The Constitutional Foundations of Intellectual Property

By Randolph J. May & Seth L. Cooper

*Reviewed by Richard A. Epstein**

The Natural Law Approach To Copyrights and Patents

One of the major unmarked developments in the past century of American law has been the decline of natural law thinking. Read any older treatment of, for example, property rights, marriage, or contract, and the unquestioned approach looks to natural law principles to set out the basic parameters of these social arrangements. Individuals by nature had the right to own and acquire property, and that gave them the full right to the exclusive possession, use, and disposition of their things. Marriage was a union between a man and woman to carry out nature's purpose of reproduction. Contract was the body of rules that allowed individuals to cooperate with each other in accordance with natural law. Until relatively recently, it was always understood that any system of property, marriage, or contract required formalities to verify that the appropriate rights were properly observed. Similarly, no one ever thought that these rights were so absolute in their inception that they could not be limited for good reason in particular cases. Indeed, the entire structure of the pleading laws, which built in ample room for excuses and justifications, built high levels of flexibility into the basic system.

The legal structures that grew up under the natural law banner powered virtually every legal achievement prior to, roughly speaking, the beginning of the twentieth century and the rise of the Progressive Era, at which point many legal doctrines moved in reverse. The criticisms of natural law theory predate that time; most famously, Jeremy Bentham quipped, with William Blackstone as his major target, that "natural rights are nonsense upon stilts."[1] Bentham, however, fell short in his attack, because his own preferred rules for the acquisition of property track to the letter the same conclusions that were earlier reached by natural law thinkers. Thus, in the *Theory of Legislation*, Bentham famously notes, "Property and law are born together, and die together."[2] He posited a utilitarian rationale for maintaining property rules to make good on his claim about the nonexistence of any natural rights. He used the example of a hunter who slays a deer, who has only the most precarious possession if he must physically hold onto the animal in order to preserve his claim of right. It is better if he may go about his business secure in the knowledge that others cannot take it away from him. Surely the state is needed to protect his expectation of future use; but the state must also use its power to defend his possession of the deer even when he grasps it firmly in his own hands, lest someone seek to wrest it from him.

The conceptual work on broadening the definition of property comes from the thinking of the Roman scholars on possession. These scholars well understood that the law had to preserve possession even when actual physical control was not present; otherwise, no one could seek a remedy for things taken from his home while he was away. Blackstone wrote within this Roman law tradition when he, in Chapter I, Book II of his *Commentaries*, invokes natural law principles to conclude that:

> [N]o man would be at the trouble to provide either [shelter or raiments], so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other.[3]

This connection is understood to this very day, for both natural law thinkers and utilitarians unite in concluding that unless individual labor is protected, no one will seek to accumulate or improve property in the first place. The old agricultural proverb that "no one should reap where he has not sown" covers far more than farming.

In their new book, Randy May and Seth Cooper work within this strong natural law tradition to defend the basic structure of intellectual property law. When a person makes an invention, it is not sufficient to protect the prototype (the physical property) if others are free to build replicas at will. When a person writes a novel, it is not sufficient to give him control of the original manuscript but allow others to freely copy. In both cases, the intangible nature of the property—which is the idea, not its physical instantiation—requires that protection extend against others who would copy the exemplar, lest the labor of the inventor or writer allow less creative rivals to produce a perfect substitute to the original invention or writing at a lower cost. In this sense, the protection that one gives to these two forms of intellectual property follow, as May and Cooper argue at great length, from the Lockean theory of labor whereby one individual acquires ownership of land or some particular thing by "mixing" his labor with it.

In assembling the impressive and continuous historical authority for the labor theory of value, May and Cooper successfully show how this natural law theory of property heavily influenced founding-era thinking about intellectual property, both at the state and the national level, even when the Articles of Confederation were still in force. It is perfectly permissible, even if ill-advised, for modern scholars to deride natural law principles. But it is far riskier to deny that these theories had any traction at the time that the United States Constitution—which offers explicit protection to intellectual property—was drafted.

On this matter, it is sometimes said that the Constitution displays only an ambivalent commitment to protecting

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intellectual property because of the language found in Article I, Section 8, Clause 8: "Congress shall have the power . . . 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 . . . ."[4] Note that the preamble to the clause makes an explicit utilitarian reference. Indeed, the phrase "useful arts" could be read to exclude literary arts and only protect under copyright items that work in harmony with patented inventions (i.e., shop manuals, not novels). But it would surely be inane to read the provision so narrowly as to exclude literature that is useful to mankind for the insights it teaches and the pleasure it offers. On this interpretive issue, moreover, natural law arguments may tip the balance in favor of a broader constitutional construction, for there is nothing whatsoever in the Lockean theory of value that excludes one class of writings for the benefit of another. Scientific and literary progress can extend in many directions at the same time.

To be sure, the clause merely *empowers* Congress to protect writings and inventions, so Congress need not create any system of patents or copyright at all. This would result in only weak incentives for productive labor, but it would be constitutional. Such weaker incentives might include protection of trade secrets, which can be secured by contracts. While these are useful for secret processes, they are of no value for the ordinary machine tool that anyone could construct in the absence of patent protection. They are also worthless with respect to the protection of literary works. In these situations, patent and copyright protect labor and innovation and thereby nurture the creation of technologies and literary works that might never have been created at all.

Critics often argue in response that patents and copyrights give too much protection to labor by creating monopoly rents that far exceed the value of the labor contributed. But this point overstates the matter in two critical ways. First, the identical objection could be made toward the Lockean view insofar as it allows mixing labor to take land or wild animals out of the postulated commons. As Locke well understood, the point is not to mix as much labor as possible into some land, chattel, or animal to claim it as one's own. Indeed, the entire venture of property acquisition would be futile if the only way to perfect ownership in land or in any given object was to invest in it labor in an amount equal to its value. It is far better to mix as little labor as is needed to establish priority over the rest of the world. Locke makes this point when he notes that gathering the acorn is enough labor to obtain the right to cook or plant it. The same is true with respect to patents and copyrights.[5] The less labor that is spent to create them, the greater the future surplus. The quicker that one person can separate a given work from the mass of common knowledge, the faster it can be put to productive use or sale. By making this simple observation, Locke adapts his labor theory of value to the Roman and common law rule, whereby the party who first takes possession of a thing, whether by great or modest effort, has a good claim against everyone else in the world.

The parallels on this score go deeper. It may be possible to grab an acorn or to lasso an animal. But taking possession of land is a far more complex problem because it is not economically practical to permanently stay in one place, once the food supply in that area has been exhausted. This is why the natural mode of acquisition (i.e., by possession) is necessarily supplemented by requirements that the property be demarcated by stones or other boundary markers in the first place, or registered, preferably by survey, in the second. It is therefore not the case that property rights are obtained in land solely by taking possession; the difficulties of proof require that formalities be observed. Similarly, filing is useful for both patents and copyrights. Both systems parallel that of the acquisition of land in that the driving force for acquisition is bottom-up. The state does not create intellectual property rights to dole out to inventors and authors in the modern systems of patents and copyrights. That method, as May and Cooper rightly stress, invites the worst form of industrial policy. This is what happened when English kings routinely granted exclusive franchises to crown favorites in order to maximize revenue, but without securing the needed quid pro quo—a new invention or writing whose creation was spurred by the public grant. In this regard too, the need for bottom-up creation of rights has the same valence with respect to both tangibles and intangibles: the object is to leave as much surplus with the owner as possible, not as little. The two systems are parallel to each other, even though very different means of acquiring rights are needed since no one can take physical possession of an intangible.

By the same token, it is important to note that the exclusive right of possession and use in both contexts is *not* tantamount to the creation of a monopoly in the economic sense, in which one person is the sole supplier of a given good or service. Exclusive rights to possession are as critical to patents and copyrights as they are to land, animals, and chattels. But in neither case do they prevent competition by other persons who seek to fill the same niche using property over which they have exclusive rights, as would be the case with a monopoly. My ownership of Blackacre does not necessarily mean that I have an exclusive right to run a restaurant. Others who wish to enter into the restaurant niche can do so by acquiring and developing Whiteacre or Greenacre. Only where the state has conferred a franchise, or where physical properties allow for only one seller—i.e., a harbor with room for only one pier—does the monopoly issue arise. The strong legal protection of the exclusive right of possession of property—physical and intellectual—has the added benefit of encouraging others to enter that market space knowing that their rival property cannot be copied either. Indeed, even the threat of illicit imitation may well lead people to lower prices in the effort to lead others to back off and turn away.

The second key point has to do with the duration of the interests in question. Under the English law of fee simple absolute in possession, initial occupation of land gives perpetual ownership of it. This is because, quite simply, there is no economic benefit to any temporal truncation of the basic property right in land. Land can be farmed or developed only once, and no owner will have the optimal incentive for its development if the property will be thrown open to the first newcomer after a certain date. Shorter interests, therefore, do not generate any public good. Indeed, when these shorter interests are created, it is always by lease, and the landlord and tenant are able to

provide for what will happen at the expiration of the initial term. In some cases, there may be renewal as of right; in other cases, there may be a purchase of the residual interest; in still others, any improvements may be removed or sold. All these permutations, and others still more complex, are within the capacity of the parties to specify at the outset, leaving the law with the unenviable task of guessing the proper resolution in cases where the parties have not made sufficient provision for what happens at termination.

The end-period problem gets a very different analysis for both patents and copyrights. The limiting of the patent or copyright does not require renegotiation over specific assets, as the assets in question slip into the public domain, available to all on equal terms, at the termination of the interest. That can happen because intellectual property is nonrivalrous, so anyone else can use the same invention or writing along with the owner. The Constitution specifies limited terms because of this unique feature of intellectual property. Terms have to be long enough to induce invention and authorship, but they should not be so long as to block imitative use down the road. Modern extensions through, for example, the Copyright Term Extension Act of 1998,[6] lose sight of the original trade-off and thus represent a political regression from sound earlier policy by making terms far too long.

Given all this, May and Cooper's defense of the basic rights in the natural law tradition is warranted. But the question then arises: can these natural law principles deliver the remainder of a workable patent or copyright system? In my view, natural law tends to run out of gas when it comes to particular policy judgments. At this point, an explicit reckoning of the utilitarian trade-offs probably offers the better path of doctrinal coherence. On this score, I think that May and Cooper do themselves a disservice by limiting their focus to showing, as they surely do, how natural law principles explain our intellectual property system. In so doing, they only show that the older language should not be regarded as alien or suspect. But they could have strengthened their argument by critically examining the many subordinate doctrines that make both patent and copyright law tick. It is fine to explain that Joseph Story, the greatest nineteenth-century expositor of the system, was a firm believer in the protection of patents; but they might have fruitfully discussed how he and other writers dealt with particular questions, such as patentable subject matter, nonobviousness, best mode, or equivalents. A close look at originality, derivative works, and fair use could have rounded out the discussion of copyright. These key areas need discussion so that modern readers can be confident that their devotion to natural law principles does not drive patent law off the rails. If they had taken that approach, they would have had to explain why certain ideas must be left in the commons (as with air and water in the realm of physical property) in order for the system to work more accurately. At that point, the utilitarian justifications for *any* property system work themselves back into the equation. In my own view, the utilitarian foundations for natural law are deep, both historically and analytically. May and Cooper have done a fine job on the historical side. But in this age of widespread skepticism about both patent and copyright, more has to be done to defend the economic and moral foundations of two systems of intellectual property that have done so much good for the advancement of human happiness, prosperity, and welfare.

Endnotes

1 2 Jeremy Bentham, *Anarchical Fallacies*, in The Works of Jeremy Bentham 489, 491 (John Bowring ed., 1843).

2 Jeremy Bentham & Etienne Dumont, Theory of Legislation 139 (R. Hildreth trans., 1840).

3 2 William Blackstone, Commentaries 4, *available at* http://oll.libertyfund.org/pages/blackstone-on-property-1753.

4 U.S. Const. art I, § 8, cl. 8.

5 *See* John Locke, Of Property § 28, *in* John Locke, Two Treatises of Government 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

6 Sonny Bono Copyright Term Extension Act of 1998, Pub. L 105-298, 112 Stat. 2827, codified at 17 U.S.C. § 303 et seq, (1998)