

A Numerus Clausus Principle for Intellectual Property

By Christina Mulligan*

Abstract

Real and tangible property can only be held and conveyed in a small number of forms, such as fee simple, life estate, and lease. This principle is known as numerus clausus, meaning “the number is closed.” For centuries, the principle has been central to the common-law system of property rights. Scholars have justified it as a mechanism for promoting the alienability of property, maintaining relatively low transaction costs in the buying and selling of property, and keeping the scope of property owners’ rights clear.

In contrast, the numerus clausus principle is essentially nonexistent in intellectual property law. For patents and copyrights, numerus infinitus — “the number is open.” There is nearly no limit to the ways in which intellectual objects can be licensed and sold.

This article will argue that aspects of the numerus clausus principle should extend to intellectual property. The justifications for the numerus clausus principle in real property law are even stronger in the intellectual property context because intellectual property rights are naturally more difficult to delineate than real property rights. The metaphysical nature of intellectual property prevents protected objects from being clearly identifiable, particularly in a patent context where the same invention can be independently created by multiple parties.

As a result, investigating the sale and licensing history of a work or invention — and whether a work or invention is protected at all — is difficult, costly, and sometimes impossible. This difficulty is compounded by the absence of a numerus clausus principle, which permits inscrutable licensing and sale agreements and allows single works to be carved into several parts and burdened by complicated usage rules.

By considering examples of digital content licensing and fragmentation of particular copyrights, this article will identify how a numerus clausus principle would facilitate the use and conveyance of intellectual property. This change would benefit intellectual property owners, licensees, and the general public by lowering transaction costs and preventing accidental over- and under-use of intellectual works.

* Resident Fellow, Information Society Project at Yale Law School. Contact at christina.mulligan@yale.edu.