Reforming Intellectual Property Through Property

Oskar Liivak
Cornell Law School

[--A Very Early Work in Progress--]
[--Comments, Questions, Suggestions Welcome--]

I. Introduction

As the name implies there exists an important connection between intellectual property and traditional property. In recent years this connection and the vision it seemingly implies, has become quite controversial as it points to an ever-expanding, absolutist future for intellectual property. But the connection and its vision need not be so controversial and so unprogressive. Agreeing in principle with many of the absolutist critics, this article finds fault with views that envision intellectual property as property.

Instead, this article argues that it is helpful, insightful, and even progressive to begin the discussion by assuming that intellectual property is property. The trouble with intellectual property as property is that it leads us to emulate the outward appearance of property in its most recognizable and familiar forms: property in land and chattels. In those examples, owing in part to the rival and fragile nature of the resources at issue, the exclusionary rights are both normatively and positively broad. In contrast, when the analysis begins with the assumption that intellectual property is property, then the scope and design of the resulting intellectual property system is not preordained by the familiar (and seemingly absolutists) examples of real and personal property. Beginning with property theory (rather than some specific exemplar of it), this article spins the implications of property theory forward for intellectual property finding that property theory does not ideally call for broad rights of exclusion in intellectual property. In fact, it ideally calls for fairly narrow rights of exclusion. In particular, because the resources are nonrival and therefore rather robust to third party actions, intellectual property need not exclude others very much. Only a relatively small set of third party actions can harm the production of ideas and therefore only that limited set of third party actions need to be prohibited. It is only when we consider real-world administrative issues that we might need to provide somewhat broader rights than ideally suggested. But such a broadening is the result of administrative exigency rather than as a normative goal of the intellectual property system.
II. The Uneasy Case for Intellectual Property as Property

“[P]roperty in the classic sense” is “the right to exclude from a thing.”¹ The right to exclude has been argued to be “the sine qua non” of property.² Without it, a person does “not have property.”³ From the Constitution, to the patent statute, to theoretical discussions, intellectual property focuses on exclusive rights.⁴ Furthermore, more literal property analogies have been drawn such as Edmund Kitch’s famous article The Nature and Function of the Patent System.⁵ In that deservedly influential article, Kitch compared patent claims to mining prospects in order to “reintegrate the patent institution with the general theory of property rights.”⁶ In this regard, intellectual property certainly looks like property.

But some have argued that over-reliance on property analogies are causing many of the recent problems with the intellectual property. For these property critics, property analogies certainly cannot reform intellectual property.⁷ Any discussion of traditional property too quickly brings up Blackstone’s oft quoted⁸ characterization that property

³ See id.
⁴ See U.S. Con. Art I § 8 Cl. 8, see 35 U.S.C. § 271(a) (2006) and as to scholarly discussions see Adam Mossoff, Patents as Property: Conceptualizing the Exclusive Right(s) in Patent Law, 7-22 available SSRN.
⁶ Id. See also Edmund W. Kitch, Patents: Monopolies or Property Rights?, 8 RES. L. & Econ. 31 (1986).
⁸ As Stewart Sterk has argued, real property analogies have been employed precisely for their rhetorical weight by association with traditional property. Sterk, supra note 52 at 418 (“One might surmise, then, that introduction of the property label into copyright and patent was not accidental. Supporters of expanded copyright and patent protections invoked property terminology to seize rhetorical advantages not otherwise available.”) Likewise Mark Lemley fears that the real property analogies are used as a one way ratchet that always increases control by patent owners. Lemley, Free Riding at 1032 (“Protectionists rely on the economic theory of real property, with its focus on the creation of strong rights in order to prevent congestion and overuse and to internalize externalities. They rely on the law of real property, with its strong right of exclusion. And they rely on the rhetoric of real property, with its condemnation of ‘free riding’ by those who imitate or compete with intellectual property owners. The result is a legal regime for intellectual property that increasingly looks like the law of real property, or more properly an idealized construct of that law, one in which courts seek out and punish virtually any use of an intellectual property right by another.”). As a result, Lemley concludes that “treating intellectual property as ‘just like’ real property is a mistake as a practical matter.” Id. But Lemley does make a distinction between real property as an institution and arguments banning all free-riding. He notes that “it might be possible to rehabilitate the property analogy by disconnecting the concept of property from the arguments against externalities and free riding.” Id. at 1069. Even though Stewart Sterk finds the real property analogy incorrect and harmful, he concludes that “[i]t is far too late to expunge the rhetoric of property from dialogue about copyright.” Sterk, supra note 52 at 417. Lemley also agrees on this last point: “[w]e may have no choice” in stopping property analogies for copyright or patent. Lemley, Free Riding at 1069. I would agree and as this article emphasizes, a clear analogy between traditional property and intellectual property must mean a balanced intellectual property regime that embraces the variety and efficiency forced by competition.
grants the owner “sole and despotic dominion” over the object of property.9 “[N]eoclassicist theory” of property rights suggests rights that are “relatively broad and clearly defined.”10 Because of such absolutist visions, many have argued for abandoning property altogether worrying that property analogies are all too fraught with “the trap of treating intellectual property as an absolute right to exclude.”11

But intellectual property as property is criticized for more than its normative slant. The analogy also leads to a strong dissonance between property theory and intellectual property. A fundamental role for an economic system is to allocate scarce resources to productive ends.12 An economic system determines how a society should use its scarce land, labor, and capital to meet its needs.13 Property rights are central to that objective.

With scarcity playing such a central role in other property discussions, property in ideas and information seems incongruent. Information and ideas are critically different from tangible resources.14 As famously and eloquently described by Thomas Jefferson, the moment [an idea] 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.15 Ideas are not scarce in the same sense that an apple is scarce. If I eat an apple, others cannot use it for other purposes. If I have an idea I can share it with everyone without degrading the idea at all.

Based on this, many have argued that traditional property rationales have no place in discussing intellectual property. As argued by Arnold Plant in the 1930’s and more recently as echoed by Mark Lemley, “[I]ntellectual property, then, is not a response to allocative distortions resulting from scarcity, as real property law is. Rather, it is a conscious decision to create scarcity in a type of good in which it is ordinarily absent ….”16 Along similar lines, Friederich Hayek, “raised serious doubts about the equation of tangible and intangible resources.”17 Hayek argued that

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9 Lemley, Free Riding at 1037.
10 Neil Weinstock Netanel, Copyright in a Democratic Society, 106 Yale L. J. 283, 314 (1996) (“neoclassicists … favor … assigning copyright owners maximum rights and leaving the allocation of those rights up to the market.”)
11 Id. at 1072.
12 WILLIAM J. BAUMOL & ALAN S. BINDER, ECONOMICS PRINCIPLES AND POLICY 34 (4th 1988). See also Jeremy Waldron, What Is Private Property?, 5 OXFORD J. LEGAL STUD. 313, 318 (1985) (“A problem, then, which I shall call the problem of allocation, arises in any society which regards the avoidance of serious conflict as a matter of any importance. This is the problem of determining peacefully and reasonably predictably who is to have access to which resources for what purposes and when. The systems of social rules which I call property rules are ways of solving that problem.”)
13 BAUMOL & BINDER, supra note 73 at 35.
14 See discussions of public goods.
16 Mark Lemley Free Riding at 1055. See also Arnold Plant, The Economic Theory Concerning Patents for Inventions, 1 ECONOMICA 30 at 36 (1934) (“It is a peculiarity of property rights in patents (and copyrights) that they do not arise out of the scarcity of the objects which become appropriated. They are not a
[t]he difference between [copyrights and patents] and other kinds of property rights is this: while ownership of material goods guides the use of scarce means to their most important uses, in the case of immaterial goods such as literary productions and technological inventions the ability to produce them is also limited, yet once they have come into existence, they can be indefinitely multiplied and can be made scarce only by law in order to create an inducement to produce such ideas. Yet it is not obvious that such forced scarcity is the most effective way to stimulate the human creative process.18

Viewed from this perspective, intellectual property is viewed as suspect: scarcity is a fact of life in tangible goods and traditional property tries to make the “most” of it.19 With intellectual property we are seemingly dealing with a resource that can be shared infinitely and yet we are, somewhat surprisingly, intentionally creating scarcity in it.

III. Intellectual Property is Property and the Implications Therein

But despite the seemingly normative push towards absolutism and the underlying dissonance, abandonment of property as an underlying ethos for intellectual property comes at great cost.20 It inevitably means that intellectual property, to some degree, will always stand apart from the rest of the economy. It means that lessons learned from many centuries of dealing with and thinking about property are inapplicable to intellectual property.21 Furthermore, forsaking property misses an opportunity. There is great rhetorical force in property22 and perhaps its use is inevitable.23 As suggested by Stewart Sterk “[i]t is far too late to expunge the rhetoric of property from [intellectual property].”24 Thus, rather than abandoning property in intellectual property, we might try instead to “rehabilitate” the concept of property in intellectual property.25

The relationship can be rehabilitated by not thinking of IP as property but rather by beginning by assuming that IP is property. As suggested above, from Hume to Waldron,
scholars have emphasized scarcity as a condition that makes property rights necessary. To allocate many scarce resources, society often turns to a specific form of property, namely private property, to accomplish this goal. Through private property, society taps one individual, the owner, to decide how to use some scarce resource. The owner might consume the resource for private benefit; the owner might sell the resource to another; or the owner might productively consume the resource with an eye towards some new product that will be sold on the market. The role of exclusionary property rights is to prevent acts by third parties that would derail the resource owner’s productive plans for the resource.

A. Allocating Scarce Resources Indirectly with Intellectual Property

Rehabilitating property in intellectual property through a scarcity-centric definition seems problematic; after all as recounted above scarcity seems to be missing for intellectual creations. But careful review of property reveals that indeed in other important areas property was ultimately allocating a scarce resource yet it did not do so directly. It is these examples that are most instructive for IP.

In its most familiar modern guise, the scarce resource and the focus of property’s exclusion coincide. This is often the case for scarce, tangible commodities where property is attempting to move the scarce resource to the resource’s highest value user. In other words, in order to allocate scarce resources like apples we dole out exclusionary rights that conceptually surround the apple. It is this example that has become central to modern law and economics views of property but this is not the only form that traditional property takes.

26 See David Hume, An Enquiry Concerning the Principles of Morals 83 (Tom L. Beauchamp ed. 1998) (“For what purpose make a partition of goods, where every one has already more than enough?”); see also Jeremy Waldron, What Is Private Property?, 5 Oxford J. Legal Stud. 313, 320 (1985) (“[t]here is, at least, no dispute between the socialist and the liberal traditions on the following points: that without some assumption of scarcity, there is no sense talking about property and justice….“); see also Sterk, supra note 52 at (“[F]or resources that are not scarce, property rights are not necessary to promote conflict avoidance or conflict resolution.”); John J. Sprankling, Understanding Property Law 7 (1999)(quoting Jeremy Waldron) (“Indeed, one scholar defines property as ‘a system of rules governing access to and control of scarce material resources.’”).

27 See Larissa Katz, Exclusion and Exclusivity in Property Law, forthcoming U. Tor. L. Rev. (2009); see also Henry Smith, supra note 75 at 1788 (“[P]roperty, by establishing boundaries over things over which decision-makers would be free to take action and prevent interference by others, was the best and only workable method to achieve a coincidence of expectations among members of society.”).


29 See Richard Posner, The Economics of Law (describing two roles for property: the static effect and the dynamic effect. The static effect allocates resources to the highest valued user while the dynamic effect focuses on investment and development of resources). See Carol Rose, The Shadow of the Cathedral, 106 Yale L. J. 2175, 2188 (1997) (arguing the modern law and economics discussions of property “deflects attention from considerations uppermost in conventional property thinking – planning, effort, and investment.”).

30 See Thomas W. Merrill & Henry Smith, What Happened to Property in Law and Economics?, 111 Yale L.J. 357, 364 (2001)(“[T]he role of property emphasized in modern economic discussions-providing a baseline for contractual exchange and a mechanism for resolving disputes over conflicting uses of resources-was at most of secondary importance in these traditional accounts”).
But there are important cases where traditional property has uncoupled the scarce resource from the *res* of the property right. In fact, direct allocation (where the resource and the legal *res* coincide) was secondary in traditional discussions.\(^{31}\) Traditionally property was rationalized often on an indirect mode of allocating scarce resources where the resource and the ultimate *res* of the property did not coincide. This indirect mode (described by Richard Posner as the dynamic analysis) was emphasized by early property scholars such as Blackstone, Smith, and Bentham.\(^{32}\) Property provided security by preventing acts that otherwise would endanger, spoil, or ruin, the property owner’s plan for their owned resources. Lack of property was argued to force us to “exist from day to day” rather than planning and investing in future industry.\(^{33}\) Lack of property “deaden[s] … Industry.”\(^{34}\) Property allows people to focus on productive business models; with property, people can focus on “planning, effort, and investment.”\(^{35}\) This indirect mode is critical to understanding traditional property’s role in intellectual property.

Perhaps the most important example of a scarce resource that often must be allocated indirectly is time, specifically a person’s labor.\(^{36}\) Time is an odd resource because it cannot be physically delineated like an apple. Rather time just flows.\(^{37}\) But like apples, time is sadly limited and is rival. Time spent writing an article necessarily means other uses for that time have been irreversibly forgone. A societies’ time is one of its most precious resources and it must be used productively.\(^{38}\) And it is this scarcity that has been traditionally the primary concern for property.\(^{39}\) From Locke’s mixing of labor to create property to Blackstone’s emphasis on “reaping what you have sown” the focus of property has been to allocate our time efficiently. In particular this means providing exclusive rights in the product of that labor. In particular, the Classical Economists emphasized this indirect mode for property as central to a broader economic system.\(^{40}\)

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31 See Smith and Merrell (arguing that the dynamic analysis was the focus in early discussions and the static was only of “secondary importance.”)

32 Richard Posner, The Economic Analysis of Law 37 (5th 1998)(describing the dynamic analysis as being “well known for hundreds of years.”).

33 BENTHAM, supra note 116.

34 Id.

35 Carol A. Rose, In the Shadow of the Cathedral, 106 YALE L.J. 2175, 2188 (1996); see also CAROL ROSE, PROPERTY AND PERSUASION 3 (1999)(“[As] expressed by the eighteenth-century philosopher Jeremy Bentham: property is designed to do something, and what it I supposed to do is tap individual energies in order to make us all more prosperous.”)


37 It is interesting that water law, dealing with a difficult to capture, flowing resource also has many important distinctions from property in tangible, containable chattels. See Adam Mosoff comparing intellectual property and water law.

38 See Ellickson on the difference between the use of time by settlers in Bermuda and Jamestown based on differences in property regimes and noting the different outcomes in the two colonies.

39 Edmund Kitch, The Nature and Function of the Patent System, 20 J. L. & Econ. 275-76 (1977). (“the property rights literature has viewed the central problem as one of scarcity, while information has appeared to be an example of something that can be used without limit. There is, however, a scarcity of resources that may be employed to use information, and it is that scarcity which generates the need for a system of property rights in information.”)

There are historically relevant examples where society tries to allocate time indirectly by granting exclusionary rights over some other (sometimes non-scarce) thing. Perhaps the oldest example of such indirect property is the usufruct in early farming. Critically usufructs for farming developed even when the land that was being controlled was not itself scarce. For these early examples of proto-property, exclusion in land allowed for the efficient allocation of other related scarce resources such as time, labor, and other scarce resources needed for farming (e.g. fertilizers). This foundational example of early property was not granted in order to allocate scarce land – at the time land was not necessarily scarce. Rather, through exclusionary rights to the cultivated field, property enabled society to allocate the scarce time and labor that went into cultivating the field. The scarce resources were expended in creating the cultivated field. Society allowed the proper allocation of time to farming indirectly by granting exclusionary rights in the land into which the time and labor were spent. It is this example where scarce resources like time and labor are allocated indirectly that intellectual property should most closely follow.

41 See Smith, *IP as P* at 1745 (describing how property’s exclusionary rights indirectly allocate other scarce resources).
43 Id.
44 See id. at 1367.
45 See also Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (Papers & Proc.) 347 (1967)(describing at length the example of property in land as an instrument to enable proper allocation of fur bearing animals as well as the time and labor poured into animal husbandry. In his example there is no suggestion that land is scarce yet exclusionary rights over land are the instrumental choice).
46 In exploring this issue Henry Smith has questioned “why we would provide for rights in information to solve this allocation problem when it would seem that we could simply give rights to appropriate the returns from these (rival) inputs like labor and lab space.” Smith, *IP as P* at 1745. Smith answers that question by looking to the information cost problems that are avoided by using exclusive rights in the information. Along similar lines, the time, labor and resources that are poured into farming, animal husbandry, or inventing are consumed in those processes. The year you spend dreaming up, creating and perfecting your creation is irrevocably gone. Only the fruits of your farm, your healthy population of fur bearing animals, or your creation remain behind. Without some control (the critical question is how much and what type of control is needed) over the use of these outputs, we might not engage in these productive activities. Without some property in these outputs we would misallocate our scarce time leaving these productive activities unattended. Critical to this line of reasoning then is the understanding that exclusionary rights in the outputs are instrumental constructs tailored not so that we necessarily have “sole and despotic” dominion over the outputs but rather so that we have enough control that we properly and efficiently allocate the inputs. See also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 309 n.108 (1996) (“For neoclassicists, therefore, intellectual property is less about creating an artificial scarcity in intellectual creations than about managing the real scarcity in the other resources that may be employed in using, developing, and marketing intellectual creations.”)
47 See Kitch, *Prospect Theory* at 275-76 (“the property rights literature has viewed the central problem as one of scarcity, while information has appeared to be an example of something that can be used without limit. There is, however, a scarcity of resources that may be employed to use information, and it is that scarcity which generates the need for a system of property rights in information”); Smith, *IP as P* at 1745. In addition to the scarcity arguments, related arguments have been made about conflict avoidance. See Sterk, *supra* note 52 at 418 (“[F]or resources that are not scarce, property rights are not necessary to promote conflict avoidance or conflict resolution.”) But this article argues that even for non-rival resources there can be conflict. At first conflict over non-rival resources seems ridiculous because these resources can be shared infinitely. But once we accept that scarce resources are often consumed in the creation of...
Thus, where intellectual property rights revolve around nonrival, intangible creations we should not assume IP is trying to allocate those things. Instead a host of scarce resources, time often being the most relevant, are consumed in making the creation. The intellectual property system seeks to allocate those resources efficiently.

B. Intellectual Property: Few Exclusionary Rights Needed

Emphasizing a scarcity based purpose for IP only sets the stage for designing the IP system. We must still determine the scope of the exclusionary rights. As to designing exclusion in tangible resources, society asks a simple question from a resource owner: what acts prevent you from disposing of the scarce resource in the way you deem best? Assume you own an apple meaning society has nominated you the person who chooses the way in which the apple should be used. Society wants you to decide whether it should be eaten, should be made into a pie, or should it be sold. In making your choice, you may be quite reluctant to contemplate some far off but ultimately productive and beneficial plan if you are worried about the myriad ways I might intervene and derail your plan. Property tries to prevent this type of worrying and its associated acts of self help. Property asks what security, what assurances, do you need from the rest of us so that you will stop worrying about such interferences and you will instead focus on disposing of the apple efficiently? These are the acts that property aims to prevent. For a tangible resource like an apple, there are many, many ways that others can impair your plans for the apple. Invariably, they all tend to involve some physical contact with the apple. As a result property in apples precludes others from physical contact. Because the resource is relatively fragile, property must be relatively broad and draconian even as a normative matter – all the potential harmful acts must be prevented. As a general rule then others are not allowed to touch your apple.

When this reasoning is imported into the intangible realm, we note an important difference. As opposed to tangibles, an owner’s plans for intangibles are rather hard to harm. Society has put you in charge of your own time and assorted other resources (like laboratory space, word processors etc.) that are needed to create intangibles. If you intend to invest your time and resources to create some intangible and you do not intend to sell them (or to receive some other benefit via an exchange), then there is very little anyone can do to disrupt that plan. Others can take, share, or even try to sell copies of your intangible all they want but you still have your original intangible and you can enjoy these non-rival resources and that creators hope to recoup for those consumed resources, then indeed real conflict can arise. In short, when someone’s livelihood is threatened, we can get real, physical conflict of the type traditional property attempts to ameliorate. As an example consider the relatively recent confrontation between comedians Joe Rogan and Jose Mencia that centered on Rogan’s accusations that Mencia was ‘stealing’ Rogan’s jokes. Though their resources (jokes) are the classic example of a nonrival resource, their near fist fight (for now enshrined on Youtube) closely resembles the heated emotions that run between two people arguing over alleged theft of tangibles. See Robert W. Welkos, Mencia, Rogan ignite hot debate in stand-up world, SEATTLE TIMES, July 30, 2007.

48 For this article, we assume that society can efficiently choose an owner for important resources. See Carol Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73 (1985).

49 See Henry Smith, IP as P (arguing for broad property rule for intellectual property due to information costs).
it all you want. In that case, your plans have not been (in fact cannot be) derailed by others. Exclusionary rights are just not needed here.

By way of this example, we can discern an important baseline assumption for intellectual property. As with the early usufructs, not all land or all ideas need to be under someone’s control. It is only needed where it can serve the instrumental purpose of allocating the time and labor that went into creating the ideas. When that need is not present, then our default position should be that ideas are “free as the air to breath.” Only where the creator invests other scarce resources into creating the information and they intend to recover for those expenditures in a market should we even consider creating property.

The actions of others become relevant only when you invest time and resources to create an intangible with the intent of selling it in hopes of recouping your costs. There the actions of others can have a real impact. Others can act in ways that can derail your plan to recoup your costs. It is these derailing acts, and not much else, that should be the focus of intellectual property. Property in tangible goods has to have rather broad exclusion because there are so many different ways others can harm a tangible. For intangibles, there are only very specific acts that need to be addressed. Intellectual property (as an arm of property) should aim to protect the feasibility of creative business models. In other words, assume that both the society and the creator determine that investing the creator’s time in making some creation is in fact the best use of that scarce resource. The exclusionary rights of intellectual property should aim to prevent only those acts that cause the creator to reorder his or her preferences for using their time.

In the following three different acts will be considered. First, the article considers outright piracy. Second, the article considers others that independently create. Third, the article considers competition from those that emulate the initial creator. Intellectual property should prevent the first act; it should not prevent the second act; and it should carefully allow the third act.

The act of piracy in intellectual property is the copying and then selling of the creation of another. When this occurs the original creator cannot recoup their large upfront costs. Pirates do not have similar substantial fixed costs to recoup and thus they can undercut the initial creator. This prevents the initial creator from recouping their investment of time and resources. In short, piracy prevents inventive business models from being feasible in the same way that theft prevents the feasible production of tangible goods. Piracy is copying that forecloses any hope of recovering the initial investment. In economic terms, unfettered piracy drives price to marginal cost. It is a parasitic act that kills its host. Such acts are described in misappropriation as acts that kill the “goose that

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52 See Christopher Sprigman, Reform(aliz)ing Copyright, 57 STAN. L. REV. 485 (2004).
53 Consider also the effect of consumers who copy the creation but who do not intend on selling it to others. Individually they cause less harm than pirates but collectively they could cause the same harm. Although there may be room for more nuanced arguments for the purposes of this article such consumer copying and using needs to also be prevented. See Sara Stadler, Copyright as Trade Regulation, 155 U. PENN. L. REV. 899 (2008) and Shyamkrishna Balganesh, Forseeability and Copyright Incentives forthcoming HARV. L. REV. (2009).
lays the golden eggs.” Without reasonable hope for any profit and in fact with almost certain losses, piracy deadens inventive business models. In order to provide adequate security, intellectual property needs to prevent piracy.

In contrast, independent creators are critically different from pirates. Market entry by an independent creator surely reduces the profits of an earlier creator and in this sense independent creators harm earlier ones. But where independent creators have similar fixed costs as the initial creator, they cannot undercut the initial creator. Entry by independent creators drive price towards average cost not marginal cost. This marks a critical distinction between pirates and independent creators. Initial creators can still profit even where independent creators are allowed to enter the market. Independent creators do not inherently destabilize inventive business models and in fact there are a host of economic benefits from independent entry.

Lastly, consider competitors that emulate a successful business model producing intellectual creations. These competitors, seeing the abnormal profits earned by the initial creator, follow the initial creator’s lead and enter the market. Here the distinction from outright piracy is most difficult. The central question is what attributes of the initial creator’s success should an emulating competitor be able to copy and what attributes should they not. For emulating competitors the focus should be on any cost savings that they enjoyed as a result of their emulation. As long as these competitors have their own comparable fixed costs to recoup then their entry into the market will not drive the price down past average cost. If they have substantially reduced fixed costs, then they can undercut the initial creator.

Ultimately this analysis suggests that the property in intellectual property directs intellectual property to prevent only one act: it must prevent piracy. It need not prevent entry by independent inventors and it need not even prevent entry by emulating competitors as long as the emulation does not stray too far into piracy.

C. Considering Implementation and Administration of an IP System

The above analysis is incomplete in that it describes what acts intellectual property should ideally prevent. Unfortunately restructuring human actions is harder than the above discussion would suggest. A real-world, functioning property system must consider the administrative costs inherent in implementing the system. Property has often sought to reduce these administrative costs by not prohibiting the proscribing acts directly rather property often prohibits specific acts through the use of a proxy exclusionary rule.

54 Posner, supra note 132 at 639 (describing as the best test for misappropriation as one developed by Judge Winter as “require[ing] the court to determine, in any case that passes through his first four filters, whether ‘the ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.’”)

55 See Oskar Liivak, Rethinking the Concept of Exclusion in Intellectual Property, forthcoming GEO. L. J. (2010)(showing that under reasonable assumptions independent inventors do not reduce incentives so far that initial creators would choose not to invest creation)

56 See Henry Smith, IP as Pat 1746 (“Property differs from other areas like torts and contracts in its heavier reliance on what I have elsewhere called the exclusion strategy. The exclusion strategy protects rightsholders’ interests in the use of resources indirectly, by using a simple signal for violations. The prototypical example is trespass to land, whereby the unauthorized crossing of a boundary serves as a (very) rough
acts, property rights are generally a strict liability offense defined by choosing a proxy thing over which an owner is given exclusionary control. By excluding others from this thing, property indirectly prohibits those acts that might undermine the plans of the property owner. The choice of that proxy rule often entails a careful balance between administrative costs for that rule and the over or under inclusiveness of the rule. Once administrative costs are considered then a real world intellectual property system may well prevent more than simply piracy but it did so it would be because we have yet to design a better, cheaper system of administration and not because intellectual property should normatively reach further than piracy.57

IV. Property Theory via Law & Economics

[This section is in a very early state but here are the points I am working towards]

The results derived from fundamental notions about property are not dependent on some older fashioned view of property. Even modern law and economics would not advocate for exclusion beyond piracy. Coase gives us very little help in designing basic property rights and Demsetz’s theory, despite the views of some of his less cautious followers, would not advocate for exclusion beyond just piracy. Under Demsetz’s theory property needs to focus on externalities but it does very little to explain which externalities property needs to worry about. Piracy is a relevant externality while competition from independent creators and even competition from most emulators is certainly an externality but it is just not an externality that economics thinks we should prevent. (In fact that type of competition may be an externality that is necessary for markets to function).

V. Property Reform of Modern Intellectual Property

[This section needs to be expanded but here are the points I plan on touching upon]

The above discussion suggests that a number of aspects of modern intellectual property stand outside the ideal system that property would warrant. In patent law, the fact that independent inventors are infringers stands as the most visible example.58 Furthermore, under a property view it is hard to justify the lack of a research use exemption even for commercial purposes.59 In copyright, a property centric vision would provide little support for the derivative work right.

VI. Conclusion

Property has been seen as the source of the ever expanding reach of intellectual property. That trend has been fueled by institutional design via analogy. But design by underlying principles leads to a different result. When intellectual property focuses its exclusion on preventing those acts that prevent the proper allocation of the scarce inputs,

57 See Oskar Liivak, Rethinking the Concept of Exclusion in Intellectual Property, forthcoming GEO. L. J (2010)(discussing the administrative costs between various proxy rules in intellectual property).
58 See id. (discussing a copyright-styled patent system where independent inventors are not infringers).
59 Research tools do provide a counter example against a blanket exemption for research. But distinctions between researching with a tool and researching on a tool can help to shape that defense.
then the exclusionary reach of intellectual property need not be absolute and need only exclude piracy.