Keeping IP Real

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This symposium contribution analyzes the relationship between intellectual property and tangible property, focusing on four types of intellectual property: copyrights, trademarks, patents, and trade secrets. It posits that—contrary to popular conceptions—the question of rivalrousness should be viewed as central both to owners' use of IP-protected goods and to others' infringement on the underlying IP rights (just as that attribute lies at the heart of the concept of real and other tangible property). The concept of rivalrousness is typically addressed to the scenario where consumption of a good by a consumer prevents simultaneous consumption of that good by other consumers or, in the tangible property context, to the impossibility of the physical occupation of the same space at the same time. This symposium piece, however, adopts an understanding of rivalrousness that rests on economic rather than physical conceptions of rivalrousness. Previous scholarship, including my own, has questioned the boundary between intellectual property and tangible property by examining binary conceptions of rivalrousness, whereby physical goods (including real property) are understood to be completely rivalrous and intangible goods completely non-rivalrous. This piece studies in depth how "(real) property-like" the different forms of intellectual property are when it comes to economic rivalrousness, and concludes that most trademarks and trade secrets hew quite closely to our understandings of real property and other tangible property as far as economic rivalrousness is concerned. There is more variance in that respect within copyrights and patents (with the associated goods often ranging from not rivalrous at all to highly rivalrous), which suggests that there may be more flexibility in those areas when granting rights to third parties. For copyright and patent rights, economic space might sometimes be more shareable than for trademarks or trade secrets, in the sense that the goods can sometimes more easily coexist in the market without the owner of the original intellectual property suffering profit losses.