Physical property v intellectual property

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The question for the day is: is it reasonable to class intellectual property along with physical property?

Mr. RMS says no: physical property is based on a sort of natural right, and the legal default is that you get to own stuff; intellectual 'property' is an entirely artificial construct invented to advance society in certain ways. Thus, to lump intellectual property in with physical property is to imply that authors and inventors are natural owners of their products.

[Mr. RMS also says that copyright law, patent law, and trademark law are too different to be lumped into the same class, so the term is misleading in that respect too. No point arguing that one; there are similarities, there are differences, so you decide if they should be categorized together or not. If any librarians are reading this, please edify us on any apropos classification theory.]

The thesis which I'll present here is that yes, physical property and intellectual property are indeed both property; this does not mean that we should be more blasé about intellectual property rights and grant them to anyone who claims them, but that we should remember how much thought and careful design went in to our physical property rights.

The menu

Text and designs are obviously different from household objects, but we all knew that. In fact, automobiles are also different from household objects. So is land, and the houses built on that land, which differ from each other. Your kidney is also significantly different. Oh, and commodities such as corn, which differ from corn futures. Correspondingly, the rights associated with all of these things are different.

There are a number of rights typically associated with ownership:

- right of transfer
- right of sale
- right of use
- right of modification or development
- right to exclude others from use [and a number of subclasses within this one]

There is a multitude of things that we call property that lack one or many of these rights, some of which I listed above. E.g., you have the right to transfer but not to sell your kidney. The study of property law is the study of which items from the rights menu should be applied to which elements of the objects menu. Many a bookshelf has been filled with discussion of that simple connect-the-dots exercise.

Some books on that bookshelf (e.g., mine) are about stories or designs or other nontangible concepts. But apart from the fact that the object to which the rights are associated are abstract, the work of analyzing the correct rights to assign to which items and how to operationalize the rights in law is about the same for the ethereal and ephemeral items. On the left, you've got exactly the same menu of rights; on the right you've got a list of abstract concepts, and the task of connecting the dots is the same as above. Of course, we must take into account the fact that text has different properties from a blender, but a competent study of real property (real as in land and houses) also takes into account how land is different from a blender.

If there were a single block of rights granted to all forms of physical property, and then we came along and called a storyline property, then that would be misleading because the storyline would be the odd man out. But because property is merely an item to which *some* bundle of rights may be attached, the storyline doesn't stand out at all: it just has associated different items from the menu of rights that could be granted.

[And what is the correct set of property rights for a storyline? Mr. FK of Alexandria, VA argues that they should be patentable. If software—text on paper or a hard drive—can be patented, then why not a storyline, he argues. Having studied the list of legal justifications for software patents myself, I actually agree with Mr FK. He doesn't mean to, but is making a strong argument against patenting software.]

Is the term intellectual property used to mislead? Yes, by assuming that there is a monolithic single set of rights that all property has, and therefore that exact set of rights should apply to text or designs. In this case, it's not the term *i*ntellectual property that's misleading, but the term *property*, which implies that monolithic set of rights. One can combat this by comparing abstract objects to less-than-simple real-world objects where not all rights are taken as given, like land or kidneys. Or how about an emergency room? The owner of an emergency room does not have the right to exclude, because society would be the worse for granting that right. By comparing code to a blender, we mislead, but by comparing code to other objects, we can edify how ownership of a block of code does not immediately mean every imaginable right at once. More examples below.

For another example of how the metaphor between intellectual and physical property can be useful, let's ask whether the DMCA is a property right. By the above reasoning: yes, because it provides the owner with some items from the menu of rights associated with property, notably the right to exclude. This has important political implications. The argument that the DMCA is a newly invented property right forces us to apply the usual 'should this right apply to this type of property' analysis we've done a hundred times with other items, but which nobody did with the DMCA because it was never billed as a property right. I'm not of the impression that it would pass that analysis.

But physical property rights are natural

Some people discuss physical property rights as natural or inherent or a default right. This is, as the social scientists say, problematic.

First, there's the problem above: there's a whole bundle of rights which could be granted or not, and is every right included by default? One has the right to leave an automobile sitting on the side of the road—some call it *parking*—and if others so much as touch the car, they can be sued. Can I leave my couch on the side of the road and expect the same property rights? What if I install a couch alarm? Why is it legal to place a car on the side of any country road but not a tent?

So the definition of default rights ain't so obvious, which brings us to the question of whose intuition we should go by. A couple of options.

truly natural property rights The only truly natural property law is that the guy with the biggest stick gets everything he wants and everybody else splits the rest. It's no coincidence that the 'real' in real estate is Spanish and Portuguese for 'royal': it used to be natural that the king (the head of the army) owned all land and we all just lived on his land by his generous grace.

individualistic property rights Go type "property rights" into your favorite search engine, and the first few links are likely to be pretty amusing. Lots of clip art of flags and eagles. From the first hit as of this writing: "Welcome to the Property Rights Research web site. If God and Country and family are your top priorities, you'll like this site." What do God and country and family have to do with property rights? I mean, the Bible says that women can't even own property, let alone debate the eminent domain clause.

These guys want property law to be written around an individualistic 'if I can grab it and hold it it's mine' philosophy. Some are dismantle-the-government, 'if you step on my land I'll shoot you' types, and some are neoclassical 'if purchased then deserved, by definition' types (and some just haven't bothered thinking much about the axioms underlying property law). Notice how quickly individualistic property rights imply that you don't have to pay taxes or to make sure your restaurant meets the health code. If all property rights are inviolably bundled with all property, then libertarianism immediately results.

double-entry property rights My own gut intuition toward objects is that if I'm in proximity to and am using an item more than anybody else, then it's mine. [Many Westerners who visited parts of Africa have told me anecdotes of people who use this concept of property rights.] Under U.S. property law, this blatantly fails. If somebody borrows a book I own and uses it every day for years, I can go to her at any time and take it back, even though her attachment to the book is greater than mine. That is, there's a great ledger in the sky listing who owns what item, and ownership is only transferred via mutually-agreed upon entries in the ledger. [To be more correct, the ledger lists property rights associated with an item, like the right to use or the right to sell, and those rights get transferred around, sometimes all at once in a fee simple sale, and sometimes piecemeal, like a rental contract.] To summarize this option, we define property rights in terms of the market.

societally-oriented property rights None of the above approaches to property rights match actual Western property law very well. The best fit comes from a simple question: what is the socially optimal allocation of rights?

Bear in mind that we live in a market-oriented society; we can have the 'is the market the optimal structure' debate later, but must take it as given that the principle of the market is ingrained in the society, and to some extent a healthy market is requisite for a healthy society. That means that the double-entry system gets it half-right, but is vetoed left and right when not appropriate or socially optimal. If your car threatens the health of others, or your tree is getting in the way of the power lines, or you want to make a fast buck but all you have to spare is your kidney, all your market-based rights are out the window.

[The neoclassicists will try to trip you up into thinking that society is built around natural, objective property rights rather than social construction (some do call themselves 'objectivists', after all). But it's a trick of definitions and not-quite logic. First, define the market as natural. If you purchased something, then you deserve that item and are its natural owner. With that definition there's a lot of overlap between their definition of what is deserved and what is legal. But even if we accept the definitions, (market $\Rightarrow$ natural/deserved) and (market $\Rightarrow$ property law) does not imply (natural/deserved $\Rightarrow$property law).]

To revisit the original question, the socially optimal allocation of rights is exactly what intellectual property law is intended to do as well. Sure, IP law is artificial, but physical property law is equally artificial; we're just so used to it that we've forgotten.

Dumb people

Mark Lemley gives a much more nuanced critique of the phrase 'intellectual property' in this paper [which is not to disparage the commentary at the head of this column, but to say that Mr. Lemley is a professor at a law school who's spent much of his life studying IP]. He concedes that the social benefit story generally works: "Demsetz believed that the creation or alteration of property rights could be explained by asking whether the social gains from internalizing an externality exceeded the costs of doing so." (p 10, giving every indication that he agrees with Demsetz) However, he points out that most of the externalities from physical properties are negative externalities to be avoided via stricter property rights, while most externalities from intellectual properties are purely positive. This means that in physical property, 'free riding' is bad—it crowds out or otherwise hurts the owner—but in IP, it takes several steps of logic to convince us that that downloading that song hurt or damaged the owner of the original song. You could make that argument, but you'll need to go through a physical property metaphor to do so: something has to get crowded out.

Lemley's paper doesn't really disagree with much of what I state above, either about property being a complex bundle or property or being a social invention to maximize social gains. But he still suggests throwing out the term 'intellectual property', because of the difference between positive and negative externalities, and therefore the limited applicability of free riding in the IP context. To rephrase, it is correct to set intellectual property as a subset of property, and to do the same social-benefit analysis, but people apply the analysis wrong in major ways.

My first reply is that you can see any situation two ways: if the default is that the public is gaining positive externalities, the private citizen is restricted from taking

action to restrict those benefits; if the default is that the public suffers negative externalities, the private citizen is forced to take action to provide public benefit. One can spin most stories in a destruction-of-value or creation-of-value direction depending on the default (and every party will of course claim that the natural state of things is the one which benefits or does not restrict them). I can't walk around the neighborhood naked because not wearing clothes creates negative externalities, or because covering my pasty hide creates positive externalities?

Second, it is my opinion that crappy method by others does not mean that we should throw out the term or the entire means of analysis. No, we should just do the analysis better. I posit that without the term 'intellectual property', people would still be drawing metaphors to physical goods. As anybody who's ever taken algebraic topology or comparably abstract topics quickly works out, people think in metaphors to things they can see and hold in their hands, whether the language facilitates it or not. Everybody will continue to provide physical examples and analogies; we just need to provide better ones.

So, here are some examples of physical goods which provide positive externalities, for which law therefore does not grant/limits the granting of private property rights:

- Emergency rooms: a physical place and pile of goods where the positive externalities are too great to be restricted.
- The club that leaves its windows open: you can't bill the guys lingering on the sidewalk in front, even though they're enjoying the same music as the guys who paid the cover.
- Most photography of a public space: even though the architects put a year or two of effort into the work of art you just snapped, you're welcome to photograph the facade, frame the picture, and sell it to offices for use in decorating their rows of cubicles. Go ahead, take a picture of your neighbor's laborious flower arrangement. (people constantly try to restrict this one, with limited success)
- Notorious possession: If the area in front of your building is a public space for long enough (like places with a semipark in front or those skyscrapers with a sidewalk inside the frame), then you can not revert it to a private space, because that destroys positive public externalities (notorious possession has loads of caveats which you can look up if so inclined).
- Zoning: residents of many areas need permission to build on their land in a manner incongruous with the surroundings. Since the status quo is a consistent theme to the area (which people evidently like), this is a restriction on private property usage to prevent the private destruction of positive externalities.

Notice all the parentheticals: there is abundant debate in physical property—flowers and buildings and pants—about how to handle externalities, and despite millennia of physical property precedent we still don't have set and finalized rules. But the base is that if you put your goods in a public place, you have a carefully limited right to exclude—which sounds a lot like intellectual property.

Let's not abandon the methods of analyzing property rights just because some people don't apply them correctly. Instead, we can talk about intellectual property as physical property and do it correctly, to show that property rights are not to be granted to anybody who wants them, but should go through the same cost-benefit analysis applied to rights in physical property.