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**The Constitutional Foundations of Intellectual Property**

**by**

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**Introduction**

Intellectual property (IP) protection is indispensable to enabling and maintaining a vibrant, healthy digital age economy. This reflects the indispensability of property protection in general to enabling and maintaining a vibrant, healthy overall economy. As innovation and value increasingly take intangible form, securing intellectual property rights becomes ever more critical to fostering the creation and marketing of goods and services to consumers. To this end, the need to prevent the improper expropriation of value created by authors and inventors makes enforceable systems of copyright and patent essential.

Long before the digital age began, intellectual property rights were secured in the U.S. Constitution. Article I, Section 8 provides: "The Congress shall have 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."

But the foundations for intellectual property predate the Constitution. Classical liberal political philosophy was a formative influence on the framers and ratifiers of the U.S. Constitution. According to this philosophy, especially the works of John Locke, government exists to protect natural rights to life, liberty, and property. This classical liberal philosophy defined "property"

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broadly to include one's person, one's faculties, and the fruits of one's labor. Lockean natural rights philosophical premises, as understood and adopted by James Madison and other of our Founders, confirm the status of copyrights and patents as genuine forms of property, on par with real or personal property.

The Constitution's Intellectual Property Clause adopts this Lockean philosophical precept by expressly recognizing the exclusive rights of authors and inventors for limited times. Putting copyrights and patents on a constitutional footing secures the legitimacy of intellectual property from spurious attacks. Increasingly in fashion in some circles are dubious claims that intellectual property is not property at all, or that somehow it must be "reconstructed" on different analytical grounds.

At bottom, such supposed "reconstruction" of intellectual property is inconsistent with fundamental principles concerning our rights that our Founders firmly embodied in the American constitutional order.

### **Government's Purpose: Protection of Life, Liberty, and Property**

The American constitutional order is premised on the idea that government exists to protect life, liberty, and property. This idea was a critical component of what the late Professor Edwin Corwin called *The Higher Law Background of American Constitutional Law*.

John Locke, the prominent seventeenth century English philosopher, profoundly influenced the framers of our Constitution and the people in the states who ratified it. Locke understood individuals to possess a natural right to the fruits of their own labor. As he famously explained in his *Second Treatise of Government*:

[E]very man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.

Thus, according to Locke, in civil society governments based on consent are established to safeguard individual rights to life, liberty, and property. In this way, individuals obtain security in producing and possessing the fruits of their own labor, consistent with respect for the equal rights of others.

In his 1792 *National Gazette* essay "On Property," James Madison, the principal drafter of our Constitution, addressed Lockean ideas about property in an American constitutional context. Madison's definition of property is worth careful attention: "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." He went on to explain: "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."

In his essay, Madison refers in Lockean terms to the natural right to the fruits of one's own labor, describing "that sacred property, which Heaven, in decreeing man to earn his bread by the sweat of his brow, kindly reserved to him, in the small repose that could be spared from the supply of his necessities." Madison listed individuals' "labor that acquires their daily subsistence" among the broad class of property that government is entrusted with safeguarding. As Madison explained:

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.

This Lockean-Madisonian formulation of government's proper purpose – and the central role of the protection of property to this purpose – is crucial to appreciating the original understanding of the American constitutional order.

### **Intellectual Property: Safeguarding the Fruits of One's Labor in Civil Society**

A Lockean approach grounds intellectual property in natural right, adjusted in a social context to account for the public welfare. Locke, Madison, and all the framers and ratifiers of the U.S. Constitution, recognized that life in civil society requires government to establish, adjust, and enforce particular rules that may modify the exercise of those rights individuals possess by nature. This modification ensures that the core of those natural rights may be exercised, consistent with the equal exercise of rights by others in civil society.

That individuals, by nature, possess a property right to the fruits of their own labor, does not necessarily mean that individuals, by nature, in all cases possess enforceable copyrights or patent rights. Certainly, coherent and functional copyright and patent systems seem to presuppose a vibrant civil society under a duly constituted governing authority that must establish and enforce intellectual property systems. But when in a state of civil society, the obligation of government to secure the free and equal exercise of natural rights should put the legitimacy of intellectual property protection beyond serious question.

Thus, and this is a key point, a Lockean-Madisonian approach also bolsters the property rights status of copyright and patent protection systems in the face of modern – or perhaps we should say post-modern – criticisms of intellectual property. In recent years, some academics and public policy advocates, even those who at times consider themselves "conservative" or "constitutionalist," have suggested that intellectual property should not be regarded as property at all. It has likewise been suggested that IP should be "rebuilt" or reformulated on different philosophical grounds.

This criticism of intellectual property is profoundly wrong. And it misunderstands or ignores important founding principles of our constitutional order.

While Locke did not speak directly to the matter of intellectual property, IP surely fits within the broad Lockean conception of property. Recall how, by Locke's definition, an individual has a

property right in his or her person and in the work of their own hands. Similarly, Madison defined property "[i]n its larger and juster meaning," as "embrac[ing] every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage." Authors and inventors certainly attach value to copyrights and patents, with their creative labors supplying their rightful claims to such value. And although copyrights and patents confer exclusive rights to authors and inventors, all other members of civil society remain free to author and invent their own works, profiting thereby.

Undoubtedly, there may be differences between vesting property rights in intangibles rather than tangibles. But there is nothing about those differences that would put copyrights or patents beyond Madison's "larger and juster meaning" of property. Moreover, rules of property routinely require adjustments on account of the characteristics of the underlying property. This is done to ascertain ownership, settle boundaries, and regulate use or transfer. The need for different rules regarding different kinds of intangible property is akin to the need for different rules for different kinds of tangible property, whether in real property, minerals, water, or personal property. This in no way suggests that, in a foundational sense, securing intangible property rights is any less grounded in natural right, or our constitutional order, than securing tangible property rights.

### **Intellectual Property as Constitutional Law**

Article I, Section 8, Clause 8 of the U.S. Constitution grants Congress 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." The Lockean principles addressed above are integral to understanding and informing its purpose. And Madison expressly endorsed the IP Clause in *The Federalist* No. 43, stating: "The utility of this power scarcely will be questioned."

By securing to authors and inventors exclusive but time-limited rights to their work, the IP Clause is best understood as safeguarding the natural right to the fruits of one's labor in a civil society. The IP Clause protects the core of that right for authors and inventors, granting Congress authority to establish a uniform system of exclusive rights in intellectual property, while also setting limits on that authority.

Express recognition of the exclusive rights of authors and inventors in the fundamental law of the land conveys the importance and respect with which these rights should be regarded. Even those unfamiliar with Lockean political philosophy should regard the IP Clause's express constitutional recognition of copyrights and patents as authoritative.

Of course, appeals to Lockean premises don't provide answers when it comes to setting specific rules respecting intellectual property. The IP Clause's high-level requirement that the exclusive rights of authors and inventors be secured "[t]o promote the Progress of Science and useful Arts...for limited times" says little about the particular contours of intellectual property policy. Fixing terms for copyrights or patents, defining fair use of copyrighted works, and setting appropriate enforcement penalties and the like, necessarily involve policy judgments for Congress. Contextual considerations, including potential trade-offs, incentives, and consequences weigh heavily in setting precise rules for safeguarding intellectual property.

However, the complexities and uncertainties involved in defining precise boundaries of copyright and patent protection in no way undermine the core property right protection rationale recognized by Lockean-Madisonian premises and the IP Clause.

In sum, the IP Clause makes intellectual property a normative feature of the American constitutional order. It substantiates not only the value but also the right that creators have in their own intellectual property – the fruits of their own labor. Any supposed latent questions or ambiguities as to whether copyrights or patents truly constitute forms of property are answered by the Constitution itself.

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