Ex Ante versus Ex Post Justifications for Intellectual Property1

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The traditional economic justification for intellectual property is well known. Ideas are public goods: they can be copied freely and used by anyone who is aware of them without depriving others of their use.[3] But ideas also take time and money to create. Because ideas are so easy to spread and so hard to control, only with difficulty may creators recoup their investment in creating the idea. As a result, absent intellectual property protection, most would prefer to copy rather than create ideas, and inefficiently few new ideas would be created. The limitations of this classic theory are also well known.[4] Nonetheless, it is the standard economic explanation for intellectual property in the United States.[5] I refer to this standard explanation as an "ex ante" justification for intellectual property, since under this conception, the goal of intellectual property is to influence behavior that occurs before the right comes into being.

Of late, commentators and courts have invoked new justifications for intellectual property protection. These arguments focus not on the incentive to create new ideas, but on what happens to those ideas after they have been developed. One

form of the new justifications argues that intellectual property protection is necessary to encourage the intellectual property owner to make some further investment in the improvement, maintenance, or commercialization of the product. Another strand argues that such protection is necessary to prevent a sort of "tragedy of the commons" in which the new idea will be overused. I refer to both these new arguments as "ex post" justifications for intellectual property, because they defend intellectual property rights not on the basis of the incentives they give to create new works but on the basis of the incentives the right gives its owner to manage works that have already been created.[6]

Distinguishing between ex ante and ex post justifications for intellectual property is more than just a philosophical exercise.[7] The different explanations entail very different consequences for the scope, duration, and enforcement of intellectual property rights. Under the classical incentive story, intellectual property is a necessary evil. We grant creators exclusive rights in their works—permitting them to charge a supracompetitive price[8]—to encourage them to make such works in the first place. This supracompetitive price in turn artificially depresses the consumption of the newly created work: some people who would be willing to pay more than the marginal cost of a copy of the idea will not be able to have access to it. Further, the exclusive control intellectual property rights grant to pioneers may stifle the invention of improvers. As a result, the incentive theory of intellectual property dictates that

intellectual property rights should be granted only where necessary.

The new ex post justifications, by contrast, endorse a greater and perhaps unlimited duration and scope of intellectual property rights. If the reason for granting intellectual property rights is to ensure that an invention, a movie, or a personal name is managed efficiently, there seems little reason to terminate that right after a period of years. Similarly, if intellectual property rights are designed to prevent overuse of an information resource, permitting significant unauthorized "fair use" by third parties would seem to undermine that goal. The ex post justifications seem to provide economic support for the legions of new intellectual property owners who claim a moral entitlement to capture all possible value from "their" information—a view that scholars have derided as "if value, then right."[9] Because the optimal intellectual property regime may look very different under an ex post approach than an ex ante approach, we should

critically evaluate the claimed ex post justifications for intellectual property.

Beginning such an evaluation is my task in this article. I divide ex post justifications into two basic groups: arguments that intellectual property rights give the owner efficient incentives to do further work improving or developing an existing creation, and arguments that intellectual property rights control overuse of information. I present and analyze the efficient management argument in Part I and the overuse argument in Part II. Neither argument strikes me as particularly persuasive. While the two arguments are somewhat different, both rely on a misleading appeal to a well-established but inapplicable principle, both depend on unproven (or sometimes disproven) empirical claims, and both are in the end strikingly anti-market. Finally, Part III suggests that both arguments reflect a fundamental misunderstanding of the economics of private ordering.

I. Incentives to Manage, Maintain, and Improve

A. Nature and Origin of the Argument

The first ex post theory for intellectual property justifies protection as a means of encouraging efficient use of existing works rather than the creation of new works. This approach has some history in patent law. Ed Kitch famously analogized patents to mining claims, suggesting that we should grant patents in

advance of an invention, making a patent a right to "prospect" a particular field for an invention.[10] In Kitch's view, just as privatizing land will encourage the owner to make efficient use of it, the patent system will do the same for inventions.[11] On this view, society as a whole should benefit from this equalization of private with social interests, as the patent owner will occupy the ideal position efficiently "to coordinate the search for technological and market enhancement of the patent's value . . . ."[12]

Kitch's prospect theory follows from two premises. The first is that creators will not invest in putting their invention to efficient use unless they obtain exclusive rights to the invention, for "fear that the fruits of the investment will produce unpatentable information appropriable by competitors."[13] Kitch's second premise—that the patent owner's monopoly right should result in efficient licensing to both end users and potential improvers—rests on the Coasian assumptions of perfect information, perfect rationality, and zero transaction costs.[14] Beyond Kitch, others have argued that patents are valuable not just to create ex ante incentives to innovate but also because they create property rights that can in turn be the subject of bargaining.[15]

The argument for intellectual property as a prospect right reappeared in dramatic form in the justifications offered for the Sonny Bono Copyright Term Extension Act, which added twenty more years to the already long copyright term.[16] Congress obviously

could not justify retroactive extension on the ground that it would encourage dead people to produce more works.[17] Instead, Congress, the copyright industries, and even some prominent academics argued that extended intellectual property rights were necessary to give existing copyright owners incentive to preserve films they had already made and to distribute books they had already created.[18] Once a work entered the public domain, they argued, it was an "orphan" and no one had any incentive to take care of it.[19] The Register of Copyrights went further, testifying in hearings on the CTEA that "lack of copyright protection . . . restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights. . . . [T]he copyright in the work represents a protection for the investment that is undertaken in the publication or production of the work."[20] And the D.C. Circuit offered as one justification for upholding the CTEA the idea that more works would be available if copyright terms were extended than if the works entered the public domain.[21] The argument here is that not just preservation but production and dissemination of copies require investment that will not occur absent exclusivity.[22] The concern here mirrors Kitch's worry that patentees will not efficiently use their inventions if they cannot appropriate all the returns from those inventions. It hearkens back to the English Crown's grant of patents on existing products, a practice abolished by the Statute of Monopolies in 1624.[23] In both cases, the optimal right would appear to be

perpetual: if only ownership gives efficient incentives to use, the right of stewardship of a film or an invention should never end.

B.Analysis of the Argument

The argument that a single company is better positioned than the market to make efficient use of an idea should strike us as jarringly counterintuitive in a market economy. Our normal supposition is that the invisible hand of the market will work by permitting different companies to compete with each other. It is competition, not the skill or incentives of any given firm, that drives the market to efficiency. Nothing about the fact that a work was once subject to copyright or patent protection should change our intuition here. It is hard to imagine Senators, lobbyists, and scholars arguing with a straight face that the government should grant one company the perpetual right to control the sale of all paper clips in the country, on the theory that otherwise no one will have an incentive to make and distribute paper clips.[24] We know from long experience that companies will make and distribute paper clips if they can sell them for more than it costs to supply them. The market for paper clips functions just fine without this type of government intervention. We can also predict with some confidence that if we did grant one company the exclusive right to make paper clips, the likely result would be an increase in the price and a decrease in the supply of paper clips. Yet supporters of the CTEA

confidently predict exactly the opposite in the case of copyrighted works from the 1920s.

Are old books different than paper clips? Not because they are copyrighted, for paper clips were once patented,[25] and the modern plastic variant was patented quite recently.[26] Not because paper clips are an economic market and James Joyce's Ulysses is not. Indeed, both paper clips and Ulysses face competition in an economic market, but neither faces perfect competition. The owner of an exclusive right to either would have some power to raise the price above marginal cost—power that results from the fact that neither product has a perfect substitute—but that power would be significantly constrained by the existence of other works that could serve some of the same purposes.[27] Is there some greater need to subsidize the making of more copies of Ulysses than the making of more paper clips? It is hard to see why; in both cases, once an intellectual property right expires, many companies can compete to make the good, and they will do so only so long as they can manufacture and distribute the work for less money than people will pay to buy it. This doubtless means that some inefficient manufacturers will stop selling Ulysses (or paper clips), but that shouldn't worry us. Indeed, if we believe in the market economy, it should delight us.

Empirical evidence strongly supports the intuition of the market, not the arguments of the lobbyists and ex post theorists. A comparison of copyrighted works from the 1920s with public

domain works from the 1910s and 1920s reveals that far more public domain works than copyrighted works are actually distributed to the public, and generally at a somewhat lower price. In percentage terms, twice as many books published in 1920 (and therefore in the public domain) are in print today than books published in 1930.[28] Similarly, films already in the public domain are more likely to be preserved than films that are the subject of copyright.[29] Not only is the argument that monopoly increases distribution counterintuitive, it is empirically incorrect.[30]

Further, even if we believed that books or paper clips needed a manager to be efficiently distributed, it does not follow that the creator is likely to be the most efficient manager. Creators are often terrible managers. They frequently misunderstand the significance of their own invention and the uses to which it can be put.[31] And many patent owners are "paper patentees" who never even built their invention; giving them control over distribution hardly seems a recipe for success. The problem is even worse for copyright and the right of publicity because of the length of the term of protection. Even if we thought creators would be good managers, there is no reason to believe that the grandchildren of creators will be. If we are to grant perpetual rights to a curator of a work to get efficient management, and not because of any sense that we must further encourage creativity, it seems far more logical to give such control to a professional versed in such management.[32] On this

view, the argument for copyright term extension justifies not additional rights given to the great-grandchildren of creators, but transfer of those rights to archivists, film preservationists, and the like. At the very least, the right should be auctioned, rather than passed on as part of an estate. Yet it seems unlikely that Congress would do any such thing, no doubt because preserving films and books is not the real reason for the CTEA.[33]

Why then does the argument seem to have resonance? The answer lies in a sort of intellectual free-riding by supporters of the CTEA. They have taken the logic of intellectual property law as a solution to the public goods problem and applied it to circumstances in which there is no public goods problem. We need to give creators of patented and copyrighted works power over price because the act of creation imposes a cost that imitators do not share. There is no similar cost imbalance when it comes to the distribution of a work that has already been created. Some companies may be more efficient manufacturers and distributors than others, but we need not worry that no one will distribute a work without a monopoly incentive. If people are willing to pay enough to justify printing copies of Ulysses, copies of Ulysses will be printed. And if people are not willing to pay even the marginal cost of printing, granting exclusive rights over Ulysses wouldn't solve the problem. Indeed, it will make it worse—people who aren't willing to pay marginal cost surely won't pay the supracompetitive price sole owners can command.

Insofar as the new ex post incentive theory suggests that control by a single firm is necessary to induce efficient distribution, therefore, it is theoretically flawed and empirically unsound. Nonetheless, it is worth considering a variant of the argument that has a more direct connection to the public goods story: the claim that only with exclusive rights will a creator have adequate incentives to improve on an existing work. This argument is more in line with Kitch's theory of patent "prospects" as incentives to search efficiently for improvements, just as mining prospects give incentives to search efficiently for ore. Kitch's argument justifies giving broad property rights to pioneer inventors on the expectation that they will best know how to improve their own inventions. William Landes and Richard Posner argue, for example, that we may need to grant copyright in ancient works that require large intellectual investment to edit or clean up for publication.[34]

This argument too strikes me as a perversion of the public goods story, though a less dramatic one than the "efficient distribution" claim. Kitch is surely correct that there is a public goods problem with improvements, just as there is with initial inventions. We must give some sort of supracompetitive incentive to engage in improvements. But the need to encourage improvements does not tell us who should receive the appropriate incentive.[35] The logical a priori answer must be that the creator of the improvement should receive an intellectual property right, just as the creator of the initial invention received such a

right. After all, while we speak of pioneers and improvers as different categories of inventors, in fact very few inventions are truly original. They all improve on existing technology in different ways.[36] Granting intellectual property rights to the actual inventors of the protected technology seems best consonant with encouraging those inventors. If we are to change the rules for improvement and to give an initial creator the right to control the search for subsequent inventions, it must be because we believe that the market will not efficiently conduct that search even with the incentives that patent law holds out to potential improvers.[37] Thus, this claim too is fundamentally anti-market: it trusts the government's choice of whom to grant control over an area of research and development rather than trusting the market to pick the best researcher.

The claim that an initial inventor is better suited to control research than the market is fundamentally an empirical one. As an empirical claim, it has been tested and found wanting.[38] As a theoretical claim it is no more promising.[39] It depends on a belief that merely because a company made an initial invention, it would be better informed than the host of companies who might otherwise compete to improve the invention. It also depends on the strict assumption of rational and efficient behavior by the firm coordinating the search.[40] A competitive market might be counted on to discipline irrational or inefficient actors, but if the government were to grant control to one company, that company would not face significant market

discipline.[41] This is not to say Kitch's theory is never valid; indeed, I have argued elsewhere that it may help to explain patent law in the pharmaceutical industry.[42] But prospect theory is most useful when conceived as a part of rather than in opposition to the classic public goods story. Prospect theory is needed when control over subsequent development is a necessary part of the incentive to produce the pioneering invention in the first place, as is arguably true with pharmaceuticals.[43] Prospect theory as a justification for displacing the market for invention, by contrast, is not a helpful justification for intellectual property.[44]

II. Preventing "Overgrazing" of Ideas

A. Nature and Origin of the Argument

In 1968, Garrett Hardin wrote his famous article in which he described the "tragedy of the commons."[45] Common property, he explained, is likely to be overused as a multitude of private parties make whatever use they like of the commons, without regard for the costs their use imposes on others. This overuse explains why common fishing stocks are depleted and why common pastures are overgrazed. Private property solves the tragedy of the commons, he argued, because it causes the owner of a parcel of land to internalize the costs as well as the benefits of use.

Scholars have increasingly adopted the idea of a "tragedy of the commons" as a justification for intellectual property. Some argue that certain intellectual property rights efficiently

discourage overuse of the information that is the subject of the right. Thus, Landes and Posner claim that most economists believe that "all valuable resources, including copyrightable works, should be owned, in order to create incentives for their efficient exploitation and to avoid overuse."[46] Gerard Magliocca argues that trademark dilution law provides a right to prevent overexploitation of a famous mark in a way that whittles away the mark's value.[47] And a number of scholars have justified the right of publicity as a means of preventing "overexposure" of celebrities by allowing them to control the circumstances of their own publicity.[48] The Federal Circuit has endorsed the latter theory, reasoning that "[w]ithout the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero. . . . [I]t would be overused, as each user will not consider the externality effect his use will have on others."[49] This "tragedy of the information commons" theory is not only distinct from, but indeed largely at odds with, the classic incentive story. On this explanation, intellectual property rights exist not to encourage the creation and dissemination of an idea, but to efficiently suppress the overuse of the idea. Like other ex post justifications, however, the tragedy of the information commons argues in favor of strong, perpetual exclusive rights.

B.Analysis of the Argument

The idea that granting exclusive rights over information will reduce the use and distribution of that information compared with an open market makes perfect sense.[50] It is consistent with everything we know about basic economics.[51] The question here is whether we should want to reduce the use and distribution of information when there is no public goods problem for intellectual property to solve.[52] Reducing the distribution of information is a good thing if, but only if, such information is in fact overproduced or overdistributed. In other words, this justification for intellectual property depends on proof that there is in fact a tragedy of the commons in information.

The idea of a tragedy of the information commons, however, is fundamentally flawed because it misunderstands the nature of information. A tragedy of the commons occurs when a finite natural resource is depleted by overuse. Information cannot be depleted, however; in economic terms, its consumption is nonrivalrous.[53] It simply cannot be "used up."[54] Indeed, copying information actually multiplies the available resources, not only by making a new physical copy but by spreading the idea and therefore permitting others to use and enjoy it.[55] The result is that rather than a tragedy, an information commons is a "comedy" in which everyone benefits.[56] The notion that information will be depleted by overuse simply ignores basic economics.

Courts and scholars who have applied the tragedy of the commons to the right of publicity have made a slightly different

argument: not that the resource itself will be depleted by "overuse," but that the value of the resource to its owner will decline with overuse. Indeed, they warn that if we do not grant to a single owner the right to control and limit uses, different people will use an idea until the marginal value of an additional use declines to zero.[57] This is true enough. The real puzzle is why anyone would think it was bad for society. Economists have a term for markets in which different providers keep selling goods with less and less value until the point is reached where it would cost more to produce a good than the public is willing to pay for it. We call such a market "perfectly competitive," and we have thought for at least three centuries (since Adam Smith) that it is a good thing. It is true that if we gave only one person control over a particular type of information, that person would restrict the flow of information, raise its price, and make more money then providers do in a competitive market. But society as a whole would be worse off, since buyers who could afford to pay more than what it costs to provide the information still wouldn't receive it. We might have to accept such a market distortion if we thought that the control we granted over price would encourage new creation, but there is no such justification for the right of publicity.

Like the argument discussed in Part I that we should grant control over distribution to encourage more distribution, the argument that we need to grant control over distribution to encourage less distribution is at base anti-market. We would

never say that we will get an efficient amount of information about Iraq only by granting to one company plenary power over information about Iraq. Nor would we think that granting one company control over the distribution of information about Enron would lead to efficient reporting of information about Enron—and that goes double if the company that got that control was Enron itself. Instead, we let the market decide how much information people want or need about any given subject. Logically this should be just as true when the subject is a person rather than a company.[58] Individual customers in information markets may get fed up with hearing about Monica Lewinsky or Lorena Bobbitt, but when they do they have a choice: stop paying attention.

But won't this market-based use of an idea or topic diminish its value to producers? It is true that permitting competition in the use of a piece of information will reduce its price relative to market exclusivity, and that if we gave an exclusive right to control that piece of information the controller would make more money than he would in a competitive market. But that supracompetitive return is not found money; it comes directly out of consumer surplus. And basic economics teaches us that what the owner gains from exclusive control is less than what consumers lose.[59] We may be willing to give such control to an intellectual property owner if we think we will get something—the creation of a new idea—in return. But without such an incentive justification, there is no economic reason to grant such exclusive control.[60]

Landes and Posner make a more sophisticated argument—that consumers desire uniformity in their cultural icons, and that permitting a work to enter the public domain will allow its reuse in many different contexts, thus perhaps reducing the value consumers get from the work.[61] The argument is that if we permit portrayals of Mickey Mouse as a drug dealer, or Barbie as a porn star, or Scarlett O'Hara abusing her slaves, these countercultural works will somehow infect the wholesome nature of the icon, ruining it for everyone else. In economic terms, Landes and Posner argue that the creation of unauthorized derivative works may have a demand-reducing effect on all works based on the original, overwhelming what they acknowledge is a positive economic effect from reducing price and expanding the potential market.

The demand-reducing effects argument may be true, though I am skeptical that it is a widespread enough phenomenon to serve as a justification for copyright or the right of publicity. First, it would seem to apply only to the subset of works that are so extremely well known that they have become cultural icons around which public expectations have crystallized. Thus, it is better as a justification for the right of publicity than for copyright, where Landes and Posner locate it. Second, there is substantial social value to allowing people to criticize and subvert cultural icons.[62] At a minimum, that social value needs to be weighed against any demand-reducing effect. Third, the problem seems self-limiting. If customers want the original Gone with the

Wind[63], not the rather more sordid story of The Wind Done Gone,[64] there would not be a large market for the latter, and we shouldn't expect such works to proliferate sufficiently to drive out demand for the former. If they do proliferate, however, presumably we should question our intuition that customers want the real thing and not the retelling.[65] A reduction in the value customers place on the original Gone with the Wind will likely occur only where there is a substantial increase in social value because a large group of people demand the retelling from the slave's perspective. Fourth, the prospect of competition to produce sequels may actually spur creators to write their own sequels more quickly and make them better.[66] Finally, even at its strongest, Landes and Posner's argument justifies controls only on unauthorized derivative works, not controls on reproduction of copyrighted works that have entered the public domain. It therefore cannot justify indefinite copyright terms.[67]

The idea that an individual should get a right to control the dissemination of information about herself is even more troubling because it is likely not only to restrain the total amount of information but to affect the type and quality of the information we receive. Individuals have an obvious incentive to encourage flattering portrayals and discourage unflattering ones. Giving them a right to preclude parodies of themselves, to prevent photographers from recording events, and to stop artists from depicting them or cartoonists from lampooning them, as recent cases have sometimes done and as ex post theory would seem to

endorse,[68] leads not to "efficient" management of information but to censorship.[69] As with the "efficient stewardship" argument, even if we believed that granting exclusive rights would yield efficient distribution of information, there is no reason to believe that the subject of the information is best positioned to manage that distribution. Indeed, there are good reasons to believe otherwise.[70]

None of this is to say that there is no legitimate role for trademark law, trademark dilution, or the right of publicity, any more than rejecting the efficient stewardship argument meant there was no need for copyright or patent law. The right of publicity has traditionally been justified in one of two ways: as a way of preventing false or misleading uses of an individual's name or likeness,[71] and as a way of preserving individual privacy.[72] Both are valid justifications for a right of publicity, though these traditional explanations justify a right substantially less sweeping than the right courts have currently constructed.[73] Similarly, trademark law has traditionally been justified as a means of preventing consumer confusion, and many of the recent expansions of that law can also be justified on that basis.[74] There is no sound theoretical basis, however, for preventing competition in the creation and distribution of information about a person or company simply to give that person or company control over the market.

III. Misunderstandings about Private Ordering

In one sense, the two theories I discuss in this paper have little in common. One argues that exclusive control will increase the incentive to distribute information, while the other argues that exclusive control will have precisely the opposite effect. The theories are united, however, in their underlying assumption that central control, not market choice, will produce the most efficient outcome.

This assumption in turn seems to be driven by a peculiar sort of myopia about private ordering that is unfortunately very much in vogue. On the one hand, supporters of ex post justifications for intellectual property are very quick to conclude that the market will not produce efficient outcomes. They embrace the public goods or tragedy of the commons theories of market failure without detailed inquiry into whether or not such market failures actually exist. In point of fact, there is no evidence the market cannot function effectively in either case. On the other hand, advocates of these ex post justifications have an abiding faith in the knowledge, rationality, and good faith of the individual companies in whom they would vest control over the distribution of information, and appear completely unconcerned that transaction costs might prevent them from making efficient use of the power we have vested in them.[75] Indeed, they seem to take it for granted that private companies wouldn't produce goods optimally unless they capture the full social value of those goods—that is, unless they can prevent free riding.[76] The ex post

justifications, in other words, seem to depend on private ordering without relying on market ordering.

This approach seems to me exactly backwards. Those who think that proper incentives require the elimination of free riding fundamentally misunderstand the lessons of economics.[77] The genius of the competitive market is precisely that while no individual producer has the incentive to fill market demand perfectly, collectively producers will meet that demand. This is not because they capture the full social surplus from their behavior, which by definition is never true in a competitive market. It is because they have enough incentive to produce what consumers demand.

Individual companies are neither omniscient, pure-hearted, nor necessarily rational. Indeed, at best they are out to line their pockets with as much money as they can find. No less a capitalist than Adam Smith warned us not to expect individual private companies to behave in the public interest.[78] The reason we can generally rely on private ordering to produce desirable outcomes is not because property has some inherently moral virtue that leads to efficient conduct,[79] nor because individual companies can eliminate free riding, but because individual companies are constrained by the discipline of a competitive market. If they are irrational, or poorly informed, or too greedy, other companies will outperform them and take their place. But if we remove these constraints—if we rely on the decisionmaking of one company rather than the aggregate decisions of the market as a

whole—we give up the very discipline that guarantees us the decisions it makes will be the right ones. The result will be a system of intellectual property that is not a measured, limited response to market failure, but a way of transferring unlimited, perpetual power over products that have at least some market power into private hands.[80] If we are to make such a radical move, we need a much sounder theoretical basis than ex post justifications have so far managed to offer.

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[3] For a general discussion of the public goods characteristics of intellectual property, see Robert P. Merges, Peter S. Menell, and Mark A. Lemley, Intellectual Property in the New Technological Age 10-18 (Aspen 3d ed 2003).

[4] The incentive theory of intellectual property has two basic limits. First, innovation will not end absent intellectual property protection, and not just because of subsidies and non-economic motives to create. See, for example, Michael Abramowicz, Perfecting Patent Prizes, 56 Vand L Rev 115 (2003) (analyzing reward system as substitute for intellectual property system); Yochai Benkler, Coase's Penguin, or, Linux and The Nature of the Firm, 112 Yale L J 369 (2002) (discussing the open-source software movement); Steven Shavell and Tanguy van Ypersele, Rewards Versus Intellectual Property Rights, 44 J L & Econ 525, 537-40 (2001) (same). Second, intellectual property rights can

discourage invention by limiting the ability of follow-on innovators to improve a patented work. See Suzanne Scotchmer, On the Shoulders of Giants: Cumulative Research and the Patent Law, 5 J Econ Perspectives 29, 32–35 (Winter 1991) (explaining that protection for first generation products "can lead to deficient incentives to develop second generation products," because second innovators "must transfer some of the innovation's revenue to the first innovator by licensing"). See also Mark A. Lemley, The Economics of Improvement in Intellectual Property Law, 75 Tex L Rev 989 (1997) (discussing the follow-on innovation problem and analyzing patent and copyright law's responses to it); Robert P. Merges and Richard R. Nelson, On the Complex Economics of Patent Scope, 90 Colum L Rev 839 (1990) (discussing the role of blocking patents in cases of cumulative innovation).

[5] For a representative judicial expression, see Mazer v Stein, 347 US 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . . .").

[6] Justin Hughes has argued to me that this distinction is exaggerated, since one substantial "ex ante" justification for intellectual property is to encourage distribution rather than mere creation. This is a fair point. I consider ex ante justifications to be those that go to the decision to invest initially in a work, even if that investment is made by an intermediary such as a publisher rather than by the author herself. By contrast, the ex post justifications I discuss here focus on management of the work after it has been created.

[7] Consider Stephen L. Carter, Does It Matter Whether Intellectual Property is Property?, 68 Chi-Kent L Rev 715 (1993).

[8] On the relationship between intellectual property and economic monopoly, see note 27.

[9] Rochelle Cooper Dreyfuss, Expressive Genericity: Trademarks as Language In the Pepsi Generation, 65 Notre Dame L Rev 397, 405 (1990). As Felix Cohen once explained: "The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected." Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum L Rev 809, 815 (1935). See also Wendy J. Gordon, Introduction, 108 Yale L J 1611, 1615–16 (1999). Because my goal in this paper is to consider ex post justifications on their supposed economic

merits, I leave for another day discussion of the non-economic argument that a creator deserves to collect the full social value of its creation.

[10] One goal of granting the prospect right in advance of the invention is to forestall competitors' wasteful races to invent. See Jennifer F. Reinganum, The Timing of Innovation: Research, Development, and Diffusion, in Richard Schmalensee and Robert D. Willig, eds, 1 Handbook of Industrial Organization 849 (North-Holland 1989) (discussing the costs of patent races); Mark F. Grady and Jay I. Alexander, Patent Law and Rent Dissipation, 78 Va L Rev 305 (1992); Matthew Erramouspe, Comment, Staking Patent Claims on the Human Blueprint: Rewards and Rent-Dissipating Races, 43 UCLA L Rev 961 (1996) ("Although a gold rush has its winners, many claims are ultimately unproductive, and thus many prospectors waste valuable resources and go unrewarded. Gold

rushes are also unproductive in a broader social sense. Follow-on prospectors bid resources away from higher valued uses outside the prospecting industry to lower valued uses inside it."). But the costs of patent races are substantially overstated. At a minimum, the costs of duplication of effort must be weighed against the likelihood that we get better results through competition than we would granting one person the right to invent in a particular field. See Robert P. Merges, Rent Control in the Patent District: Observations on the Grady-Alexander Thesis, 78 Va L Rev 359, 381 (1992). Indeed, if this were not true, there would be no reason for intellectual property at all; the government could efficiently encourage innovation by granting exclusive rights to work in a particular field. But doing so would merely push rent-seeking back to an earlier stage, causing parties to compete for the exclusive right to prospect. See

Donald G. McFetridge and Douglas A. Smith, Patents, Prospects, and Economic Surplus, 23 J L & Econ 197, 198 (1980). Further, races bring us innovation earlier than we would otherwise get it, and that acceleration creates social value. See John F. Duffy, A Minimum Optimal Patent Term, working paper (2003), online at http://ssrn.com/abstract=354282. For a powerful critique of rent-dissipation theories in the copyright context, see Michael Abramowicz, Copyright Redundancy 10-18, working paper (2003), online at http://www.gmu.edu/departments/law/faculty/papers/ (visited Sept 20, 2003).

[11] Edmund W. Kitch, The Nature and Function of the Patent System, 20 J L & Econ 265, 271–75 (1977) (making the analogy to land explicit).

[12] Id at 276.

[13] Id. Polk Wagner similarly argues that ex post control over ideas will give the owner more flexibility in building business models to make revenue from those ideas. R. Polk Wagner, Information Wants to be Free: Intellectual Property and the Mythologies of Control, 103 Colum L Rev 995 (2003). While he spends some time lauding the virtues of centralized control over market allocation, Wagner's argument ultimately falls back on ex ante incentive theory. He claims that because control can never be perfect, strengthening intellectual property protection would encourage more new invention that would in turn create positive spillovers to the public domain, outweighing the costs of enhanced protection. Wagner offers no empirical support for this supposition, and it seems likely we are far past the point where further strengthening of copyright protection produces more costs

than benefits. But unlike many advocates of ex post theories, Wagner at least acknowledges the tradeoffs involved.

[14] For a discussion of what happens when we relax these unrealistic assumptions, see Lemley, 75 Tex L Rev at 1048-72 (cited in note 4). On the importance of efficient licensing to the case for intellectual property protection, see Wendy J. Gordon, Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property, 17 U Dayton L Rev 853, 857 (1992) (explaining that intellectual property rights won't produce proper incentives without efficiently functioning markets).

[15] See Paul J. Heald, A Transaction Costs Theory of Patent Law, working paper (2003), online at http://ssrn.com/abstract=385841 (last modified March 5, 2003) (asserting that patent law serves to lower transaction costs relative to a trade secrecy regime); F. Scott Kieff, Property Rights and Property Rules for

Commercializing Inventions, 85 Minn L Rev 697 (2001) (arguing that patent law's grant of property rights facilitates efficient commercialization).

[16] 17 USC § 302 (providing copyright term of life plus 70 years, or, for anonymous works, pseudonymous works, and works for hire, the shorter of 95 years from publication or 120 years from creation).

[17] Some defenders of the statute tried a slightly less spurious version of this argument—that knowing that Congress had a habit of retroactively extending copyright terms would encourage future authors to believe that their term would be extended even further. See, for example, Orrin G. Hatch and Thomas R. Lee, "To Promote the Progress of Science": The Copyright Clause and Congress's Power to Extend Copyrights, 16 Harv J L & Tech 1, 20-21 (2002); Arthur R. Miller, Copyright Term Extension: Boon for

American Creators and the American Economy, 45 J Copyright Socy 319 (1997) (arguing in favor of the CTEA). Unfortunately, the Supreme Court seemed to credit this remarkable argument. See Eldred v Ashcroft, 123 S Ct 769, 784-86 (2003) ("Congress could rationally seek to 'promote . . . Progress' by . . . guarantee[ing] that authors would receive the benefit of any later legislative extension of the copyright term" either expressly in the statute or "as a matter of unbroken practice.") (first omission in original).

[18] Senator Orrin Hatch, for example, has repeatedly made this argument in print. See, for example, Hatch and Lee, 16 Harv J L & Tech at 3 (cited in note 17) (glossing the Copyright Clause's goal of "promoting the progress of science" to include "improvement in the dissemination and preservation of works already in existence"); Orrin G. Hatch, Toward a Principled

Approach to Copyright Legislation at the Turn of the Millennium, 59 U Pitt L Rev 719, 736-37 (1998) ("[T]he 20-year extension of copyright protection provides the important collateral benefit of creating incentives to preserve existing works."). Copyright industry groups made this argument to the Supreme Court in defense of the CTEA. See Brief of Amicus Curiae American Intellectual Property Law Association in Support of Respondent, Eldred v Ashcroft, No 01-618, *16-17 (Sup Ct filed Aug 5, 2002) available on Westlaw at 2002 WL 1822117; Brief of Amicus Curiae of the Nashville Songwriters Association International (NSAI) in Support of Respondent, Eldred v Ashcroft, No 01-618, *14 (Sup Ct filed Aug 2, 2002),available on Westlaw at 2002 WL 1808587 (citing the soundtrack to O Brother Where Art Thou as an example of copyright protection providing incentives to promote and develop older works). For an articulation in the academic

literature, see, for example, Robert Gorman and Jane C. Ginsburg, Copyright: Cases and Materials 347 (Foundation 6th ed 2002) (justifying copyright term extension as "fostering preservation and availability of crumbling old works");;;.

[19] Jessica Litman, Digital Copyright 77 (Prometheus 2001) (quoting Jack Valenti of the Motion Picture Association of America).

[20] Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on HR 989, HR 1248 and HR 1734 before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 104th Cong, 1st Sess 161, 171, 188 (1996) (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress).

[21] See Eldred v Reno, 239 F3d 372, 379 (DC Cir 2001), affd Eldred v Ashcroft, 537 US 186 (2003).

[22] See Hatch and Lee 16 Harv J L & Tech at 16—17 (cited in note 17). Landes and Posner make a similar argument, speculating that the reason so few classical composers are recorded notwithstanding the existence of copyright protection for the new recordings is not because there is insufficient demand, but because copyright is insufficiently broad to capture the spillover effects that a successful recording of a musical composition by an undiscovered artist would have on the value of other works by that artist. William M. Landes and Richard A. Posner, Indefinitely Renewable Copyright, 70 U Chi L Rev 471, 492-93 (2003). They then reason that those who "rediscover" a public domain work should be able to reinvest it with intellectual property protection. Id at 493–94. The logical conclusion of their argument (though they do not draw it) is that copyrights should not only extend perpetually, but should be

broader than a single work to permit recapture of these externalities.

[23] UK Statute of Monopolies, Statutes at Large, 21 James 1, ch 3, § 6 (1624). See also Robert Patrick Merges and John Fitzgerald Duffy, Patent Law and Policy: Cases and Materials 5 (LexisNexis 3d ed 2002) ("With the accession of James I in England in the early seventeenth century, patents became less an incentive for new arts and more a royal favor to be dispensed to well-placed courtiers."); Peter Meinhardt, Inventions Patents and Monopoly 30-32 (Stevens & Sons (London) 1946) (describing the history of British patent law since the 12th century).

[24] Yochai Benkler makes a similar point quite eloquently with respect to tradeable property rights in wireless spectrum in his article, Some Economics of Wireless Communications, 16 Harv J L &

Tech 25, 25-27 (2002) (imagining an analogous property right in "trade with India.").

[25] Indeed, there were many different claimed inventors and even substantial litigation over ownership of the exclusive rights to the paper clip. See, for example, Cushman Denison Manufacturing Co v Denny, 147 F 734, 734-35 (SD NY 1906).

[26] US Patent No 5,179,765 (issued Jan 19, 1993) (granting patent to a "Plastic paper clip").

[27] The vast majority of intellectual property rights do not confer monopoly power in a relevant economic market. See Herbert Hovenkamp, et al, IP and Antitrust § 4.2. But intellectual property rights must confer some power to raise prices above the marginal cost of production if they are to serve their acknowledged primary purpose of encouraging creation. Indeed, the "incentive to distribute" argument made in support of the CTEA

also depends on giving copyright owners some measure of power over price; without that power, there could be no incentive. Intellectual property most commonly enables price increases by permitting some differentiation among products, thus rendering any competing goods imperfect substitutes that do not limit price to marginal cost. On the effects of product differentiation in copyright law, see Christopher Yoo, Copyright and Product Differentiation, __ NYU L Rev __ (forthcoming 2004).

[28] Brief of Amicus Curiae The Internet Archive in Support of Petitoners, Eldred v Ashcroft, No 01-618, *9 n 10 (Sup Ct filed May 2002), online at http://cyber.law.harvard.edu/openlaw/eldredvashcroft/cert/archive-amicus.pdf (visited Sept 21, 2003) (noting that 307 books out of 8,422 published in 1920, or 3.6 percent, are currently available

for sale, compared to 180 books out of 13,470 published, or 1.3 percent, in 1930).

[29] See Deirdre K. Mulligan and Jason M. Schultz, Neglecting the National Memory: How Copyright Term Extensions Compromise the Development of Digital Archives, 4 J App Prac & Process 451, 472 (2002) ("According to the Internet Movie Database, 36,386 motion picture titles were released from 1927 to 1946. Of those, only 2,480 are currently available on videotape; only 871 are available on DVD; only 114 are available on Pay-Per-View/TV; and only thirteen are available in theaters."). By contrast, just one archive—the Prelinger Archive—has over 27,000 public domain films and has put more than 1,100 online. See Rick Prelinger, Prelinger Archives, online at http://www.prelinger.com/ (visited).

[30] This should not come as a big surprise. Intellectual property scholars have long been saying that intellectual

property must be limited, not expanded, to encourage distribution. See, for example, Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 Mich L Rev 1197, 1206-07 (1996) (discussing the deadweight social loss that results from monopoly power over distribution of existing works). See also Jane C. Ginsburg, Copyright and Control Over New Technologies of Dissemination, 101 Colum L Rev 1613, 1613 (2001).

[31] See, for example, Richard R. Nelson and Sidney G. Winter, An Evolutionary Theory of Economic Change 130 (Belknap 1982); AnnaLee Saxenian, Regional Advantage: Culture and Competition in Silicon Valley and Route 128 (Harvard 1994); Nathan Rosenberg, Factors Affecting the Diffusion of Technology, 10 Explorations in Econ Hist 3, 10–11 (1972); Carol Haber, Electronic Breakthroughs: Big Picture Eludes Many, Electronic News 46 (Jun. 13, 1994) (detailing numerous examples of fundamental inventions that the

inventor himself did not fully appreciate). Among the inventors who did not recognize the potential of their ideas are Marconi, who expected the radio to be used only for point-to-point communications rather than mass broadcast; the inventors of the transistor, who anticipated its use in hearing aids; the inventors of the VCR, who anticipated it would be used only by television stations, id; and the inventor of the personal computer, who could not come up with significant uses for it. Steven Johnson, Interface Culture 148 (Basic 1997).

[32] In a transaction-cost-free world, creators who are inefficient managers would simply sell the rights to their creations to professional managers. In the real world, however, we cannot simply assume such transactions will occur. See Lemley, 75 Tex L Rev at 1048-72 (cited in note 4) (discussing impediments to perfect bargaining between innovators and improvers).

[33] See Dennis S. Karjala, Judicial Review of Copyright Term Extension Legislation, 36 Loyola LA L Rev 199, 234–35 (2002) (referring to the film preservation argument as a "smokescreen," and noting that Congress rejected proposals that might actually enhance film preservation). It is also worth noting that professional curators were leading the fight against term extension, which would seem odd if term extension would indeed result in better stewardship.

[34] Landes and Posner, 70 U Chi L Rev at 491 (cited in note 22). The fate of the Dead Sea Scrolls shows some of the dangers of exclusive rights in restoration; the single group given exclusive control over the Dead Sea Scrolls has spent decades working without releasing much information to the public. See generally David Nimmer, Copyright in the Dead Sea Scrolls: Authorship and

Originality, 38 Houston L Rev 1 (2001). Arguably, competition would have produced more and better information more quickly.

[35] Or indeed whether anyone should. Wendy Gordon has argued that "not all public goods are the proper province of copyright" any more than they are necessary grounds for public subsidy. Wendy J. Gordon, Authors, Publishers, and Public Goods: Trading Gold for Dross, 36 Loyola LA L Rev 159, 164-65 (2002).

[36] See, for example, Emerson v Davies, 8 F Cas 615 (3 Story 768), 618–19 (CCD Mass 1845) (No 4,436) ("[I]n literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. . . . Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest

originals would be found to have gathered much from the abundant stories of current knowledge and classical studies in their days. . . .").

[37] The classic argument cited in favor of monopolists coordinating innovation is Joseph A. Schumpeter, Capitalism, Socialism, and Democracy 100–02 (Harper 2d ed 1947). For an application to patent law, see Kieff, 85 Minn L Rev 697 (2001); Kitch, 20 J L & Econ 265 (1977) (cited in note 11) (arguing that the monopoly features of the patent system encourage efficient allocation of rights after an invention); Suzanne Scotchmer, Protecting early innovators: should second-generation products be patentable?, 27 RAND J Econ 322 (1996) (proposing to weight incentives towards pioneers at the expense of improvers). The theory is that monopolists will have the resources to devote to research and development, and the fact that they can control all

possible research in a field ex ante will encourage them to invent efficiently.

[38] For discussions of particular industries that disprove the central control thesis, see, for example, Mark A. Lemley and Lawrence Lessig, The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era, 48 UCLA L Rev 925, 960-62 (2001) (the Internet); Arti Kaur Rai, Evolving Scientific Norms and Intellectual Property Rights: A Reply to Kieff, 95 Nw U L Rev 707 (2001) (biotechnology); Howard A. Shelanski, Competition and Innovation in US Telecomm., 2000 U Chi Legal F 85 (telecommunications). In the specific context of intellectual property, the canonical argument from both theory and empirical evidence is Merges and Nelson, 90 Colum L Rev 839 (cited in note 4). Consider also Kenneth W. Dam, The Economic Underpinnings of Patent Law, 23 J Legal Stud 247, 252 (1994)

(noting that in the computer industry, for example, companies coordinate improvements by broad cross-licensing because of "the pace of research and development and the market interdependencies between inventions").

[39] See Kenneth J. Arrow, Economic Welfare and the Allocation of Resources for Invention, in National Bureau of Economic Research, The Rate and Direction of Inventive Activity: Economic and Social Factors 609, 620 (Princeton 1962) (concluding that "preinvention monopoly power acts as a strong disincentive to further innovation"). See also Morton I. Kamien and Nancy L. Schwartz, Market Structure and Innovation (Cambridge 1982) (discussing various theories of the effects of economic structures on the rate and form of innovation); F.M. Scherer and David Ross, Industrial Market Structure and Economic Performance 660 (Houghton Mifflin 3d ed 1990) (criticizing Schumpeter's "less

cautious" followers for advocating monopoly to promote innovation).

[40] For a variety of reasons, society cannot rely on pioneers to license efficiently to improvers the right to compete with them. See Rebecca S. Eisenberg, Patents and the Progress of Science: Exclusive Rights and Experimental Use, 56 U Chi L Rev 1017, 1072-73 (1989) ("The risk that the parties will be unable to agree on terms for a license is greatest when subsequent researchers want to use prior inventions to make further progress in the same field in competition with the patent holder, especially if the research threatens to render the patented invention technologically obsolete."). See also Lemley, 75 Tex L Rev at 1048-72 (cited in note 4) (offering a variety of reasons why granting exclusive control to pioneers is inefficient); Robert P. Merges, Intellectual Property Rights and Bargaining Breakdown:

The Case of Blocking Patents, 62 Tenn L Rev 75, 78-91 (1994) (focusing on bargaining failures between pioneers and radical improvers); Merges and Nelson, 90 Colum L Rev at 862–66 (cited in note 4) (discussing the effect of improvement patents on prospects for bargaining).

[41] To the extent that intellectual property gives creators some power over price, market discipline will be imperfect. See note 27. Further, the intellectual property rights that do confer monopoly power are the very ones most likely to be the subject of a significant search for improvements.

[42] See Dan L. Burk and Mark Lemley, Policy Levers in Patent Law, working paper 188–210 (2003) (forthcoming in 89 Va L Rev).

[43] See, for example, Suzanne Scotchmer, The Role, Value, and Limits of S&T Data and Information in the Public Domain for Innovation and the Economy 7 (working paper 2002, on file with

author). It is conceivable that there are other industries besides pharmaceuticals that would flourish under a property rights model, but since Kitch's approach is not the law it is impossible to know for sure.

[44] Thus, it seems to me that Scott Kieff is wrong to suggest that a hope to encourage greater commercialization itself can justify intellectual property rights. See generally Kieff, 85 Minn L Rev 697 (cited in note 15); F. Scott Kieff, Facilitating Scientific Research: Intellectual Property Rights and the Norms of Science—A Response to Rai and Eisenberg, 95 Nw U L Rev 691 (2001). Kieff's elaboration of Kitch's prospect idea takes an exceptional case—the circumstance in which commercialization requires years of very large but routine invention-specific investments even after the invention is made—and uses it to justify patent rights across all industries.

[45] Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

[46] Landes and Posner, 70 U Chi L Rev at 475 (cited in note 22).

[47] See Gerard N. Magliocca, One and Inseparable: Dilution and Infringement in Trademark Law, 85 Minn L Rev 949, 975–82 (2001). See also Robert C. Denicola, Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols, 62 NC L Rev 603, 637–38 (1984) (comparing market oversaturation with trademarks to "inefficient exploitation in the traditional example of the public common" and arguing that "if use by some does diminish the value of the mark to others, a mechanism to manage its exploitation may be desirable").

[48] See, for example, Mark F. Grady, A Positive Economic Theory of the Right of Publicity, 1 UCLA Ent L Rev 97, 103-04 (1994) ("The legal right of publicity can be understood as a fishing

license designed to avoid races that would use up reputations too quickly."); Landes and Posner, 70 U Chi L Rev at 485 (cited in note 22) ("The motive is not to encourage greater investment in becoming a celebrity (the incremental encouragement would doubtless be minimal), but to prevent the premature exhaustion of the commercial value of the celebrity's name or likeness.") McCarthy refers to this as the "economic justification" for the right of publicity. See J. Thomas McCarthy, 1 The Rights of Publicity and Privacy § 2:7 at 2-19 to 2-22 (Thomson West 2d ed 5th rel 2003).

[49] Matthews v Wozencraft, 15 F3d 432, 437-38 (Fed Cir 1994).

[50] See Arrow, Economic Welfare at 617 (cited in note 39) ("[I]nventive activity is supported by using the invention to create property rights; precisely to the extent that it is successful, there is an underutilitzation of the information.");

Harold Smith Reeves, Property in Cyberspace, 63 U Chi L Rev 761, 785 (1996) ("With respect to information resources, then, the existence of any legal boundaries will decrease the potential availability of informational resources on the Internet.").

[51] It is also, I should note, fundamentally inconsistent with the theory described in Part I that exclusive control will encourage additional distribution.

[52] Unlike patents and copyrights, trademark law and the right of publicity do not exist to encourage the creation of new brand names, personal names, or likenesses. There is no affirmative social interest in encouraging their proliferation, and, in any event, the fixed costs invested in creating a new name are so minimal that it is hard to imagine that creating one would require incentives. See Ralph S. Brown, Jr., Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L J

1165 (1948) (noting that companies do not need incentives to come up with new trademarks); Mark A. Lemley, The Modern Lanham Act and the Death of Common Sense, 108 Yale L J 1687 (1999) (arguing that trademark law is increasingly focused on trademarks as property, at the expense of the public good).

[53] See Merges , Menell, and Lemley, Intellectual Property in the New Technological Age at 15–16 (cited in note 3).

[54] See, for example, James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, 66 L & Contemp Probs 33, 41 (Winter/Spring 2003) ("[A] gene sequence, an MP3 file, or an image may be used by multiple parties; my use does not interfere with yours."); Carol M. Rose, Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age, 66 L & Contemp Probs 89, 90 (2003) ("In Intellectual Space, [the tragedy of the commons argument] falls

away, since there is no physical resource to be ruined by overuse.").

[55] See Reeves, 63 U Chi L Rev at 785 (cited in note 50).

[56] See David Bollier, Silent Theft: The Private Plunder of Our Common Wealth 37 (Routledge 2002) (collecting references to the "comedy" or "cornucopia" or "inverse" commons that occurs with non-depletable information); Benjamin G. Damstedt, Note, Limiting Locke: A Natural Law Justification for the Fair Use Doctrine, 112 Yale L J 1179, 1182-83 (2003) (suggesting that it is waste by underuse rather than depletion by overuse with which intellectual property theorists should be concerned).

[57] See notes 46–48 and accompanying text (discussing this argument). Stacey Dogan points out, however, that celebrities may have incentives to optimize their uses regardless of the rights

we grant them to control the uses of others. Stacey L Dogan, An Exclusive Right to Evoke, 44 BC L Rev 291, 318 (2003).

[58] Indeed, Richard Posner has offered such an argument as a reason for eschewing a strong right of privacy. Richard A. Posner, Privacy, Secrecy, and Reputation, 28 Buffalo L Rev 1 (1979). See also Mark A. Lemley, Private Property, 52 Stan L Rev 1545, 1553-54 (2000) (discussing cases in which privacy and the good of society are in conflict, including criminal and driving records, investigative reporting, and biography).

[59] This is the familiar deadweight loss associated with monopoly pricing.

[60] See Glynn S. Lunney, Jr., Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution, working paper 54-55 (2003) ("[E]stablishing private rights over information inevitably entails some societal loss. Under the traditional

economic approach, this tension demands that we provide private rights in information only where and to the extent that private rights are essential to ensure the information's creation.").

[61] See Landes and Posner, 70 U Chi L Rev at 486-88 (cited in note 22). See also Justin Hughes, "Recoding" Intellectual Property and Overlooked Audience Interests, 77 Tex L Rev 923 (1999) (discussing the interests of listeners in having "cultural objects with stable meanings").

[62] See generally Dreyfuss, 65 Notre Dame L Rev 397 (discussing the value of trademarks in everyday language and pop culture); Jessica Litman, Breakfast With Batman: The Public Interest in the Advertising Age, 108 Yale L J 1717, 1731-35 (1999) (arguing that the expansion of trade symbol law beyond needed to prevent consumer confusion arrogates to the creator the entire value of cultural icons that should be deemed collectively owned).

[63]

[64] Alice Randall, The Wind Done Gone (Houghton Mifflin 2001) (retelling the story of Gone With the Wind from a slave's perspective).

[65] Where a work is truly iconic, even repeated debasement is unlikely to affect public perceptions. Justin Hughes observes that the Statue of Liberty, the Mona Lisa, Mount Rushmore, and the Eiffel Tower retain their iconic status despite repeated uses and abuses in many different contexts. So too do the works of Shakespeare and the characters Frankenstein (and his monster), Dracula, Scrooge, Uncle Sam, and King Arthur. Hughes, 77 Tex L Rev at 961 (cited in note 61).

[66] For example, Cervantes was moved to write the second part of Don Quixote more quickly because another author published an unauthorized sequel to the first part, and the book is arguably

better for it. See William Byron, Cervantes: A Biography 498 (Doubleday 1978). I am indebted to Larry Lessig for this example.

[67] David McGowan has pointed out to me that if the copyright owner's function is to prevent the development of derivatives, we may need to give them control over the original work to give them enough incentive to police against unauthorized derivatives. This is true, though it is still worth noting that granting such control imposes a pure social cost by raising the price of the unaltered work—the argument would be that that cost, and the lost social value of the suppressed derivatives themselves, are more than offset by avoiding the psychic cost to Gone with the Wind fans of having a retelling published that they find offensive. That balance is ultimately an empirical question, though I am skeptical.

[68] See, for example, White v Samsung Electronics America, Inc, 971 F2d 1395 (9th Cir 1992) (parody of Vanna White as a robot); Comedy III Productions, Inc v Gary Saderup, Inc, 25 Cal 4th 387, 106 Cal Rptr 2d 126, 21 P3d 797 (2001) (T-shirts containing sketch of the Three Stooges); Winter v DC Comics, 99 Cal App 4th 458, 121 Cal Rptr 2d 431 (2002) (musicians depicted in comic books as half-worm, half-human villains). The Winter decision was reversed on appeal, 134 Cal Rptr 2d 881, 69 P3d 473 (2003), so courts have not been uniformly receptive to these claims.

[69] On the First Amendment problems raised by the strong form of the right of publicity, see Mark A. Lemley and Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L J 147 (1998); Diane Leenheer Zimmerman, Fitting Publicity Rights Into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!, 10 DePaul-LCA J Art &

Ent L 283 (2000); Jessica Villardi, Note, ETW Corp. v. Jireh Publishing, Inc.: Why the First Amendment Should Trump the Right of Publicity When Art Imitates Life, 34 Conn L Rev 293 (2001).

[70] See Zimmerman 10 DePaul-LCA J Art & Ent L at 310 (cited in note 69):

> [T]he informational and symbolic values associated with celebrity are not scarce resources, and it is not at all clear that they should be treated as if they were. As a society, we are committed to promoting speech, and, logically, to ensuring that anyone who desires it will have reasonable access to the content that makes speaking socially and personally worthwhile.

[71] While Landes and Posner seem to accept the idea that the right of publicity may be overused, they acknowledge the force of the economic point in text. The examples they fall back on to

show the harm from overuse are in fact examples that result from confusion or the wrongful creation of tarnishing associations, not from overuse. Landes and Posner, 70 U Chi L Rev at 487-88 (discussing, among other examples, Mickey Mouse portrayed as a Casanova, as catmeat, as an animal rights advocate, or the henpecked husband of Minnie).

[72] Alternatively, the right of publicity might be justified by a moral sense that people should be able to control what others say about them. See Roberta Rosenthal Kwall, Fame, 73 Ind L J 1, 35-37 (1997). I don't share this view personally, but because it is not an economic justification for the right of publicity I do not discuss it further in this article.

[73] Dogan suggests limiting the right of publicity to cases that involve confusion as to endorsement, which is certainly where the

right finds its strongest economic justification. Dogan, 44 BC L Rev at 320 (cited in note 57).

[74] See Lemley, 108 Yale L J 1687 (cited in note 52) (arguing that dilution law and protection for product configurations are both justifiable, but only on the limited basis that they prevent consumer deception).

[75] Consider Lawrence Lessig, The Architecture of Innovation, 51 Duke L J 1783, 1784–85 (2002) (arguing that the value of property is taken for granted to such an extent that people think only in terms of who will control a resource, not whether it will be controlled at all).

[76] This is an unwarranted extension of Harold Demsetz's argument that property rights limit the creation of uncompensated externalities. Harold Demsetz, Toward a Theory of Property

Rights, 57 Am Econ Rev Papers & Proc 347 (1967). Demsetz did not argue that all externalities must be internalized.

[77] See Wendy J. Gordon, On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 Va L Rev 149, 167 (1992) ("A culture could not exist if all free riding were prohibited within it.").

[78] Adam Smith, 1 An Inquiry into the Nature and Causes of the Wealth of the Nations 130 (Methuen 6th ed 1950) (Edwin Cannan ed) ("People of the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.").

[79] On the vices of assuming that a particular property regime has moral significance, see Anupam Chander, The New, New Property, 81 Tex L Rev 715, 722 (2003); Carol M. Rose, Property

as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory, 2 Yale J L & Human 37, 38-39 (1990).

[80] Indeed, one ironic effect of the ex post justifications is that they actually give the government much more power to interfere in markets than do the more limited ex ante justifications.