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Reasserting the Property Rights Source of IP

by

Randolph J. May * and Seth L. Cooper **

Introduction

Economic prosperity generated by and through intellectual property is dependent upon the existence of the same conceptual and legal framework applicable to property rights more generally. Of course, such framework may be adapted in certain appropriate ways to take into account the advances of the Information Age. But there is no justification for excluding intellectual property from fundamental principles of property law that government is charged with enforcing.

"The entire U.S. economy relies on some form of IP, because virtually every industry either produces or uses it." A [March 2012 report](#) released by the U.S. Commerce Department contains the foregoing remarkable statement. According to the Commerce Department report, "IP-intensive industries directly accounted for 27.1 million American jobs, or 18.8 percent of all employment in the economy, in 2010." And "IP-intensive industries accounted for about \$5.06 trillion in value added, or 34.8 percent of U.S. gross domestic product (GDP), in 2010."

Despite the dramatic rise in intellectual property as a source of value and a key driver of economic progress, intellectual property rights have come under fire. Wrongly in our

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

view, some academics and public policy analysts have called into question the institutional legitimacy of intellectual property.

Intellectual property and physical property share the same conceptual foundations. Thus, attacks on intellectual property are in large measure attacks on property itself, even though they may not be characterized as such or even recognized as such by those attacking IP. The foundational source of property rights and the status of intellectual property therefore need to be reasserted and defended.

The comprehensive understanding of property that informed the framing and ratifying of the U.S. Constitution includes both intellectual and physical property. As James Madison, often described as "the Father of the Constitution," once explained, individuals by nature have rights to "their persons," "their faculties," "their actual possessions," and "the labor that acquires their daily subsistence." Intellectual property and physical property share this common grounding in natural right.

Similarly, both intellectual property and physical property play a critical institutional role in defining and limiting the powers of government while, concomitantly, securing individual freedom and promoting individual initiative. Article I, Section 8 of the U.S. Constitution delegates to the federal government a responsibility for securing the exclusive rights of authors and inventors for limited times. It also confers on government a role in adjudicating disputes between private parties and in clarifying the boundaries of ownership and use of property, including intellectual property.

A property rights approach to copyrights and patents necessarily must reflect, and be true to, government's primary purpose – protecting property. Regardless of how intellectual property and tangible property differ, the rights claims of intellectual property are on par with those of physical property. Any adjustments to intellectual property rules must ultimately respect the right of an individual to the fruits of his or her own labors. This means rejecting any notion that government can denigrate the idea of property in intangibles or reduce intellectual property to second-class status.

Intellectual and Physical Property Are Both Encompassed Within Classical Liberalism's Comprehensive Understanding of Property

The classic liberalism of the 17th and 18th Centuries fostered a comprehensive understanding of property. Such an understanding was advanced by John Locke. And it was received by James Madison and others who framed and ratified the U.S. Constitution. To put it in Madison's words, individuals possess rights of property in the safety and liberty of "their persons, and their faculties." They also possess property rights "in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their Fatigues and soothe their cares."

The classical liberal understanding of property includes both things tangible and intangible. On the one hand, liberty and choice in cultivating one's farmland or operating a mercantile trade typically are manifest in tangible produce or manufactures. And on the

other hand, as Madison explained, "a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them." While opinions can be communicated in tangible form, in their essence, opinions are, of course, intangible.

Authoring or inventing certainly requires the use of one's faculties. The created value comprises the fruits of one's labor. Thus creation of intellectual property constitutes a means of one's subsistence. In all these respects, intellectual property is as deserving of protections as physical property.

Intellectual and Physical Property Share the Same Institutional Role in Defining and Limiting Governmental Power

Closely related to this comprehensive understanding of property is its function in defining and limiting the powers of government. Tasking government to protect intellectual property rights and administer intellectual property systems implicates the same basic set of government responsibilities and public benefits associated with physical property.

Madison concluded in his essay *On Property* (1792) that "[g]overnment is instituted to protect property of every sort." First and foremost, government is delegated authority to prevent expropriation or destruction of property through force or fraud. Government therefore serves as an impartial arbiter when disputes arise between individuals regarding rights in property. This involves making judicial determinations based on prevailing custom or background expectations regarding rights in property. It likewise includes judicial enforcement of contract terms regarding the use and exchange of property.

Property is further protected through government-adopted rules to clarify boundaries of ownership and usage rights. This ensures individuals have the ability to enjoy their rights, free from interference but consistent with the rights of others. It also facilitates individuals' ability to make intelligent choices about what to do with their resources and enables planning for the future.

In addition, government has an important role in establishing and administering a records system to clarify and document property ownership and to streamline title transfers. Such systems help ensure that rightful owners maintain title. They also help reduce transaction costs when property is sold, thereby facilitating transfer of property to individuals who value it the most.

A critical byproduct of the protection of property rights by government is the safeguarding of individualized decisionmaking in economic and personal matters. Individuals are at liberty to pursue their own ends, rather than be made subservient to government interests. Individuals remain free to utilize their first-person knowledge and skills in pursuing opportunities and adjusting to market changes. Most obviously, property ownership provides the best economic incentives for investment and innovation, since individuals are then free to reap financial rewards for their efforts. This property-

centric approach to governance is opposed to command-and-control economies where governments coordinate activities through top-down rules or arbitrary action.

Protection of property rights also implies government conformity to the rule of law. As Madison wrote, "[t]hat is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest." Property's function in confining government actions to the rule of law is perhaps best reflected in the Lockean-themed guarantees of the Constitution's Fifth and Fourteenth Amendments that no person shall be deprived of "life, liberty, or property, without due process of law."

Importantly, the institutional role of property rights in defining the duties and limits of government power does not depend upon whether any particular species of property resides in intangible or tangible form. When it comes to the purpose and scope of government power, the case for intellectual property rights and the case for physical property rights are one in the same.

Protection of property extends to the fruits of one's labors. What matters is that those fruits result, at least in part, from an individual's labors. This is the grounding of intellectual property rights, not the good graces of government. It is immaterial whether the fruits of one's labors result from cultivating one's land, manufacturing physical goods, authoring literary works, or inventing innovative products. There is no principled reason for excluding any of these forms of property, whether tangible or intangible, from protection under law.

Rendering judicial decisions regarding intellectual property rights involves no special accommodation by government either. Rather, enforcement of property rights in intangibles easily falls within the scope of routine governmental activity in enforcing property rights generally. Different areas of law have unique doctrines. But no reason exists for specifically excluding intellectual property from the basic principles of law that government is charged with enforcing.

Aspects unique to various types of physical property require particular adjustments and periodic readjustments to the rules of property. But the fundamental property rights status remains whether those rights are in minerals, water, real property, or personal possessions. So it is with different types of intellectual property, whether in copyright or patents. That the rules of property must be tailored to the unique features of different types of intellectual property is typical of property systems.

Intellectual property and physical property operate as part and parcel of this conceptual and legal framework for decentralized decisionmaking. Both forms of property check the tendency toward government centralization of decisionmaking.

That the role of property as a rule of law limitation on government is a matter of principle reinforces the point that whether a given government activity relates to intangibles or tangibles is by itself of no moment in a foundational sense. There is no reason to exempt

government from compliance with the rule of law norms merely because property happens to be in either intangible or tangible form. Indeed, it would be improper to do so.

Despite Differences, Intellectual and Physical Property Share the Same Source

Intellectual property and physical property are different in certain respects. But such differences in no way undermine the common source of both types of property rights. Both types of property are grounded in the natural rights that an individual has to the fruits of his or her own labors. Oft-cited differences between intellectual and physical property are important insofar as they inform judgments about the particular rules best suited to clarify ownership and use limits.

One commonly observed difference between intellectual and physical property is the non-rivalrous nature of the former and the rivalrous nature of latter. Intellectual property can be possessed and used by many individuals at the same time without causing interference with such possession or use. Physical property, however, cannot be successfully possessed and used by many individuals simultaneously. The rivalrous and possessory aspect of tangible things is reflected in Sir William Blackstone's classic statement of property as "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

Another commonly observed difference between intellectual and physical property is the non-exhaustible nature of the former and the exhaustible nature of latter. Intellectual property is not depleted with usage or repeated usage, although increased or universal access to intangible property by numerous users can deplete its market value. But physical property typically is depleted with usage.

Additional differences between intellectual and physical property include the ease with which the former generally can be used and transferred compared to the latter. Modern industrial production techniques and digital technologies have made replication and simultaneous access and use of inventions and created works increasingly easy and less costly in many instances. And policing efforts to prevent or prosecute such unauthorized reproductions and their usage is increasingly difficult.

But those different attributes of intangibles and tangibles should not cause one to overlook that rights in both types of property are grounded in natural right. Madison's essay *On Property* recites the Blackstonian meaning of property – but, importantly, goes beyond it. "[I]n its larger and juster meaning," wrote Madison, property embraces "every thing to which a man may attach a value and have a right." This includes the property right that an individual by nature possesses to the fruits of his or her labors, which Madison regarded as "sacred property."

As pointed out earlier, Madison expressly recognized property rights in intangibles. Consider the intangible that Madison placed at the pinnacle of property rights: "Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right." Of course, in the

American constitutional order this understanding of property rights receives its most explicit embodiment in the Intellectual Property Clause.

Properly understood, non-rivalry and non-exhaustibility are characteristics of various kinds of property. But those characteristics do not define property as such. The presence or absence of non-rivalry and non-exhaustibility are factors that bear on the realistic expectations of ascertainable property ownership and beneficial usage. The extent to which certain types of property exemplify non-exclusivity and non-rivalry are circumstances that should inform the administration of property rights systems. Ease of use and transfer are also contextual factors that should influence the contours of property rules regarding ownership and use. Calibrating the rules of property according to those dynamics may be necessary to ensure and facilitate the use and transfer of property by its respective owners.

Conclusion – A Property Rights Approach to Intellectual Property Reform

According to the U.S. Commerce Department's March 2012 Report, "IP-intensive industries directly accounted for 27.1 million American jobs, or 18.8 percent of all employment in the economy, in 2010." That same year, "IP-intensive industries accounted for about \$5.06 trillion in value added, or 34.8 percent of U.S. gross domestic product (GDP)."

In his book *The Noblest Triumph: Property and Prosperity Throughout the Ages*, Tom Bethell wrote that "the sudden rise of intellectual property is the legal expression of this transition" from the Industrial Age into the Information Age. However, Bethell also directed attention to a conundrum created by new technological capabilities:

An information economy is one in which the value added by intellectual goods, such as songs and films and software, is higher at the margin than that added by steel and oil. But thanks to the possibility of almost costless replication, that "value added" is threatened with collapse.

Economists Carl Shapiro and Hal R. Varian identified these same considerations in *Information Rules: A Strategic Guide to the Networked Economy*. Shapiro and Varian recognized the "danger" that "if copies crowd out legitimate sales, the producers of information may not be able to recover their production costs." Nonetheless they pointed out that "[t]he very technology that makes rights management more difficult – the dramatic reduction in costs of copying and distribution – also offer a fantastic opportunity for owners of intellectual content."

Protecting the intellectual property rights of creators and inventors is a mission-critical public policy challenge in the Information Age. This includes preserving intellectual property owners' opportunity to recover production costs and obtain profits. Preventing improper expropriation of the fruits of their labors and preserving incentives to further innovation are therefore essential.

Meeting this challenge may likely require periodic adjustments to the rules of intellectual property to reflect the changing landscape of digital technologies and Internet communications. But reforms made in this regard should reflect, and be consistent with, government's primary purpose: Protecting property rights.

Any adjustments to intellectual property rules must ultimately respect the right of individuals to the fruits of their own labors. This means rejecting any notion that government can jettison the idea of property in intangibles or reduce intellectual property to second-class status in property's realm. It should be understood that attacks on intellectual property are attacks on property itself.

* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

** Seth L. Cooper is a Research Fellow of the Free State Foundation.

Further Readings

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