**IP Law is Worth Examining Right Now – So Here’s an Examination:**

Why should we care about intellectual property right now?

That’s an easy one. IP law matters right now for two compelling reasons: the ubiquity of the internet, and the burgeoning use of artificially intelligent machines in workplaces.

The internet has changed the way we think about ideas and their spreading. Content and media are accessed in the click of a button, lightning-fast. And while we used to access creative works in relation to their physical embodiment, we now access them in relation to a series of 1s and 0s that have been converted into recognizable content by our machines. This has thrown off our conception of what it means to own an idea or a creative work.[[1]](#footnote-1)

On a different and perhaps more anxiety-inducing note, AI has made a grand entrance into our economy. Because of the impact artificially intelligent agents will have on our world in the coming years, tasks typically reserved for humans will increasingly become turned over to robots.[[2]](#footnote-2) If robots can perform physical and remedial mental tasks that humans have traditionally performed throughout history, what will humans do? What will our ‘work’ look like? The value we bring to the workplace and to the world will increasingly be defined by our capacity to be creative. Our ideas and creative works of the intellect will be even more commoditized than they are now. It is not unreasonable to assume that at some point, robots will perform most of the duties we currently perform, and we will have to ‘get creative.’

And what is the body of law that governs the creations of the intellect? Ah, it’s IP. Copyrights, Patents and Trademarks. These laws and policies that account for issues that creators deal with will become more important to a broader range of the population in the coming decades.

For this reason, we are going to take a deep look at the concept of Intellectual Property: its history, its struggles and disruptions, and current state in the age of the internet and AI. This is the first of three installments dealing with this important body of law.

**Origins**

The idea of owning property is intimately tied to the American conception of liberty. To show this, a thought-experiment is in order:

Say that a 1600s settler decides to build for himself a cabin in a remote forest somewhere in Colonial America. He chops up the wood and he nails boards together. He stacks everything in a neat and organized way so as to create a shelter. Surely this cabin is his property. But what about the cabin *makes it his*? It’s not the wood in itself. He has no more right to ‘wood’ than anybody else. And it’s not some natural law that protects the cabin. In the absence of government, nothing would prevent a gang of bandits from killing him and taking it. Instead, it is the *creation made from the wood* that he owns, which, if it is to be protected, will be done so by a governing body. And it follows that he then owns the actual wood because it is the physical manifestation of his idea of the house.

The reasoning that anchors our conception of property can be traced directly to Enlightenment thinker John Locke, who in his “Two Treatises of Civil Government” argues that, “every man has a *property* in his own *person:* this nobody has any right to but himself. And the *labour* of his body, and the *work* of his hands, we may say, are properly his.”[[3]](#footnote-3) We have the right to the fruits of our labors. If we didn’t, what incentive would there be for anyone to work or create things? What value could a human possibly add to a society? We must *at a minimum* be able to own the fruits of our own labors if we are to be a society in which the members are truly free.

Now consider: doesn’t it seem to follow that we have property in any creation of the mind which is manifested in physical form? This would include novels we author, songs we write, inventions we design, and many more things. To the founding fathers, the consensus seemed to be a mitigated ‘yes.’

James Madison had a broad understanding of property, and defined it in a 1792 essay as such:

“That dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual… In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.* In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them.” [[4]](#footnote-4)

That someone could legally protect the flow of their ideas was something practiced primarily in England, where this issue was largely settled under common law and the Statute of Anne. Madison was a proponent of the government protection of the communication of ideas, such that the ability to speak freely was one of the rights fundamental to a free society. Indeed, for Madison, “as a man is said to have a right to his property, he may be equally said to have a property in his rights.”

Thomas Jefferson, on the other hand, was much more skeptical of the government protecting creative expressions. In a famous letter written to Isaac McPherson in 1813 (which is often cited by proponents of broad copyright reform), Jefferson discusses the problem he sees with legally protecting ideas – namely, that they are inherently unconstrained:

“ 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. 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 every one, 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.”[[5]](#footnote-5)

Indeed, as Jefferson says, ideas are, in nature, non-rivalrous. That is to say that one person’s use does not diminish another’s. My reading of John Locke’s ideas does not take away someone else’s ability to read him. And my ability to read instructions to create a Lego house does not diminish someone else’s ability to use that same idea. Additionally, ideas have limited exclusivity. I can only exclude someone from using my idea insofar as I keep it to myself. As soon as I divulge it to the world, I can’t stop people from using it. Jefferson realizes these properties of ideas and is thus skeptical of the government protecting them. But he goes on to say,

 “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. Accordingly, it is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices.”[[6]](#footnote-6)

It’s worth noting that this letter was written in reference to a specific patent lawsuit Jefferson was involved in, and so the generalizability of his statements to the whole body of IP may be too big a leap. But from this passage it seems that Jefferson is at best ambivalent to the notion of ‘society’ giving its citizens exclusive rights in their ideas. He recognizes that societies can and do reserve monopolies for authors and inventors, and that this may indeed foster innovation.

In any event, the product of Madison and Jefferson’s deliberations in the 1780s was a clause in our Constitution specifically dedicated to patents and copyrights, the original tenets of intellectual property law:

Article 1, Section 8, Clause 8 provides that Congress may “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."

The founders gave us the right to limited monopolies on our creative works and inventions, where for a limited amount of time we are the exclusive owners of the expressions of our creative ideas. From this clause Patents and Copyrights were born. Statutes were enacted by Congress, and the Copyright and Patent & Trademark Offices became arms of our legislative branch. Since then, we have seen myriad technological innovations which have tested the strength of these legal mechanisms. From the time when Jefferson and Madison debated it, throughout all of these disruptions, though, the balancing act has remained the same: should ideas be subject to pure utilitarianism and not protected by law? Or is Madison’s framing of ideas and opinions as hallowed property better for society as a whole? Madison’s version made it into the Constitution, and since then it seems that the structures put in place have been largely successful in fostering innovation and creativity. The internet, however, has posed a new problem: ideas are even more perfectly and indefinitely copied, and it is harder to tell the expression from the idea itself.

The next post in this Intellectual Property series will be concerned with how the body of law has molded and transformed and grown throughout the many technological disruptions of the past one-hundred years. Thanks for reading!

1. https://www.wired.com/1994/03/economy-ideas/ [↑](#footnote-ref-1)
2. https://learnmore.economist.com/story/57a849c338ba0ee26d98a68d [↑](#footnote-ref-2)
3. http://oll.libertyfund.org/titles/locke-the-two-treatises-of-civil-government-hollis-ed#chapter\_16239 [↑](#footnote-ref-3)
4. http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html [↑](#footnote-ref-4)
5. http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl220.php [↑](#footnote-ref-5)
6. Ibid [↑](#footnote-ref-6)