

Rivalry

The concept of rivalry is a cornerstone of modern explanations for property law. Some sort of system governing access to resources becomes necessary when one person's use of a given resource impedes another's ability to use it as well. Property law is the system of rules developed to resolve the conflicting demands arising from the rival character of different goods. One consequence of this understanding is that it makes it difficult to account for IP rights, since IP goods like inventions and creative works are generally thought to be non-rival. This article examines the idea of rivalry more closely. It argues, first, that goods cannot be classified simply as rival or non-rival, but that rivalry depends on the extent to which each person's desires with respect to a given resource are compatible with the desires of other people. Further, it rejects the usual assumption that rivalry must be determined solely with reference to people's active use of a resource. In a range of contexts, such as interests in conservation and ideological opposition, a good should be considered rival simply because one person wants to use the good while another wants that person not to use it. Understood this way, tangible property turns out to be less rival than is commonly assumed and intellectual property more so. The article also considers the implications of this understanding for commercial interests, such as a landlord who has no desire actually to inhabit an apartment she rents out but who does not want others to live there without paying rent, and for interests in spite, revenge, and cantankerousness. It concludes that while our views about which goods are and are not rival is thought of as a purely objective inquiry into the nature of the goods themselves, they in fact embed either unsubstantiated categorical empirical assumptions or, more likely, a substantial element of moral judgment as to the acceptability of different uses and motives. In the background is an implicit sympathy for what Locke called the "industrious and the rational" and scorn for of the "quarrelsome and contentious."

—James Y. Stern
Assistant Professor
William & Mary Law School