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The Constitutional Foundations of Intellectual Property

by

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A December 2014 study estimated that in 2013, the core copyright industries contributed \$1.1 trillion dollars to U.S. GDP, accounting for 6.71 percent of the U.S. economy. And businesses dependent upon patents contribute billions of dollars each year to the country's GDP. In other words, intellectual property rights play an outsized role in sustaining and growing our nation's economy.

Given the size of the economic impact, perhaps it should not be surprising that the boundaries of certain intellectual property rights are subject to dispute, especially as technological changes affect business models and marketplace demands. For example, there are often debates regarding the length of copyright and patent terms, the scope of "fair use" for copyright and enforcement mechanisms for claimed infringement of intellectual property rights.

In fact, Congress is considering various proposals to once again update our copyright and patent laws. As it is beseeched by parties with differing interests, it is important that Congress, and the public at large, keep in mind the distinction between contested

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"boundary" questions like those cited above and foundational principles that should not be contested at all.

What should not be contested is an understanding of why our founders thought it important to protect intellectual property rights — important enough to include the Intellectual Property Clause in the Constitution. Indeed, the primary purpose of our new book, *The Constitutional Foundations of Intellectual Property – A Natural Rights Perspective*, published last month by Carolina Academic Press, is to explicate the principles that impelled the founders to safeguard intellectual property rights and embed their protection in American constitutionalism.

Article I, Section 8, Clause 8 of the Constitution grants Congress 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." The IP Clause makes copyrights and patent rights unique areas in which the federal government is expressly charged with protecting private property rights.

As our book shows, the Constitution's founders were influenced greatly by classical liberal philosophy. A central aspect of this classical liberal philosophy is that each person has a natural right to the fruits of his or her own labor. In this view, "property" ownership is rooted in the product of a person's own labor. And, crucially, a central aim of government is to protect a person's property.

Our book devotes significant attention to James Madison's little-known 1792 National Gazette essay, "On Property," explaining that the "father of the Constitution" drew directly from influential 17th-century philosopher John Locke. Madison offered a broad definition of property, which, he said, "in its larger and juster meaning ... embraces everything to which a man may attach a value and have a right." According to Madison, "A man has property in his opinions and the free communication of them," and that which his own labor has created. Following Locke, Madison concluded, "Government is instituted to protect property of every sort."

Madison's "On Property" essay shows that the founders' concern with protecting property rights was not limited to tangible property. By including the IP Clause in the Constitution, the founders applied to intellectual property the Lockean idea that a person has a natural right to enjoy the fruits of his or her labor, regardless of whether those fruits take tangible or intangible form.

The founders' solicitude for intellectual property rights should not surprise anyone familiar with our Constitution's foundational principles. We hope our new book, which, in addition to Madison, examines the contributions to the development of IP rights from figures such as Noah Webster, Daniel Webster, Joseph Story and Abraham Lincoln, will provide those lacking such familiarity with an accessible work that promotes understanding of such principles.

Armed with such understanding, public officials, and the broader public, will be more likely to accord intellectual property rights the respect and protection they deserve as rights rooted in American constitutionalism.

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