Ex Ante versus Ex Post Justifications for Intellectual Property

Mark A. Lemley†

The standard justification for intellectual property is ex ante: the goal of intellectual property is to influence behavior that occurs before the right comes into being. It is the prospect of the intellectual property right that spurs creative incentives. Of late, new justifications for intellectual property protection have begun to appear in the literature and in court decisions. These arguments focus not on the incentive to create new ideas, but on what happens to those ideas after they have been developed. I refer to 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 they give to manage or control works that have already been created.

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. 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 arguments. In the final analysis, both arguments reflect a fundamental misunderstanding of the economics of private ordering.

INTRODUCTION

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. 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.

† Elizabeth Josslyn Boalt Professor of Law, Boalt Hall, University of California at Berkeley; of counsel, Keker & Van Nest LLP. Thanks are due to Michael Abramowicz; Stacey Dogan; Rose Hagan; Paul Heald; Justin Hughes; Larry Lessig; Glynn Lunney; David McGowan; Kimberly Moore; David Mowery; Nathan Musick; Suzanne Scotchmer; participants at conferences at Stanford Law School, the University of Chicago Law School, and the National Bureau of Economic Research for comments on an earlier draft; and to Bhanu Sadasivan for research assistance.

The limitations of this classic theory are also well known. Nonetheless, it is the standard economic explanation for intellectual property in the United States. 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 of 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.


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.”).

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.
Distinguishing between ex ante and ex post justifications for intellectual property is more than just a philosophical exercise. The different explanations entail very different consequences for the scope, duration, and enforcement of intellectual property rights. Under the classic incentive story, intellectual property is a necessary evil. We grant creators exclusive rights in their works—permitting them to charge a supracompetitive price—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 access 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.” Because the optimal intellectual property regime may look very different under an ex post approach than under 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 Essay. I divide ex post justifications into two basic groups: arguments that intellectual property rights give the owner efficient incentives to do further work.

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6 On the relationship between intellectual property and economic monopoly, see note 25.
7 Rochelle Cooper Dreyfuss, Expressive Generictiy: 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 Essay is to consider ex post justifications on their supposed economic merits, I leave for another day discussion of the noneconomic argument that a creator deserves to collect the full social value of the creation.
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. In Kitch's view, just as privatizing land will encourage the owner


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 by 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 an intellectual property regime 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: A Comment, 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 3 (working paper, presented at the Thirteenth Annual Meeting of the American Law and Economics Association, Sept 2003), online at http://ssrn.com/abstract=354282 (visited Oct 29, 2003). For a powerful critique of rent-dissipation theories in the copyright context, see Michael Abramowicz, Copyright Redundancy 10–18 (Law and Economics Working Paper Series, George Mason University School of Law, 2003), online at http://www.gmu.edu/departments/law/faculty/papers/
to make efficient use of it, the patent system will do the same for inventions." On this view, society as a whole should benefit from this equation of private with social interests, as the patent owner will occupy the ideal position to efficiently "coordinate the search for technological and market enhancement of the patent's value."

Kitch's prospect theory depends upon 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." 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 Coasean assumptions of perfect information, perfect rationality, and zero transaction costs. 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.

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 (CTEA), which added twenty more years to the already long copyright term. Congress obviously could not justify retroactive extension on the ground that it would en-
courage dead people to produce more works." Instead, Congress, the copyright industries, and even some prominent academics argued that extended intellectual property rights were necessary to give existing copyright owners an incentive to preserve films they had already made and to distribute books they had already created. Once a work entered the public domain, they argued, it was an "orphan" and no one had any incentive to take care of it. The Register of Copyrights went further, testifying in hearings on the CTEA that "lack of copyright protection . . . restraints dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights," and noted that "the copyright in the work represents a protection for the investment that is undertaken in the publication or production of the work." 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. The argument here is that not just preservation

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15 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). See also Arthur R. Miller, Copyright Term Extension: Boon for American Creators and the American Economy, 45 J Copyright Socy 319 (1997). Unfortunately, the Supreme Court seemed to credit this remarkable argument. See Eldred v Ashcroft, 537 US 186, 215 (2003) (stating that "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).

16 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 15) (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 (S Ct filed Aug 5, 2002) (available on Westlaw at 2002 WL 1822117); Brief of Amici Curiae of the Nashville Songwriters Association International (NSAI) in Support of Respondent, Eldred v Ashcroft, No 01-618, *14 (S Ct filed Aug 2, 2002) (available on Westlaw at 2002 WL 1808587) (citing the soundtrack to the movie 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 Robert A. 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").

17 See 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 50, 55 (1996) (statement of Jack Valenti, President and CEO, Motion Picture Association of America).

18 Id at 161, 171, 188 (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress).

19 Eldred v Reno, 239 F3d 372, 379 (DC Cir 2001), affd as Eldred v Ashcroft, 537 US 186
but production and dissemination of copies require investment that will not occur absent exclusivity. 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. 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. 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

(2003).

See Hatch and Lee, 16 Harv J L & Tech at 16–17 (cited in note 15). 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.

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 1946) (describing the history of British patent law since the twelfth century).

Yochai Benkler makes a similar point quite eloquently with respect to tradable 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”).
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 from paper clips? Not because they are copyrighted, for paper clips were once patented, and the modern plastic variant was patented quite recently. 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 products that could serve some of the same purposes. 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 it 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 should not 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

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23 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).


25 The vast majority of intellectual property rights do not confer monopoly power in a relevant economic market. See Herbert Hovenkamp, Mark D. Janis, and Mark A. Lemley, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* § 4.2 (Aspen 2003). 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 S. Yoo, *Copyright and Product Differentiation*, 79 NYU L. Rev (forthcoming 2004).
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.\footnote{Brief of Amici Curiae The Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation in Support of Petitioners, \textit{Eldred v Ashcroft}, No 01-618, *9 n 10 (S Ct filed May 2002) (available on Westlaw at 2002 WL 1059714) (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).} Similarly, films already in the public domain are more likely to be preserved than films that are the subject of copyright.\footnote{See Deirdre K. Mulligan and Jason M. Schultz, \textit{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 Feb 7, 2004).} Not only is the argument that monopoly increases distribution counterintuitive, it is empirically incorrect.\footnote{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, \textit{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, \textit{Copyright and Control over New Technologies of Dissemination}, 101 Colum L Rev 1613 (2001).}

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.\footnote{For a general discussion of this phenomenon, see Carol Haber, \textit{Electronic Breakthroughs: Big Picture Eludes Many}, 40 Electronic News 2018 (June 13, 1994) (detailing numerous examples of fundamental inventions that the inventor himself did not fully appreciate). See also Nathan Rosenberg, \textit{Factors Affecting the Diffusion of Technology}, 10 Explorations in Econ Hist 3, 10-11 (1972) (noting the historical lag between the discovery of a new technology and the realization of its ultimate value or use); AnnaLee Saxenian, \textit{Regional Advantage: Culture and Competition in Silicon Valley and Route 128} 161-62 (Harvard 1994) (describing how the regional culture of Route 128 stifled innovation and caused it to fall behind Silicon Valley); Richard R. Nelson and Sidney G. Winter, \textit{An Evolutionary Theory of Economic Change} 126-31 (Belknap 1982). Some examples of inventors who did not recognize the potential of their ideas include 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; and the inventors of the VCR, who anticipated that it would be used only by television stations. See Haber. 40 Electronic News at 2018. Even more remarkably, the inventor of the personal computer could not articulate a more significant use for it than filing electronic versions of cooking recipes. See Steven Johnson, \textit{Interface Culture} 148 (Basic 1997).} 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. 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."

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* would not solve the problem. Indeed, it will make it worse—people who are not willing to pay marginal cost surely will not 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, 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 min-

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30 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 2) (discussing impediments to perfect bargaining between innovators and improvers).

31 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 "smoke-screen," 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.
ing 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.32

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.33 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.34 Granting intellectual property rights to the actual inventors of the protected technology seems most 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.35 Thus, this claim too is fundamentally anti-market: it trusts

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32 Landes and Posner, 70 U Chi L Rev at 490 (cited in note 20). 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.33 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).34 See, for example, Emerson v Davies, 8 F Cas 615 (3 Story 768), 618-19 (CCD Mass 1845):

[[In 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.

35 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 at 707-12 (cited in note 13) (discussing incentives for creators to commercialize inventions); Suzanne Scotchmer, Protecting Early Innovators: Should
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. As a theoretical claim it is no more promising. 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. 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. 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. 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. Prospect theory as a justification for displacing the market for invention, by contrast, is not a helpful justification for intellectual property.

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.” 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 Pos-

39 To the extent that intellectual property gives creators some power over price, market discipline will be imperfect. See note 25. 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.


41 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: Intellectual Property—When Is It the Best Incentive Mechanism for S&T Data and Information? 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.

42 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 13); 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.

43 Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).
ner 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." 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. 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. 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." 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 suppress efficiently 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. It is consistent with everything we

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45 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 (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").
46 See, for example, Landes and Posner, 70 U Chi L Rev at 485 (cited in note 20) ("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."); Mark F. Grady, A Positive Economic Theory of the Right of Publicity, 1 UCLA Enter 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."). 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 2003).
48 See Arrow, Economic Welfare at 617 (cited in note 37) ("[I]nventive activity is supported by using the invention to create property rights; precisely to the extent that it is successful, there is an underutilization of the information."); Harold S. 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.").
know about basic economics." The question here is why we should want to reduce the use and distribution of information when there is no public goods problem for intellectual property to solve. 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. It simply cannot be "used up." 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. The result is that rather than a tragedy, an information commons is a "comedy" in which everyone benefits. 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

49 It is also fundamentally inconsistent with the theory described in Part I that exclusive control will encourage additional distribution.

50 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). See also 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).


52 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 (Winter/Spring 2003) ("In Intellectual Space, [the tragedy of the commons argument] falls away, since there is no physical resource to be ruined by overuse.").

53 See Reeves, 63 U Chi L Rev at 785 (cited in note 48).

54 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 nondepletable information); Benjamin G. Damstredt, 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).
and limit uses, different people will use an idea until the marginal value of an additional use declines to zero. 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 than 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 would not 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 trademarks or 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 by granting to only 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 were 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. 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.

55 See notes 44–46 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. See Stacey L. Dogan, An Exclusive Right to Evoke, 44 BC L Rev 291, 318 (2003). See also Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal L Rev 125, 203–04 (1993); Rochelle Cooper Dreyfuss, We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity, 20 Colum-VLA J L & Arts 123, 144–45 (1996).

56 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 Buff 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).
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. 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.

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. 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. At a minimum, that social value needs to

57 This is the familiar deadweight loss associated with monopoly pricing.
58 See Glynn S. Lunney, Jr., Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution 29 (working paper 2003) (on file with author) ("[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.").
60 See generally Jessica Litman, Breakfast with Batman: The Public Interest in the Advertis-
be weighed against any demand-reducing effect. Third, the problem seems self-limiting. If customers want the original *Gone with the Wind*,\(^{61}\) not the rather more sordid story of *The Wind Done Gone*,\(^{62}\) there would not be a large market for the latter, and we should not 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.\(^{63}\) 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.\(^{64}\) 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.

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 also 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


\(^{62}\) Alice Randall, *The Wind Done Gone* (Houghton Mifflin 2001) (retelling the story of *Gone with the Wind* from a slave’s perspective).

\(^{63}\) 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 59).

\(^{64}\) 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.

\(^{65}\) 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.
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, leads not to “efficient” management of information but to censorship. 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.

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, and as a way of preserving individual privacy. 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.

66 See, for example, White v Samsung Electronics America, Inc, 971 F2d 1395 (9th Cir 1992) (allowing Vanna White to proceed on a right of publicity claim against the defendant for its parody of her as a robot); Comedy III Productions, Inc v Gary Saderup, Inc, 25 Cal 4th 387, 21 P3d 797 (2001) (involving T-shirts containing a sketch of the Three Stooges); Winter v DC Comics, 99 Cal App 4th 458, 121 Cal Rptr 2d 431 (2002) (involving depictions of musicians in comic books as half-worm, half-human villains). The Winter decision was reversed on appeal, 30 Cal 4th 881, 69 P3d 473 (2003), so courts have not been uniformly receptive to these claims.


68 See Zimmerman, 10 DePaul-LCA J Art & Enter L at 310 (cited in note 67):

[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.

69 While Landes and Posner seem to accept the idea that overuse may be a justification for the right of publicity, they acknowledge the force of the economic point made above. 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 (cited in note 20) (discussing, among other examples, Mickey Mouse portrayed as a Casanova, as catmeat, as an animal rights advocate, or the henpecked husband of Minnie).

70 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 R. Kwall, Fame, 73 Ind L J 1, 36–37 (1997). I do not 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 Essay.

71 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
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. 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 Essay 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 that 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 would vest in them. Indeed, they seem to take it for granted that private companies would not produce goods optimally unless they were to capture the full social value of those goods—that is, unless they could prevent free riding. The ex post justifications, in other words, seem to depend on private ordering without relying on market ordering.

BC L Rev at 320 (cited in note 55).

See Lemley, 108 Yale L J 1687 (cited in note 50) (arguing that dilution law and protection for product configurations are both justifiable, but only on the limited basis that they prevent consumer deception).

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).

This is an unwarranted extension of Harold Demsetz's argument that property rights limit the creation of uncompensated externalities. See Harold Demsetz, Toward a Theory of Property Rights, 57 Am Econ Rev 347 (1967). Demsetz did not argue that all externalities must be internalized.
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. 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. 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, 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. 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.

75 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.”).

76 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.”).


78 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.