The Comedy of the Market

Thomas B. Nachbar*

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. 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. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.[1] Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.[2]

Modern American intellectual property thinkers are keen on rivalry, or rather, the lack thereof. An object displays rivalry when one party's possession or use of it is necessarily to the exclusion of others'. Thus, the sandwich I ate for lunch today is subject to rivalry because, I having eaten it, the sandwich is no longer available for another's consumption. The same is true of non-consumable objects; my family's home is subject to rivalry because it would be impossible for an unlimited number of people (or even a few more than currently do) to live in it simultaneously. Rival goods, therefore, are only valuable if their owners can exclude others from using them, and the *excludability* exhibited by a particular article represents the ability to do so. My sandwich was very excludable, especially after I put it in my mouth. My house is somewhat less so, but walls, doors and locks help; my un-fenced front yard even less so, since preventing the wayward pedestrian from setting up a picnic on my lawn would require my constant

* Professor of Law, University of Virginia.

1. And, by extension, writings.

2. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) *in* JEFFERSON: POLITICAL WRITINGS 575, 580 (Joyce Appleby & Terence Ball eds., 1999).

vigilance.

Thomas Jefferson in 1813 summed up in 237 words the argument of dozens of IP scholars today: intellectual property is different from tangible property because intellectual works are not subject to rivalry. If I hear a story, I can pass that story on to another without diminishing my own understanding or enjoyment of the story. If that story is captured in a book, the individual copies of the book are subject to rivalry, but the story itself is not. If you take my book I can no longer enjoy the tangible object, but if you make a copy of my book, I do not lose enjoyment of the story. I have one reason for fighting over ownership of the book—my own lost use—that I do not have for fighting over ownership of the story.[3] Intellectual works are similarly poorly adapted to excludability, since, once intellectual works are publicly distributed, there is no tangible object whose possession can readily prevent their uncontrolled sharing. The rivalry story is important to intellectual property thinking, because it serves as the primary justification for providing "owners" of intellectual property less complete protection over their intellectual works than we normally provide to owners of tangible property.

More importantly, concerns that overuse will deplete a shared resource, the so-called "tragedy of the commons,"[4] do not apply for non-rival goods like intellectual works, suggesting instead a "comedy of the commons:"[5] an increasing return to additional uses of a shared resource to replace the tragedy of decreasing returns that dominates property theory relating to tangible articles. The combination of non-rivalry and poor excludability has led many to liken intellectual works to common resources and to argue for reduced protection for them, following Justice Brandeis's admonition that intellectual works are "free as the air to common use."[6] Some have specifically suggested that intellectual works' insusceptibility to rivalry underscores the constitutional limits placed on Congress's power to make policy for information markets,[7] and may even provide a reason for preventing Congress from using other powers to award exclusive rights.[8]

---

3. *See, e.g.*, Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1052–53 (2005).

4. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

5. *See generally* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986), which is routinely cited in intellectual property scholarship for the benefits of recognizing the non-rivalry principal.

6. *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.").

7. *See, e.g.*, Thomas F. Cotter, *Prolegomenon to a Memetic Theory of Copyright: Comments on Lawrence Lessig's The Creative Commons*, 55 FLA. L. REV. 779, 792–93 (2003); Kurt M. Saunders, *Patent Nonuse and the Role of Public Interest as a Deterrent to Technology Suppression*, 15 HARV. J.L. & TECH. 389, 447–48 (2002).

8. *E.g.*, Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 543–44 (2000). Some have also argued that the rivalry distinction suggests that copyright rules should be more susceptible to First Amendment challenge than other laws of general application. *E.g.*, Edwin

One could easily quibble with the characterization of intellectual works—or rather intellectual property—as not being subject to rivalry. If nothing else, the intellectual property laws are a recognition that there is *something* rivalrous about intellectual works: the investment necessary for their creation and the concomitant income stream to be generated from their use. Jefferson himself recognized the tension, distinguishing ideas themselves, which he claimed were insusceptible to "exclusive property," from "the profits arising from them," to which he suggested society could grant an "exclusive right" as an incentive to the ideas' creation. The non-rivalry of intellectual works is something of a fiction, because the intuition that intellectual works are non-rivalrous presupposes the existence of the works themselves. But intellectual works, unlike air (which served as an example for both Jefferson and Brandeis), for instance, do not exist except as the product of human labor, which is itself the subject of considerable rivalry. The economic distinction between intellectual and tangible products is easy to overstate.

Intellectual property rules necessarily recognize both that there are very real and tangible benefits for those who use intellectual works and that the cost of thinking up and spreading ideas must be recouped. In this way, non-rivalry serves paradoxically as both the justification for and implicit limit on intellectual property protections. The whole purpose of intellectual property laws is to artificially increase the excludability of intellectual works so that the proprietor of an intellectual work can credibly charge for access to it. In so doing, intellectual property laws allow the conversion of some of the non-rival benefits of using intellectual works into the kinds of rival resources (read: money) necessary to create and distribute them, and channels those rival resources into the hands of those who do the creating and distributing. Jefferson himself acknowledged the need to create artificially the ability to exclude others from a non-rival resource that naturally exists in tangible articles.

But even if one accepts wholeheartedly the non-rivalry paradigm of intellectual works, that paradigm does nothing to suggest that their regulation deserves special constitutional care. There is, initially, the matter of text. The Patent and Copyright Clause[9] contains several limits on the power it confers on Congress to grant exclusive rights in intellectual works: such grants must "promote the Progress of Science and useful Arts;"[10] they must be for "limited Times;"[11] they must be granted only to "Authors and Inventors;" and they must be granted only for "Writings and Discoveries."[12] None of these limits is tied at all to the presence or

---

C. Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 907–08 (2002); *see also* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 184–85 (1998).

9. U.S. CONST. art. I, § 8, cl. 8. The Clause reads in full: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

10. *See* Eldred v. Ashcroft, 537 U.S. 186, 212 (2003); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991). *See generally* Thomas B. Nachbar, *Judicial Review and the Quest to Keep Copyright Pure*, 2 J. ON TELECOMM. & HIGH TECH. L. 33, 36–40 (2003).

11. *See Eldred*, 537 U.S. at 199.

12. *See Feist*, 499 U.S. at 346–47; The Trade-Mark Cases, 100 U.S. 82, 94 (1879).

absence of rivalry. Requiring an intellectual work to promote the progress of science or the useful arts does not read on rivalry, except perhaps that progress itself is not readily subject to rivalry, but that goes to the result of the work, not the work itself. A (tangible) electron microscope promotes progress of science as much as, if not more than, the disembodied *idea* of an electron microscope, a distinction that holds doubly true for the promotion of useful arts. Duration has nothing to do with rivalry at all; we could just as easily imagine a durational limit on property rights in tangible objects (and in some cases, we do in the form of adverse possession and abandonment laws). Granting the rights to their actual creators ("Authors and Inventors") rather than some proxy does not go to the nature of the works at all, although the Clause's use of the terms "authors" has informed the Supreme Court's interpretation of "writings" to exclude subject matter that has no author, namely facts.[13] The subject-matter restrictions themselves—"writings and discoveries"—do little to distinguish between what is and is not subject to rivalry. In copyright, facts and ideas are not subject to copyright, but neither ideas nor facts are less subject to rivalry than their expression, which is completely copyrightable.[14] The limitation of the protection to "writings" suggests that, in order to be copyrightable, expression must be reduced to a tangible form,[15] a requirement that may increase the work's excludability, but, if anything, only increases the amount of rivalry the work displays (by tying the non-rival intellectual work to the rival paper on which it is expressed). If the Framers were trying to shape the patent and copyright powers in response to the non-rivalry of intellectual works, they made rather a poor fit between the object of the limits and their actual form.

But I would like to talk about what I think is a much larger problem with the rivalry-centric approach to both constitutional and sub-constitutional intellectual property law: the seemingly irrelevant place that rivalry (and its absence) generally holds in both constitutional law and regulatory policy generally.

I. MARKETS AND ANTI-RIVALRY

Although intellectual property scholars tend to be somewhat fixated on it, there are much more significant objects of regulation that similarly display non-rivalry, most notably markets. I am not referring to any particular markets, but rather to markets in their own right. Markets provide a service (facilitating exchange) and are "produced" just like any other service: by groups of individuals who organize and run the market. When buyers and sellers go to a market to obtain or sell a particular good or service, they "consume" the market service of matching buyers

13. *See Trade-Mark Cases*, 100 U.S. at 94. The Court has suggested that the vesting of copyright in "authors" was intended to forestall the formation of an American publishing monopoly. *See Eldred*, 537 U.S. at 200 n.5.

14. Ideas may be less subject to excludability, but that goes to the cost of controlling them, not their degree of rivalry.

15. *See* United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999) (examining the fixation requirement).

to sellers. Understood as resources for providing buyer-seller matching services, markets are a non-rival resource. Assume a market made up of one buyer and one seller. An additional buyer or seller can enter that market without taking away anything from the preexisting participants. Markets are not merely immune from rivalry from additional participants, they actually thrive on additional participants. Additional uses of a piece of intellectual property may increase or decrease social value, depending on the nature of the use,[16] but the social value of a market is almost invariably increased by the addition of another participant, since the additional participant provides the opportunity for those already in the market to find a more optimal match than they previously had. In this sense, markets are not only free from the constraints of rivalry; they actually increase in value as they are more heavily consumed: they are *anti*-rival. Markets are the prototypical network good. The only real value a market offers is in its ability to match buyers and sellers; there is no intrinsic value to the market at all. In this way, the absence of rivalry is actually a larger component of the value of markets than it is of the value of most intellectual works, since most intellectual works have intrinsic value separate from their ability to be shared through copying—the comedy of the market is actually more joyous (if the metaphor can stand it) than the "comedy of commons," as applied to intellectual works. There may be technical limits to the number of participants in a market (it would have been hard to fit millions of buyers and sellers into a town market in medieval England), but there is no theoretical one. And, of course, the same could be said of intellectual works—even if the work is not subject to rivalry, there are technical limits (the cost of creating and distributing copies of the work) to sharing. The similarity between markets and intellectual works is no more apparent than with the advent of the Internet; the same characteristics of the Internet led to the rise of both eBay and BitTorrent. When it comes to the criterion of rivalry, markets are even more responsive to Jefferson's concerns than intellectual works are.

A. THE ROLE OF RIVALRY (AND THE NON-ROLE OF NON-RIVALRY) IN MARKET-REGULATION DEBATES

Although widespread debate over intellectual property regulation is a fairly new phenomenon, academics, policymakers, and market participants themselves have debated the more general problem of freedom to enter markets for hundreds of years. But even though non-rivalry is actually a more important component of the social value of markets than it is of the social value of intellectual works, talk of rivalry is completely missing from serious debates over the legitimacy of restrictions on market participation.

Under the mercantilist economic order that dominated England during the American colonial period, debates raged over the ability of government to restrict

16. *See generally* Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33 (2004); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004).

access to markets. Given the economic system dominant at the time, the debate was not so much about whether there should be market restrictions as who should be able to exercise them. Municipal corporations routinely controlled the means of production within their jurisdictions and limited market participation extensively. That form of politically responsive market control was taken as a given, but when the Crown attempted to wrest control from the local companies in order to further its own regulatory or financial agenda, legal theories developed in opposition to the restrictions. Those claims rested not on the non-rivalry of market participation; rather, they were largely premised on poorly theorized, but nevertheless well-traveled, intuitions that went under various names, including the "liberty of the subject" or the "natural right" of a man to practice his trade.[17] That right, in turn, rested not on any particular economic or normative justification, but rather on the reliance interest of journeyman craftsmen, whose limited personal mobility meant that exclusion from the local market equaled practical exclusion from any market.[18]

If non-rivalry arguments played little part in these debates, perhaps it is because they were instantly overwhelmed by the obvious realization that in a small, closed economy, the non-rivalry of market participation simply could not compete with the rivalry all felt over the limited profits available to those who participated in those local markets. In markets where additional (outside) participation was costly, the scope of the market was small enough that all the players present could instinctively perceive that there were only so many sales to be made. In such cases, private desire for the profits of those few sales is likely to overshadow the uncertain possibility of attracting an additional buyer or seller. And, of course, such markets were not controlled by independent market operators; they were controlled by sellers alone, who were willing to open up markets to outside buyers, but not outside sellers.[19]

---

17. *See, e.g.*, Raynard v. Chase, (1756) 97 Eng. Rep. 155, 157 (K.B.) (opinion of Mansfield, C.J.) (the Statute of Artificers should be read restrictively because, among other reasons, "it is restraint of natural right" and "it is contrary to the general right given by the common law of this kingdom"); Darcy v. Allen (The Case of Monopolies), (1603) 77 Eng. Rep. 1260, 1262–63 (K.B.) (striking a playing-card monopoly as "against the common law, and the benefit and liberty of the subject"); East-India Co. v. Sandys, (1685) 10 St. Tr. 371, 523 (K.B.) (opinion of Jeffries, C.J.) (the right to manufacture "remain[s] with the most liberty by the common law," compared to the right to conduct, inland or foreign trade, which are protected to declining degrees); Mayor of Winton v. Wilks, (1705) 92 Eng. Rep. 247, 248 (K.B.) (noting that "every man at common law might use what trade he would without restraint") (argument for defendant).

18. Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1336–37 (2005).

19. The self-serving, rent-seeking behavior of local sellers is a commonly documented aspect of English medieval and mercantilist economies, and took many forms, usually the exclusion of foreign artisans from local markets. *See generally* W. CUNNINGHAM, THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE IN MODERN TIMES 429–32 (5th ed. 1968); ELI F. HECKSCHER, MERCANTILISM 302–05 (Mendel Shapiro trans., 1935). It was common in England, for instance, to refuse to allow foreign traders to leave the country with money; they had to leave with purchased goods, which had the intended effect of increasing demand for manufactured goods. *See* CUNNINGHAM, *supra*, at 431–32. The practice was not officially eliminated in England until the middle of the nineteenth century, with the adoption of the Municipal Corporations Act, which separated local government from the trade guilds. HECKSCHER, *supra*, at 310.

Local control over market participation was carried forward to the Colonies and retained its vitality through the founding period. Although many of the Framers waxed eloquently about freedom, that freedom was never considered to include the untrammeled right to participate in markets. American municipal corporations, following their English progenitors, controlled access to local markets, systematically favoring local, established interests over those of distant or new competitors.[20] The social harm of denying access to the non-rival resource of markets again went completely unnoticed, overcome by the recognition of a limited supply of rents to be had from the exploitation of any particular market.

In the nineteenth century, American cities eventually moved away from the model of municipal control over markets, but the change was both very gradual and had little to do with ideology, much less a recognition of the social value of non-rivalry. Rather, as American cities grew, it became harder and harder for municipalities to enforce their restrictive trade practices, angering the licensed tradesmen who were essentially paying for their maintenance through dues and rents imposed by municipal corporations.[21] There was a principled rejection of the *political* structure of municipal corporations,[22] but rejection of the market control they exercised was a product of the invisible hand, not economic theory, although it certainly jibed with increasingly popular thinking about economic liberty.[23]

As improvements in transportation and communication rendered municipal corporations incapable of providing protectionist work rules for incumbents, the effort shifted to the state level.[24] Those efforts met with mixed political and legal success. Wage and hour restrictions were routinely struck down during the *Lochner* era, but professional groups had considerably better luck in obtaining and sustaining preferential treatment through state professional licensing laws, which were used both to exclude outsiders and to vest control over entire trades in associations of (incumbent) professionals.[25] Legal resistance to these laws, when successful, was premised in the general abhorrence of the "monopolies" that such licensing laws allegedly created[26] or carried forward the sensibilities evident in the mercantilist English cases about the "liberty of the citizen" to practice his chosen calling, and like those earlier cases were decidedly supplier-centric.[27] There was

20. *See generally* JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA 16–34 (1975).

21. *See generally id.* at 91–100.

22. *See generally id.* at 64–78.

23. *See id.* at 100.

24. Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal Case Study*, 53 CAL. L. REV. 487, 494–97 (1965).

25. *Id.*

26. *Id.* at 523–24. *See, e.g.*, Banghart v. Walsh, 171 N.E. 154, 156 (Ill. 1930) (requiring beauty shop operators to qualify as barbers invalid because it sets "up a permanent, limited, and monopoly class to cut and trim hair."); Dusenbury v. Chesney, 121 So. 567, 568 (Fla. 1929) (striking a $250 per day tax on occasional auctions, because "the ordinance tends to create a monopoly and is in restraint of trade.").

27. Friedman, *supra* note 24, at 521. *See, e.g.*, Nechamcus v. Warden, 39 N.E. 686, 691 (N.Y. 1895) (Peckham, J., dissenting) (attacking a licensing law for plumbers as "detract[ing] from the liberty of the citizen, acting as a tradesman"). As in the earlier English cases, reliance played a role. In New York, the courts upheld a 1898 licensing law for embalmers, but when the law was extended in 1905 to require all funeral directors to be licensed embalmers, the court immediately recognized the potential for

no single, coherent economic theory tying together either line of cases,[28] much less one keying on the non-rivalry of market participation. The idea that unadulterated market economics—in the form of economic liberties—could drive constitutional law suffered its demise at the end of the *Lochner* era, but even when markets were considered to be constitutionally protected, non-rivalry played no real role in establishing their protected status.

B. LOPSIDED CONTESTS BETWEEN RIVALRY AND NON-RIVALRY

Throughout our history, theories of economic liberty have carried little traction when confronted with the real possibility of rivalry over the rents to be had from participation in easily controlled markets. Professional licensing is one example, but securities trading might be an even better one. Securities are amenable to concentrated trading within a confined space, and securities markets have been correspondingly amenable to tight control by a few market participants.

The cases with perhaps the most salience for the intellectual property context are the series of cases that arose out of attempts by securities markets to use their control over price information—literally, control over access to telegraphic price tickers—to limit or control market participation. After all, information (like ideas) is non-rivalrous and presents the same problems of excludability. More important than the fact that such efforts were largely successful is that the objections to them betray no real understanding of what we would today call the non-rivalry of either markets or information. Rather, the struggle for control over markets was seen for exactly what it was in practical purposes: a struggle over the very rival profits available to those who controlled access to the markets.[29] Later, when control over the distribution of information itself was asserted in *International News Service v. Associated Press*, the Court analogized to the "ticker" cases and, while recognizing the benefits to readers of the non-rivalrous nature of information, distinguished that non-rivalrous benefit from rivalry over profit between the AP (or rather its member newspapers) and the INS.[30] The non-rivalry of information was consistently trumped by the realities of rivalry over the rents to be gained from it, so long as there was a model in place for capturing those rents. Whether you agree with cases like *Chicago Board of Trade* in the market context, or *INS* in the information context itself, it is hard to glean from either one of them an important role for the wonders of non-rivalry, much less the kind of dominant one that would be

displacing *current* funeral directors from their trade, and struck the extension. *See* Friedman, *supra* note 24, at 514.

28. Friedman, *supra* note 24, at 525.

29. *See* Bd. of Trade of the City of Chicago v. Christie Grain & Stock Co., 198 U.S. 236, 250–51 (1905) ("The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. . . . [T]he information will not become public property until the plaintiff has gained its reward."). *See also* Hunt v. N.Y. Cotton Exch., 205 U.S. 322, 324, 336 (1907) (acknowledging that the members of the plaintiff exchange "were deprived of many customers" because of unauthorized distribution of pricing information. Also measuring, in the context of a dispute over the amount in controversy, the harm to the exchange by the value of losing control over the information).

30. Int'l News Serv. v. Associated Press, 248 U.S. 215, 239–41 (1918).

necessary to support a constitutional prohibition that would override a legislature's choice to grant exclusive rights over non-rivalrous resources outside of the Patent and Copyright Clause.[31]

If understanding non-rivalry is important for understanding the constitutional place of intellectual property, why hasn't it been equally important in understanding the constitutional place of market restrictions more generally? One way to answer that question is to identify the significance of non-rivalry in modern intellectual property debates.

II. THE ROLE OF (NON-)RIVALRY IN MODERN INTELLECTUAL PROPERTY DEBATES

A. JEFFERSON AND LOCKE

One reason why rivalry has played so large a part in modern debates about intellectual property may be attributable to Jefferson himself. After all, his 237-word summary not only lays out the happy characteristic of intellectual works (non-rivalry), but also (albeit by implication) the problems resulting from non-excludability, the solution to that problem (artificial excludability in the form of exclusive rights), and even a limit on the solution that follows from the problem being solved (only those exclusive rights necessary to encourage people to pursue such useful ideas).[32] But, although Jefferson's words have been widely available since the mid-nineteenth century, they have received little notice until recently.[33]

Instead of being asserted positively as a basis for intellectual property protection, the non-rivalry concept has done the most work in recent times as a *negative* claim: to distinguish intellectual works from tangible articles and, thereby, to distinguish exclusive rights in intellectual works from real and personal property rules. The general argument is that the "propertization" of "intellectual property" (which is itself a term of relatively recent vintage, although use of the term "property" in relation to intellectual works is not[34]) has allowed the expansion of intellectual property laws to provide the same degree of control (or at least as close as possible) as offered by real property laws. That broader concern breaks down into two more specific ones. The first, championed by Mark Lemley, focuses on the harm addressed by property rules, at least as modified by modern law-and-

31. *See* Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 317–18 (2004).

32. *See* Graham v. John Deere, 383 U.S. 1, 8–9 (1966) (describing the meaning of the letter).

33. According to a search in the Westlaw ALLCASES database, the letter was first cited by United States courts in 1951 and has only been cited four times since then. Although it is difficult to determine how long the letter has been cited in secondary sources, its use has clearly exploded. From 1995 through 1999, the letter was cited in twenty-four articles in the Westlaw Journals and Law Reviews database; over the next five years, the letter was cited in sixty-five articles.

34. Lemley, *supra* note 3, at 1033–34; Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1008–26 (2006).

economics scholarship. His argument is that real property rules are now widely considered to prevent free riding by non-owners of a piece of property, and courts have used the rhetoric of property to attack anything they identify as free riding in the intellectual property context.[35] Recognizing that intellectual works are non-rivalrous itself suggests that use by non-owners is not free riding in the same sense as use by non-owners of tangible articles, and therefore undermines the efforts of some courts to expand intellectual property laws to cover any conduct they view as free riding.[36] But the equation of property rules with free-riding is inaccurate. Real property rules have traditionally allowed substantial free-riding,[37] even with the law-and-economics movement's shift toward a free-riding approach to property rights, and free riding itself can be addressed through concepts sounding in tort without resort to property analogies, as it was in *INS* itself.[38] Rules against "unfair competition" are themselves vague enough to allow the kind of rapid expansion of intellectual property that Lemley bemoans, without resort to property analogies.[39]

The second argument is actually an exercise in second-order rhetorical combat: applying the rhetoric of property to exclusive rights in intellectual works opens to intellectual property rules the same kinds of justifications that underlie real (and personal) property rules.[40] Such justifications have traditionally been invoked to provide broad protection for tangible property (the inviolability of property rights in tangible objects) and have relied on non-utilitarian subsidiary justifications (in particular the Lockean view that property rights flow as a consequence of exercising one's labor to develop a particular article into something valuable to humans).[41] The scope of American intellectual property protection, on the other hand, is widely considered to be narrower than tangible property rights and to rely almost exclusively on the utilitarian justification of providing an incentive for development of intellectual works, so that the rest of society can have access to

---

35. Lemley, *supra* note 3, at 1037–41.

36. *Id.* at 1041–42.

37. *Id.* at 1037 ("The rise of property rhetoric in intellectual property cases is accordingly closely identified not with common law property rules in general, but with a particular view of property rights as the right to capture or internalize the full social value of property"); Mark A. Lemley, *Reply: What's Different About Intellectual Property*, 83 TEX. L. REV. 1097, 1098–99 (2005) [herinafter Lemley, *Reply*].

38. Int'l News Serv. v. Associated Press, 248 U.S. 215, 234–35 (1918) ("We need spend no time, however, upon the general question of property in news matter at common law . . . since it seems to us the case must turn upon the question of unfair competition in business."). The Court did employ the terminology of property in the opinion, but defined the right as a matter of the relationship between the parties and the defendant's conduct: "[The news] has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition, because contrary to good conscience." *Id.* at 240.

39. Mark McKenna has noted this phenomenon with regard to the area of intellectual property that is most closely associated with unfairness: trademark. *See* Mark McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. (forthcoming 2007), *available at* SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=889162&high=%20mark%20mckenna#PaperDownload.

40. *See, e.g.*, Lemley, *supra* note 3, at 1035 n.8 (collecting sources); *id.* at 1037.

41. *See infra* note 43.

them.[42] It is necessary then to divorce intellectual works from tangible objects in order to reinforce the understanding that intellectual property is supported by narrow instrumental, not broader "natural rights," justifications; non-rivalry (as Jefferson himself demonstrated) is the most convincing way to distinguish intellectual works from tangible objects.[43]

I think it likely that those arguing for less protective intellectual property regimes overestimate the value of separating intellectual works from tangible property. As people like Wendy Gordon have pointed out, it is entirely possible to build a more limited intellectual property (or at least a copyright) regime, out of a Lockean view, than the one we have today,[44] and as Justin Hughes explains, the association of intellectual works with "property" of some form has a long history and did not lead to vast expansions in intellectual property rights in earlier times.[45] On the incentives side, others like Glynn Lunney and David McGowan have demonstrated that the utilitarian paradigm that dominates American intellectual property law tells us very little about how to formulate optimal intellectual property regulation for the real world.[46] It is easy to compose several utilitarian justifications for intellectual property that would allow protection for works that attaches even after they are created, or to entities not involved in the creation of

---

42. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"). Lemley, *Reply*, *supra* note 37, at 1103–04 (explaining that the natural-rights approach has failed to limit previous, retroactive extensions of intellectual property law).

43. *See, e.g.*, Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 402 (2005) ("All of John Locke's examples of the just acquisition of property are based upon the laborer investing effort to creating tangible, rivalrous property . . . ."); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 64 U. PITT. L. REV. 225, 256 (2005) ("Since identity is nonrivalrous and therefore not scarce, it need not be appropriated exclusively, and Lockean property theory offers little moral support for property rights in identity."); Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 229 (2004) ("The Lockean provisos on ownership make more sense in relation to tangible goods like land, crops, and livestock, than in relation to intangible goods like information."). *See generally* Hughes, *supra* note 34, at 1058–60 (collecting sources). Justin Hughes identifies in the scholarship *three* major concerns over likening intellectual property to property: the use of natural-rights justifications for intellectual property rules, the too-ready application of tangible-property-based law and economics analysis (Lemley's primary concern), and too-easy "parallels with real or chattel property." *Id.* But the effect that those parallels have on intellectual property thinking, I think, is primarily accounted for by the first two categories.

44. *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993). *See also* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (laying out the possible limits imposed by Locke's mandate against waste).

45. Hughes, *supra* note 34, at 1058.

46. Glynn Lunney, *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 655–56 (1993); David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1 (2004). *See also* John Duffy, *Comment: Intellectual Property Isolationism and the Average Cost Thesis*, 83 TEX. L. REV. 1077, 1078–79, n.7 (2005) (responding to Lemley's reliance on utilitarian justifications). Lemley's reply to Duffy's criticism of utilitarian cost-benefit analysis is not to highlight what limits it does impose but rather to argue that cost-benefit analysis is comparatively a better approach than the alternatives (which of course is the question). *See* Lemley, *Reply*, *supra* note 37, at 1103.

them.[47]

But, more importantly for my enterprise, distinguishing intellectual works from tangible property through the lens of non-rivalry carries no *constitutional* significance.

B. LOCKEAN PROPERTY RIGHTS AND THE CONSTITUTIONAL ORDER

The Lockean view of property is actually composed of two underlying claims: one about the nature of government and one about identifying property owners. The first is that the purpose of government is to secure certain natural rights, the right to property being foremost among them.[48] It is a claim about the positive rights that a government must protect in order to rightly be considered a government. The second is an orthogonal claim about ordering among members of society: that the best way to identify the owner of the property interest, whose protection is the state's *raison d'être*, is to ask whose labor was involved in creating the piece of property in question.[49]

The former claim is interesting from a constitutional perspective, since it touches on the nature and obligations of government, but it has no actual role in debates over Congress's power to grant exclusive rights. The point of the passage of Jefferson's letter to McPherson (quoted at the outset) was not that grants of exclusive rights in intellectual works must necessarily be cabined in particular ways (Jefferson himself wavered considerably on this point[50]), it was that governments could choose either to grant them or not. Jefferson in the letter argued against strong property rights in land, as well,[51] but the more widely held distinction was

---

47. *See, e.g., Copyright Term, Film Labeling, and Film Preservation Legis.: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 52 (1995) (statement of Jack Valenti, President & CEO, Motion Picture Association of America, arguing that copyright terms should be extended for existing works, because doing so would provide an incentive to preserve and distribute older works).

48. John Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government (The Second Treatise of Government) in* TWO TREATISES OF GOVERNMENT 329, 350–51 (Peter Laslett, ed. 1988) (1690).

49. *Id.* at 287–88.

50. *See* Hughes, *supra* note 34, at 1031–32.

51. The passage immediately before the quoted excerpt reads:

> It has been pretended by some (and in England especially), that inventors have a natural and exclusive right to their inventions . . . . But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural and even an hereditary right to inventors. It is agreed by those who have seriously considered the subject, that no individual has of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it, but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property.

JEFFERSON: POLITICAL WRITINGS, *supra* note 2, at 579–80. Thus, Jefferson seemed to grudgingly accept the view that natural rights exist in tangible articles and land, but argued that any natural property right was extinguished when an individual failed to make productive use of it, and any continuation of the property interest was a consequence of social rather than natural law. Justin Hughes interprets the

between property in tangible items, considered to be a "right" that governments must protect, as opposed to property in intangibles, one of the many "privileges" that governments may or may not grant according to political will.[52] Distinguishing between tangible articles and intellectual works for the purposes of identifying whether governments are obligated to protect them may be an interesting enterprise, but because no one seriously contends that the United States government has an affirmative constitutional duty to provide any particular level of intellectual property protection, the distinction is irrelevant as a matter of modern debates over Congress's ability to promulgate intellectual property regulations.

The latter part of the Lockean property paradigm is a normative claim about how to decide *who* should have control over a particular piece of property. That question does have tremendous salience for modern intellectual property debates, but it does not rise to constitutional dimensions. There is some textual basis for arguing that all exclusive rights granted under the Patent and Copyright Clause have to comport with some version of the utilitarian justification, and even though there is substantial evidence to the contrary, I will take it as a given that they must.[53] But the argument does not find any similar foothold for grants made outside the Patent and Copyright Clause itself.[54] When legislatures grant exclusive rights to intellectual works, they are engaged in market regulation in much the same way as when they artificially limit access to other non-rivalrous resources, like markets. Those who would argue that such limitations must satisfy some particular understanding of welfare-maximization in order to be constitutional are repeating a form of economic substantive due process, a theory whose decades-old rejection was at the core of perhaps the most fundamental reversal in constitutional thinking in our nation's history.

III. CONCLUSION

As Jefferson's words demonstrate, non-rivalry is an intriguing and powerful economic concept, and rivalry's absence in intellectual works is the source of tremendous wealth. But intellectual works are hardly so special. Non-rivalry forms an even more important component of the value of other social goods, goods inestimably more important to our society than intellectual works themselves. That we have been willing to regulate such goods completely without even a nod to their

---

letter to suggest that *all* property rights are a product of social law, *see* Hughes, *supra* note 34, at 1028-29, but Jefferson limited his claim to "*stable* ownership," that is, ownership beyond the point of use. Jefferson himself, I think, was willing to accept natural property rights in "occupied" articles.

52. Adam Mossoff, *Who Cares What Thomas Jefferson Thought about Patents? Reevaluating the Patent 'Privilege' in Historical Context*, 92 CORNELL L. REV. (forthcoming 2007), *available at* SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892062&high=%20adam%20mossoff#PaperDownload.

53. On the evidence against, *see* Nachbar, *supra* note 31, at 336. On the utilitarian justification, *see supra* note 43.

54. I am assuming of course that Congress can make *any* grants of exclusive rights outside the Clause, but, given my previous work, I hope I can be forgiven the assumption. *See* Nachbar, *supra* note 31.

non-rival status suggests that rivalry, while economically important, pales in comparison to other regulatory values. It is impossible to locate a place for non-rivalry in the American constitutional order, and it is bold talk indeed to suggest that our legislatures must regulate markets to comport with a particular view about incentives, access, or industrial organization, even if that regulation happens to be of something—in the form of intellectual works or markets themselves—that is not subject to rivalry.