Property, Intellectual Property, and Free Riding

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Intellectual property protection in the United States has always been about generating incentives to create. Thomas Jefferson was of the view that "[i]nventions . . . cannot, in nature, be a subject of property;" for him, the question was whether the benefit of encouraging innovation was "worth to the public the embarrassment of an exclusive patent."[1] On this long-standing view, free competition is the norm. Intellectual property rights are an exception to that norm, and they are granted only when—and only to the extent that—they are necessary to encourage invention. The result has historically been intellectual property rights that are limited in time, limited in scope, and granted only to authors and inventors who met certain minimum requirements. On this view, the proper goal of intellectual property law is to give as little protection as possible consistent with encouraging innovation.

This fundamental principle is under sustained attack. Congress, the courts, and commentators increasingly treat intellectual property not as a limited exception to the principle of market competition, but as a good in and of itself. If some intellectual property is desirable because it encourages innovation, they reason, more is better. The thinking is that creators will not have sufficient incentive to invent unless they are legally entitled to capture the full social value of their inventions. On this view, absolute protection may not be achievable, but it is the goal of the system.

The absolute protection or full-value view draws significant intellectual support from the idea that intellectual property is simply a species of real property rather than a unique form of legal protection designed to deal with

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1. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* BASIC WRITINGS OF THOMAS JEFFERSON 708, 712–13 (Philip S. Foner ed., 1944), *quoted in* Graham v. John Deere Co., 383 U.S. 1, 8–9 & n.2 (1966). There are other nonutilitarian theories of intellectual property, primarily based on Locke and the natural law tradition, though it is worth noting that Locke himself spent plenty of time on utilitarian rather than desert-based justifications for property. *See, e.g.*, Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713, 733–34 (1989); Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 152 (Stephen R. Munzer ed., 2001).

public goods problems. Protectionists rely on the economic theory of real property, with its focus on the creation of strong rights in order to prevent congestion and overuse and to internalize externalities. They rely on the law of real property, with its strong right of exclusion. And they rely on the rhetoric of real property, with its condemnation of "free riding" by those who imitate or compete with intellectual property owners. The result is a legal regime for intellectual property that increasingly looks like the law of real property, or more properly an idealized construct of that law, one in which courts seek out and punish virtually any use of an intellectual property right by another.

In this Article, I suggest that the effort to permit inventors to capture the full social value of their invention—and the rhetoric of free riding in intellectual property more generally—are fundamentally misguided. In no other area of the economy do we permit the full internalization of social benefits. Competitive markets work not because producers capture the full social value of their output—they do not, except at the margin—but because they permit producers to make enough money to cover their costs, including a reasonable return on fixed-cost investment. Even real property doesn't give property owners the right to control social value. Various uses of property create uncompensated positive externalities, and we don't see that as a problem or a reason people won't efficiently invest in their property. Analogously, I argue that full internalization of positive externalities is not a proper goal of tangible property rights except in unusual circumstances, for several reasons: (1) there is no need to fully internalize benefits in intellectual property; (2) efforts to capture positive externalities may actually reduce them, leaving everyone worse off; and (3) the effort to capture such externalities invites rent-seeking.

The goal of eliminating free riding, then, is ill-suited to the unique characteristics of intellectual property. Efforts to permit intellectual property owners to fully internalize the benefits of their creativity will inevitably get the balance wrong. Because this goal seems to derive in the minds of many from their conception of property rights, I suggest that treating intellectual property as "just like" real property is a mistake as a practical matter. We are better off with the traditional utilitarian explanation for intellectual property, because it at least attempts to strike an appropriate balance between control by inventors and creators and the baseline norm of competition. If we must fall back on a physical-world analogy for intellectual property protection—and I see no reason why we should—treating intellectual property as a form of government subsidy is more likely to get people to understand the tradeoffs involved than treating it as real property.[2]

2. Tom Bell is the first to draw this analogy, likening copyright specifically to a particular form of government subsidy: welfare. Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 231 (2003).

Part I outlines the growth of the real property theory of intellectual property and explains how that theory has influenced courts to focus on free riding and the complete internalization of externalities. Part II explains why attempting to fully internalize the benefits of inventions is not appropriate and indeed is counterproductive. Finally, Part III discusses the alternatives to the free riding model.

I. The Free Riding Model of Intellectual Property[3]

Talking about patents, copyrights, and trademarks as just another species of property is very much in vogue. The rhetoric and economic theory of *real* property are increasingly dominating the discourse and conclusions of the very different world of *intellectual* property. The shift begins with simple rhetoric—talking about intellectual property rights as aspects of a broader system of property. But its implications go far beyond that. The temptation to move from rhetoric to rationale seems almost irresistible. Courts and commentators adopt—explicitly or implicitly—the economic logic of real property in the context of intellectual property cases. They then make a subconscious move, one that the economic theory of property does not justify: they jump from the idea that intellectual property is property to the idea that the IP owner is entitled to capture the full social value of her right. This leads them to an almost obsessive preoccupation with identifying and rooting out that great evil of the modern economic world—free riding.

The idea of propertization begins with a fundamental shift in the terminology of intellectual property law. Indeed, the term "intellectual property" itself may be a driver in this shift. Patent and copyright law have been around in the United States since its origin, but only recently has the term "intellectual property" come into vogue.[4] A quick, unscientific search

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3. Two paragraphs of this Part of the Article are adapted from my earlier work *Romantic Authorship and the Rhetoric of Property*, 75 TEXAS L. REV. 873, 895–96 (1997) [hereinafter Lemley, *Romantic Authorship*], which sought to describe the emergence of the property view of intellectual property.

4. The modern use of the term intellectual property as a common descriptor of the field probably traces to the foundation of the World Intellectual Property Organization (WIPO) by the United Nations. *See* Convention Establishing the World Intellectual Property Organization, July 14, 1967, art. 2(viii), 6 I.L.M. 782, 784 (defining the term "intellectual property" to include "rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields"). Since that time, numerous groups such as the American Patent Law Association and the ABA Section on Patent, Trademark, and Copyright Law have changed their names (to the American Intellectual Property Law Association and the ABA Section on Intellectual Property Law, respectively).

There were uses of the term in the literature well before this time, especially on the Continent. *See, e.g.*, A. NION, DROIT CIVILS DES AUTEURS, ARTISTES ET INVENTEURS (1846) (referring to "propriete intellectuelle"); Davoll v. Brown, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (calling intellectual property "the labors of the mind" and concluding that they were "as much a man's own . . . as what he cultivates, or the flocks he rears"). Copyright was sometimes referred to as literary property and patents as industrial property. These uses do not seem to have reflected a unified property-based approach to the separate doctrines of patent, trademark, and copyright, however.