

**Honey, they shrunk the honey** by Michael J. O'Hara, J.D., Ph.D.

<http://cba.unomaha.edu/faculty/mohara/web/ALSB09HoneyTheyShrunkTheHoney.pdf>

**ABSTRACT:** *Some think honey is a natural food produced by honeybees from the nectar of flowering plants. Others think honey merely is excellent advertising copy. All jurisdictions legally define some, but not all, types of foods with a "Standard of Identity"; adopted either by statute or by regulation. Increasingly, jurisdictions are reacting to market behaviors by firms exploiting positive attitudes towards honey. This paper looks at remedies available with and without a standard of identity when the honey a business or a consumer buys is not honey due to adulteration (e.g., with HFCS) or due to mislabeling.*

- I. I seek the objectivity of a zealous advocate seeking both strategic and tactical advantage while engaged in commercial litigation.
- II. **Why honey?**
  - A. For my academic research agenda I have sought out an agricultural industry that involves a **critical input** (ideally, also a catalytic input) and that clearly has attributes of an externality.
  - B. Geographic footprint of bee yard is measured in 10's of square feet whereas the geographic footprint of the honeybee's foraging range is measured in 10's of square miles.
    1. Is the honeybee an implied invitee with a usufruct of a profit in gross based upon the unavoidable inadvertent pollination service?
    2. Keeping of the wild animal honeybees is a misnomer.
      - a. Enticement is more accurate than harboring.
  - C. An **externality** is an allocation of resources that is external to market transactions.
    1. Market transactions, like most transactions in USA law, are to be both knowing and voluntary.
    2. Externality transactions sometimes are knowing, but never are voluntary.
      - i. Involuntary resource allocations are at inaccurate market prices.
        - (a) An *external cost* (e.g., pollution) causes the market supply curve of that externality to show a market price below the true price (a.k.a., theft) on the higher true supply curve, which generates *over consumption*.
        - (b) An *external benefit* (e.g., education) causes the market demand curve of that externality to show a market price below the true price on the higher true demand curve which generates *under consumption*.
  - D. Externalities force the law towards the seams of adjacent or overlapping public policies.
    1. **Standing to sue** questions related to the zone of protected interests are frequent.
      - a. If the trees lack standing, what about the bees?
        - i. Does the beekeeper need to stand as the next best friend of the honeybees or does the commercial enterprise create an enforceable reasonable expectation?



- G. All persons everywhere and all cultures everywhere use the **precautionary principle** (i.e., take no action whose array of feasible consequences include one or more profoundly objectionable consequences).
1. But, both persons and cultures vary widely as to when use of the precautionary principle is appropriate.
- IV. Economics is the study of choice: the choices for constrained optimization.
- A. Resources are constrained relative to human wants.
1. ***Are resources also constrained relative to human needs?***
- B. Choices allocate scarce resources.
1. Cultures vary widely on how they make those economic choices.
    - a. Cultural pressures for selection of choice methodology are both temporally and contextually far more self referential than those pressures are aligned with related systems (e.g., biology).
      - i. Generically, cultures prefer now over the future.
    - b. Currently, but not necessarily, the USA culture has a marked preference for using market transactions for most resource allocation choices.
      - i. Market transactions are exchanges.
        - (a) Exchanges can be direct or indirect.
          - (i) Almost never are exchanges direct.
        - (b) Indirect exchanges vary in magnitude of disconnect between the items of exchange. For example, barter is less indirect than is a money exchange. When grain is bartered for tools, the true exchange is protein and sugar created via biological processes in the form of harvested grain is exchanged for human time and effort in the form of tools.
      - ii. Market transactions depend upon very indirect choices mediated by the economic lubricant of money.
      - iii. Monetized exchanges have money as their prime output (e.g., profit).
- C. Exchanges seek segregate and capture (*merely apparent?*) surpluses (e.g., harvestable grain; profit).
1. Capture can be in the motif of farming or the motif of mining.
    - a. **Farming** limits capture of the surplus seeking to assure repetition of the opportunity for capture.
    - b. **Mining** is extractive toward exhaustion.
  2. Resources vary in their susceptibility to capture via the motif of farming.
    - a. Some resources necessarily are extractive (e.g., natural gas) and thus can not be farmed and must be mined (if to be used).
    - b. Some resources offer sharply constrained access via farming or far greater access via mining (e.g., ground water).

- c. Some resources (*??given our currently limited understanding of the vectors and their systems??*) necessarily are susceptible to capture solely via the motif of farming (e.g., solar energy).
    - 3. Monetary profit as a temporally isolated system output is prone to an even stronger temporal bias than culturally preferred exchanges generally.
      - a. Generically, stealing from the future is accepted as morally superior to stealing from the present.
      - b. Externalities in the present further ease any perception of moral burden tethered to stealing from the future.
    - 4. Legal causes of action can be implemented as exchanges with monetary attributes.
      - a. Legal causes of action can contribute to the internalization of externalities by creating non-zero market prices or move market prices towards true prices.
        - i. It is feasible for changes in market prices generated by legal causes of action to exceed the magnitude of change needed to align the market price with the true price.
          - (a) Single transactions at excessive prices can (but are less likely to than aggregated transactions at excessive prices) generate distortions or disruptions greater than the original externality.
- V. One lack of synchronicity between the legal, economic, and biological systems is geographic.
  - A. Legal jurisdictions rarely, if ever, align with either the relevant biological systems or economic systems.
  - B. The honeybees' foraging geographic footprint is large enough that a hive's bees often forage in more than one legal jurisdiction.
    - 1. Especially since an ideal bee yard location includes ready access to water, and since water often serves as a boundary for legal jurisdictions, hives routinely are located adjacent to boundaries.
  - C. Honey participates in markets as a major monetary output of beekeeping.
    - 1. Honey is a by-product of the foraging area's botanical inventory.
      - a. RECALL: monetary transactions are very indirect exchanges.
      - b. The competitive advantages and the comparative advantages of different global localities both in terms of honey production (e.g., supply of botanical inventory) and in terms of honey consumption (e.g., demand of income levels).
        - i. Honey is exchanged in a mature array of interrelated global markets.
        - ii. China is a major source of tainted honey which confronts many legal barriers to market entry, but

- which is unlawfully mislabeled as to quality and origin.
2. NOTE: In the USA, beekeeping revenues generated from contractual payments for pollination services exceeded honey for the first time in 2007.
- VI. There is an expansive array of legal jurisdictions governing the commercial and the consumer sale of honey.
- A. Relative to the USA market, there are multiple interfaces with separate international legal systems.
    1. United Nations' Convention on the International Sale of Goods uses a product definition that comes from acceptance by the market of that offered item.
      - a. Commercial definitions are inherently more inclined towards *caveat emptor* that requires greater self protection including independent awareness of alternative formulations of the good.
    2. World Trade Organization treaty obligations to limit non-tariff barriers to entry to those supported by science as opposed to protectionism.
    3. European Union food regulations include Standards of Identity to precisely define traditional foods and prohibit alternative formulations without concurrent warning labels.
  - B. Relative to the USA market, there are federal, USA State, and local legal systems.
    1. The federal law is regulatory, with the FDA imposing very weak Country of Origin and product definitions and the Department of Agriculture opening and then tabling a Standard of Identity.
    2. The USA State of Florida has adopted, and 37 other States are entertaining adopting, Standards of Identity, for honey.
      - a. The Uniform Commercial Code's merchantability (i.e., passes without objection in the market) is implemented differentially for merchant buyers and for consumer buyers.