utility, and it was wholly inappropriate to assign property rights to abstract things simply not bound by those limits.

Some Clarifications

It should be noted that just because anyone is entitled to use an idea or discovery of someone else's – since, in doing so, they do not deprive the other of the use of it – this does not mean that they have an automatic right to gain access to it. They, too, have to acquire knowledge of it by a process that is in itself in accordance with notions of justness. The original discoverer is under absolutely no obligation to reveal the details – or indeed the very existence – of his discovery.

To take a clichéd but perfectly illustrative example. A man may invent a 'secret formula' for a wonderful soft drink. Another man may, either by a like process of experiment and discovery, or simply by a sophisticated chemical analysis of a bottle of the drink that he had honestly acquired, bring exactly the same product to the market. However, a denial of intellectual property rights does not entitle to him to burgle the original discoverer's office, render unconscious the night-watchman, blow open his safe, and make away with the document conveniently labelled 'Secret Formula', since Tucker would have regarded all of these things as serious offences against the person or property.

This also means that the discoverer of any idea is entitled to be protected, if not in monopolistic ownership of the idea, but certainly of any concrete items deriving from it.

Equally, under the system envisaged by Tucker, anyone may copy and distribute, including for commercial purposes if they wish, a 'work of art' created by another. (This is even more pertinent now with the huge growth in the commercial market in popular culture and the fact that copying is technically so much easier to do at the start of the twenty-first century than it was at the end of the nineteenth.) To take the example of pop music. Lacking laws protecting intellectual property, a man may copy and distribute the works of whoever is currently at the top of the music charts that week. What he cannot do is to make fraudulent claims about the origin of the song, e.g. by claiming that it was by Band B when it was really by Group A. He may decide to analyse, record, and distribute in hardcopy the musical score to the song. What he cannot do is to put his name at the top and fraudulently imply that he originally wrote it.

Intellectual Property Rights: Here to Stay for the Foreseeable Future

Benjamin Tucker lived to see the carnage of the First World War (and perhaps remarkably for an anarchist had, along with the leading proponent of communist anarchism, Peter Kropotkin, supported the Allies on the grounds that Imperial Germany was the 'mother of reaction' (DeLeon, 1978: pp. 178-179)). He also lived to see the rise and implementation of Marxism in Russia – with all the baleful consequences that Tucker and anarchists of all sorts had long warned about (Pipes, 2001: p. 15) – and the rise of Fascism and Nazism in much of Europe.

But away from these extremes of military carnage and political terror, and although he stated very plainly that he regarded the bourgeois democracies as at least relatively tolerable (Martin, 1953: p. 275), even by the end of his active working life he had become increasingly pessimistic

about the prospects of his brand of anarchism ever taking hold. One of the major reasons was that he detected in the bourgeois democracies the rise and strengthening of what we might now term 'corporatism', featuring huge, State-protected and in practice often State-created conglomerations that were too wealthy and politically powerful to be successfully challenged by individuals and small associations (Tucker, 1911: pp. 24-25).

It is hard to say that things have improved since then. Even if Tucker and other opponents of intellectual property conventions and law were and are correct, those who benefit by them have far too much to lose to ever give them up voluntarily, and it seems for now too much political power to allow others to force them to do so.

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