



**INTELLECTUAL PROPERTY, MORAL
RIGHTS, AND SOCIAL UTILITY:
A CLASSICALLY LIBERAL
EXPLORATION OF THE NORMATIVE
AND PRACTICAL IMPLICATIONS OF
INTELLECTUAL PROPERTY RIGHTS**

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INTRODUCTION

Consider a world where ideas belong to no one, where patents and copyrights do not exist, and trademarks are only important for preventing consumer confusion, rather than preserving a company's goodwill. When one examines current trends, it is difficult to envision an economy that does not hold intellectual property dear to its heart.¹ And yet, the massive growth in the acquisition and exercise of intellectual property rights in many industries is a recent phenomenon.² This is certainly true for patents, which, in combination with the growth of high-tech industries, have spurred a sort of "arms race," where the winner is the group with the most patents to lord over the rest.³

The protection of intellectual property creates interesting problems for scholars and lawmakers who, despite their devotion to the preservation of physical property rights, nonetheless feel that intel-

¹Note, for instance, the rise of non-practicing entities (NPEs), sometimes called "patent trolls," which profit by purchasing and licensing patents for use in various industries. See, e.g., Timo Fischer & Joachim Henkel, *Patent Trolls on Markets for Technology - An Empirical Analysis of Trolls' Patent Acquisitions* (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523102.

²See Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 310-13 (2010).

³*Id.*

lectual property rights represent a set of concerns and principles that can be quite distinct from those evoked by ownership of a plot of land or a bag of gold.⁴ Scholars within the classical liberal tradition have made arguments for and against intellectual property rights from ideological and pragmatic perspectives. Whichever side of the argument one takes, the modern world presents a number of new issues. The products that people buy and sell today can best be described as copies—innumerable, identical, and easily reproduced manifestations of some original idea. Consumption, in the historical sense of taking control of and exhausting some physical resource—thereby making it unavailable for further or concurrent use—accounts for a diminishing portion of consumers' purchases.

Some classical liberal arguments against intellectual property rights are founded upon a reasoned outrage against the association between the word "property" and the rights and monopolies given to creators of "ideal objects"—inventions, books, musical works, etc.⁵ Such arguments assert that the monopolies granted by intellectual property rights are anathema to a classical liberal tradition.⁶

I do not argue that intellectual property rights are a morally justified and benign legal phenomenon, nor do I argue that current intellectual protection regimes are tools of destructive governmental intervention. Rather, I hope to argue that, when tailored appropriately, intellectual property rights may offer a more effective means of protecting individual interests and promoting innovation than a voluntary contractual regime that provides no *sui generis* rights at all. Context is critical; intellectual property law has found its way into almost all modern economic activity, and in at least some cases, this may be an unwarranted and unjustifiable intrusion.

⁴ See, e.g., MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY (2008), available at <http://www.dklevine.com/general/intellectual/againstfinal.htm>.

⁵ See *id.*

⁶ *Id.*

Although many argue intellectual property rights represent an endeavor entirely bereft of moral justification or consequential benefits, I believe the complete eradication of such rights would be as poor a policy as their overenforcement, and that a voluntary contract regime arising in the vacuum left by intellectual property would present its own set of problems. Finally, the concept of intellectual property, under an approach informed by Israel Kirzner's theory of created value, allows creators to assign values to their creations and ensures that all transactions involving those creations are voluntary.

In Part I, I will describe the justifications for and arguments against intellectual property protection from theoretical, philosophical, and moral perspectives. In Part II, I will discuss the notion of scarcity, and the ways in which scarcity—and the resultant conflicts over use of scarce resources—interacts with intellectual property. In Part III, I will apply current scholarship and understanding to an argument that intellectual property regimes, though flawed, are powerful and necessary tools for providing valuable information to economic actors, regardless of whether one prefers centralized or decentralized decisionmaking as a paradigm.

I. OVERVIEW: MORAL AND CONSEQUENTIALIST PERSPECTIVES

In framing the arguments for and against intellectual property rights, one may appeal to the moral foundations for such rights, or to the practical consequences of recognizing or denying those rights. For the purposes of this paper, I define moral arguments as normative examinations of the justifications for intellectual property rights, and consequentialist arguments as explorations of theoretical or empirically observed effects of intellectual property protection on how people behave and the consequent benefits or disadvantages of that behavioral modification. With that in mind, a utilitarian perspective is for my purposes a consequentialist one, even though a successful utilitarian analysis of intellectual property rights would also lead to a moral categorization of the same.

A. MORAL ARGUMENTS

A classically liberal moral understanding of intellectual property rights⁷ treats the subject matter on its own merit, either as a derivation from a traditional view of property rights, or more basically as a set of rights springing naturally from fundamental tenets of classical liberal thought.

I begin with a superficial issue, the matter of labeling: does the term “intellectual property” make any sort of sense? Some who argue that there are parallels to be drawn between intellectual property and the historic, physical conception of property appeal to Locke’s labor theory of property.⁸ William Fisher gives a succinct description of how Locke’s theory may be applied by pro-intellectual property writers.⁹ Fisher argues that even though the basic components of an idea—facts and concepts—may not, themselves, be appropriable as property; applying labor and effort to rearrange those facts and concepts into some useful form results in a natural, Lockean property right in the (perhaps intangible) end product.¹⁰ Adding nuance to this argument, Fisher discusses Robert Nozick’s analysis of how a proper reading of Locke leads to limitations on the scope of any proposed intellectual property regime.¹¹ Locke’s limiting provision is this: after one mixes his labor with resources that were once part of a common pool, property rights in the new mixture can only be legitimately claimed if “there is enough and as good left in common for others” once the mixture of labor and previously common resources is set apart as private

⁷ Despite the controversy over whether or not intellectual property is in fact property, the term itself is generally unambiguous.

⁸ William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168 (Stephen R. Munzer ed., 2001), available at <http://cyber.law.harvard.edu/people/tfisher/iptheory.pdf>.

⁹ *Id.*

¹⁰ *Id.* at 4.

¹¹ *Id.*

property.¹² Nozick's treatment of this "proviso" leads him to approve the notion of intellectual property as a concept, assuming that certain limitations are placed on the property rights conferred:

An inventor's patent does not deprive others of an object which would not exist if not for the inventor. Yet patents would have this effect on others who independently invent the object. Therefore, these independent inventors, upon whom the burden of proving independent discovery may rest, should not be excluded from utilizing their own invention as they wish (including selling it to others).¹³

Insofar as patent law does not currently recognize an "independent invention" defense against infringement liability,¹⁴ it violates Nozick's interpretation of Locke's proviso. However, this is a problem of implementation rather than justification, and there has been scholarship advocating the creation of an independent-invention defense within existing patent law.¹⁵

There are objections to using Lockean theory as ideological support for the protection of intangible intellectual creations as a legitimate subset of property in general.¹⁶ Stephen Kinsella argues that a proper understanding of Locke recognizes occupancy, rather than the application of labor, as the wellspring of property rights.¹⁷

¹² JOHN LOCKE, *Second Treatise* § 27, in TWO TREATISES OF GOVERNMENT 306 (Peter Laslett, ed., 2d ed. 1967) (1689). See also Fisher, *supra* note 8, at 4.

¹³ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 181–82 (1974).

¹⁴ For a discussion of the economic benefits of an independent invention defense, see Stephen M. Maurer & Suzanne Scotchmer, *The Independent Invention Defense in Intellectual Property*, 69 *ECONOMICA* 535 (2002).

¹⁵ See, e.g., Samson Vermont, *Independent Invention as a Defense to Patent Infringement*, 105 *MICH. L. REV.* 475 (2006).

¹⁶ See, e.g., Stephan Kinsella, *Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and "Rearranging,"* MISES ECONOMICS BLOG (Sept. 29, 2010), <http://blog.mises.org/14045/locke-on-ip-mises-rothbard-and-rand-on-creation-production-and-rearranging/>.

¹⁷ *Id.* Kinsella draws upon Hegel and others to make this claim.

For Kinsella, the act of creation (as in an idea or invention) generates additional *value*, not additional property rights.¹⁸ Tom Palmer questions whether the basic foundation of Locke's justification of private property supports the notion of intellectual property.¹⁹ Palmer's understanding of Locke places self-ownership at the very heart of all claims to private property rights—as a starting point, Palmer states that “[o]wnership in ourselves is the foundation for ownership of alienable objects because they become assimilated to our bodies.”²⁰ This becomes a key point in his argument, discussed later in this section, that intellectual property illegitimately restricts the freedom of other actors (those not possessing intellectual property rights) to use resources which are rightfully theirs.²¹ As Justin Hughes states, we are left with a binary proposition: “[I]ntellectual property is either labor or personality, *or* it is theft.”²² “Personality,” in this context, refers to arguments arising from civil rights—notably, the rights to expression and privacy.²³ I will address the various ideological justifications, including the labor and personality theories next.

1. *Categorizing the Moral Foundations of Intellectual Property*

Palmer describes intellectual property rights as “rights in ideal objects, which are distinguished from the material substrata in which they are instantiated.”²⁴ The statutory fixation of copyright law highlights this definition by referring to all possible instantia-

¹⁸ *Id.*

¹⁹ Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J. L. & PUB. POL'Y 817, 831–35 (1990).

²⁰ *Id.* at 833.

²¹ *Id.*

²² Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 289 (1988).

²³ *Id.*

²⁴ Palmer, *supra* note 19, at 818.

tions of copyrighted works, including “originals,” as “copies.”²⁵ This comports with a view of the protected item as an ideal object, existing in the real world only as a reflection in “material substrata.” Palmer separates moral arguments that attempt to justify intellectual property rights into four categories: labor-based moral desert theories, personality theories, utilitarian reasoning, and “piggyback” theories, each assigning moral force to intellectual property rights based on antecedent justifications for “conventional” property rights which, by analogy, apply in a parallel fashion to intellectual property.²⁶ Palmer de-emphasizes his treatment of utilitarian justifications from the outset, leaving his primary analysis of those arguments to another paper.²⁷ I will, similarly, remove discussion of utilitarian justifications to later sections,²⁸ and focus here on Palmer’s treatment of labor-based, personality, and “piggyback” theories.

The labor-based moral-desert theory is founded on Lockean reasoning. Palmer’s discussion of this theory of intellectual property justification introduces what he perceives as a fundamental problem: though Lockean justifications of intellectual property rights are founded upon self-ownership, they “restrict others’ uses of their own bodies in conjunction with resources to which they have full moral and legal rights.”²⁹ Essentially, the creation of intellectual property rights allows a rights holder to prevent others from taking resources from the common fund—to which they have as valid a claim as the rights holder—and transforming or configuring those resources in the manner that the rights holder has pioneered. This objection takes for granted the idea that there is no validity to the

²⁵ See 17 U.S.C. § 101 (2012) (“The term ‘copies’ includes the material object . . . in which the work is first fixed.”).

²⁶ Palmer, *supra* note 19, at 819–20.

²⁷ *Id.*

²⁸ See *infra* Part III.

²⁹ Palmer, *supra* note 19, at 827.

notion of intellectual property rights as morally justified entitlements. Palmer does not consider the possibility that appropriation of an ideal good by someone other than its creator is a harm, the prevention of which is worth the restrictions it places on others. Hughes argues that “[i]ntellectual property is often the propertization of what we call ‘talent.’”³⁰ If this is true, then perhaps there is a case that the restrictions placed on others against transforming resources in a certain manner is an unavoidable consequence of ensuring *every* individual’s right to “own” his talent (as opposed to the labor he has invested). Richard Epstein, responding to John Rawl’s critique of the notion that individuals may “own” their talents, notes, “it seems indefensible to say, as a general matter, that across the board individuals’ successes and failures depend in large measure on circumstances beyond their control.”³¹ As Professor Epstein asks: if an individual is not entitled to the fruits of his genes, upbringing, and labor, who is?³²

However, I think Palmer is correct in that intellectual property rights represent a far greater curtailment of liberty than property rights in individual, tangible objects.³³ The difference lies in the fact that property rights in an object simply deny others the use of that specific object, while intellectual property rights abridge others’ freedom to transform raw materials *into* that object. Perhaps the best answer to Palmer’s argument is an appeal to utilitarian arguments,³⁴ but there are perhaps a few moral responses. For example, to the extent that intellectual property rights prevent non-owners from transforming resources they possess into protected configura-

³⁰ Hughes, *supra* note 22, at 291.

³¹ Richard A. Epstein, Liberty Versus Property? Cracks in the Foundations of Copyright Law, 48 SAN DIEGO L. REV. 1, 6 (2005).

³² *See id.* at 7.

³³ Palmer, *supra* note 19, at 831.

³⁴ Whether utilitarian arguments can, in the light of empirical data, be supported is a question I leave for Part II.B, *infra*.

tions, Israel Kirzner has an absolutist answer: “until a resource has been discovered, *it has not*, in the sense relevant to the rights of access and common use, *existed at all*.”³⁵ If the particular configuration of materials embodied by an invention did not exist prior to the invention, then it is not an abridgement of liberty to forbid others to create that configuration. In this view, property owners are as free as they were *before* a patent issues as *after*, because the inventive use did not exist prior to the patent. This view is compatible with American patent law, which, as it grants recognized inventors a right to exclude all others, is as absolute a bar as Kirzner’s statement supports.

In conjunction with Hughes’ characterization of intellectual property as commoditized “talent,” Kirzner’s answer appears to create a “resource” that does not differ from tangible property, at least in terms of determining ownership. At the moment of inception, the new “resource” is as unique as any gemstone or tree. If this is to constitute a response to Palmer’s argument, we must ask whether one’s freedom to act upon common resources is impermissibly curtailed. In other words, if the use forbidden by an intellectual property right was not conceived prior to the innovator’s conception, has the liberty of non-inventors been reduced? To answer this, we must determine whether the patented invention was within the set of conceivable uses prior to the patent’s issuance. This raises issues of genuine novelty versus mere non-obviousness: was the use truly inconceivable before the inventor did his work, or was it simply a clever combination the inventor found before others? If we find a use was inconceivable prior to the inventor’s efforts, then there is no reduction in the liberties of other parties after the innovator has obtained a patent, and we have the beginnings of a moral

³⁵ Israel M. Kirzner, *Entrepreneurship, Entitlement, and Economic Justice*, in *Perception, OPPORTUNITY, AND PROFIT: STUDIES IN THE THEORY OF ENTREPRENEURSHIP* 200, 212 (1979).

counterargument to Palmer's self-ownership argument. If we cannot discount the possibility that others, perhaps several others, would have discovered the use, then intellectual property advocates must appeal to someone other than Locke, because if such a use exists prior to its first discovery, it is not rightly a product of labor.

The personality and "piggyback" theories that Palmer discusses focus, respectively, on the interaction between property rights and personal development, and on the idea that intellectual property rights may be expressed as a selective repackaging of the bundle of rights that are possessed in tangible property.³⁶ The idea of occupancy—rather than labor—as the wellspring of property rights takes center stage in this discussion, and copyright law (and therefore the treatment of creative work, the value of which is not necessarily tied to a physical manifestation, as is the case with technological innovations) becomes the object of study. Simply stated, Palmer rejects these theories on the bases of subjectivity and impracticality. The personality value of a work is as much a result of audience participation as the creator's labor, and the piggyback theory requires a more substantial definition and division of the "bundle" of rights in property than can sensibly be divined.³⁷

B. CONSEQUENTIALIST ARGUMENTS

Consequentialist arguments about intellectual property regimes focus on the consequences of any proposed regime (or any proposed modification or destruction of an existing regime), and those consequences can be described simply as costs or benefits. This basic paradigm of comparing imposed costs to accrued benefits leads directly into the territory of economic analysis and the examination of how markets react to intellectual property laws. Such an

³⁶ Palmer, *supra* note 19, at 835, 851–55.

³⁷ *Id.* at 843–49, 853–54.

analysis may lead to rather ambiguous results—for example, William Landes and Richard Posner come to the conclusion that:

The economic case for abolishing intellectual property rights has not been made. But neither economic theory nor empirical evidence enables a ringing endorsement of any complete body of intellectual property law other than trademark law, which protects “property” in only an attenuated sense. We do, however, find, pretty solid economic support for . . . a degree of copyright and patent protection as well, but possibly a lesser degree than we have.³⁸

It is important to note this less-than-wholehearted endorsement of intellectual property rights does not fail to find merit in the institution of intellectual property; rather, the critique is one of implementation. This seems to parallel the implementation problems that arise when we consider Nozick’s analysis of the Lockean proviso.³⁹ As economic discussions of intellectual property law tend to arise within the analysis of patent law specifically, much of this section will focus on scholarly analysis of patents rather than trademarks or copyrights.

Palmer’s treatment of consequentialist arguments raises at least one critical issue: consequentialist arguments for or against intellectual property are, by necessity, fact-based.⁴⁰ Thus, a general utilitarian argument must devise a theoretical framework from which one may *determine* whether the costs of a given protection regime outweigh the benefits or vice versa. Subsequently, it is necessary to apply that framework to a given specific circumstance; consequential arguments may, for example, lead to an approval of patents in

³⁸ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 9 (2003).

³⁹ See *supra* note 13 and accompanying text.

⁴⁰ Palmer, *supra* note 19, at 850.

the electronics industry while forbidding them in pharmaceuticals.⁴¹

Tim Wu presents one framework for analysis. Wu approaches the issue of intellectual property rights from a different perspective than the traditional incentive versus monopoly debate by examining, from a Hayekian foundation, the effects that intellectual property rights regimes have on economic actors' decisionmaking.⁴² He argues the proper approach to the problem is to examine the costs of increased centralization of economic decisionmaking incurred under a strong intellectual property rights regime.⁴³ This emphasis on how intellectual property affects the ability of economic actors to make decisions appears to be a more enduring touchstone of analysis than simple incentive-burden comparisons, as Wu's model begins with human organizational and decisionmaking structures, which vary less with technological change than comparative costs and benefits. Although Marxists might disagree, in the context of classical liberalism, it is reasonable to presuppose a relatively static and universal quality to human mental and social processes.⁴⁴

Professor Wu focuses his analysis on "the effects of rights assignments on the decision architectures of affected industries."⁴⁵ His analysis begins with a treatment of centralized and decentralized decisionmaking, describing two paradigmatic decision architectures: hierarchies and polyarchies.⁴⁶ Hierarchies represent a centralized decisionmaking scheme where all actors serially approve a project before it goes forward. Polyarchies represent a decentralized

⁴¹ This is simply a hypothetical example; for a more thorough analysis of a utilitarian-type argument with regard to pharmaceuticals, see *infra* Part III.D.

⁴² Tim Wu, Essay, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123 (2006).

⁴³ *Id.*

⁴⁴ See, e.g., Will Wilkinson, *Capitalism and Human Nature*, CATO POLICY REPORT, Jan. 2005, at 1.

⁴⁵ *Id.* at 124.

⁴⁶ *Id.*

scheme where any single actor can approve of a project with or without other actors' concurrence.⁴⁷ In other words, hierarchies require knowledge of a given project to pass to *all* relevant parties for that project to continue, whereas polyarchies emphasize ease of forward progress by eliminating the "inform all actors" requirement.

Edmund Kitch has also bypassed the traditional formulation of intellectual property (or at least patent protection) as a pure reward theory that simply holds that the costs of patents are outweighed by the benefit of incentivizing innovation.⁴⁸ Professor Kitch claims that the patent system serves to "increase the output from resources used for technological innovation."⁴⁹ Insofar as this understanding of the patent system grants it an enhancing effect on resource allocation and utilization beyond what would occur in a patent-free world, it can be categorized as a utilitarian justification for intellectual property rights. It might be helpful, at this point, to briefly consider how a utilitarian justification of intellectual property law as a "top-down" legal regime might interact with the classical liberal paradigm of a "bottom-up" spontaneous order.⁵⁰ Although a Hayekian might reject, at first, the imposition of intellectual property rules justified by a utilitarian framework, Hayek himself gives intellectual property a means by which to make a passable utilitarian case for itself: "[T]he test of any system of rules is whether it maximizes an anonymous individual's chance of achieving his unknown purposes."⁵¹ Returning to Justin Hughes, one can construct

⁴⁷ *Id.* at 128–29.

⁴⁸ See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977).

⁴⁹ *Id.* at 265.

⁵⁰ See Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261, 263 n.10 (1989).

⁵¹ Hayek's *Utilitarianism and Liberty*, in LITERATURE OF LIBERTY (Winter 1982), available at <http://oll.libertyfund.org/title/1305/100497> (summarizing the nature and substance of Hayek's view of utilitarianism).

an argument that intellectual property, ideologically conceived of as avoiding social stratification by providing merit-based access to rights, does in fact maximize a given *anonymous* individual's ability to maximize his or her own prospects.⁵² However, as Hughes himself notes, intellectual property rights are frequently obtained after significant financial investment, meaning it is possible that such rights tilt opportunities in favor of moneyed actors, rather than the anonymous everyman.⁵³

Professor Kitch develops a "prospect" theory of patents, as opposed to a "reward" theory,⁵⁴ to make the case for a patent system over a patent-free regime that instead relies on trade-secret laws.⁵⁵ He identifies six key advantages of a patent regime: (1) efficiency of investment, (2) incentives to maximize innovation value, (3) lower transaction costs for obtaining complementary assets from other firms, (4) signaling functions, (5) lower costs to control outside access to innovations, and (6) the imposition of a uniform structure on how returns are made on innovations across a broad range of industry types.⁵⁶ Assuming these are real advantages, I believe they compose a robust defense of intellectual property rights within a Hayekian framework.

Much of the compatibility of Professor Kitch's prospect theory with classical liberalism arises from the manner in which patents can act as a means to communicate non-protected, economically useful information and create a structure to protect and convey sensitive local information, such as a company's internal data. I will address each of Professor Kitch's "advantages" in turn.

⁵² See Hughes, *supra* note 22, at 291.

⁵³ *Id.*

⁵⁴ Reward theories examine the patent system as the means by which inventors turn a profit on their investment in their inventions. Professor Kitch's prospect theory examines how the patent system allows parties to "stake a claim" in *advance* of investing in a potential innovation. Kitch, *supra* note 48, at 266-68.

⁵⁵ Kitch, *supra* note 48, at 275.

⁵⁶ Kitch, *supra* note 48, at 275-80.

The first advantage Kitch notes is that patents increase efficiency in investments.⁵⁷ This is a communicative advantage—Kitch argues that the exclusivity offered by patents provides patentees a means to maximize the efficiency with which technological innovation may be enhanced by investment, research, and development.⁵⁸ This should, however, be examined in light of Professor Wu’s model. Patent-based exclusivity favors a hierarchical decisionmaking mode—executives, who are aware of (or pay others to be aware of) patents, make decisions about which innovations to pursue, and such top-down decisions control the activities of subordinate actors. Professor Wu argues that hierarchies are more likely to reject good ideas along with bad ones.⁵⁹ When good ideas are plentiful, efficiency is best achieved by a focus on rejecting bad ideas, rather than actively seeking good ones. In this type of situation, hierarchical decisionmaking can outperform polyarchical, decentralized decisionmaking.⁶⁰ This leads to the conclusion that Kitch’s first advantage is a real one only in scenarios where the “information environment” provides a steady stream of good ideas and where wasted investments are a greater evil than missed opportunities.⁶¹ This sort of stable information environment tends to arise around existing and successful inventions, where ideas for improvements abound—the priority here is to protect the invention from bad ideas, not necessarily to hunt for improvements. Thus, patent protection can play a positive role where evolutionary innovations are concerned. However, where there is an opportunity for revolutionary and disruptive innovation, it becomes more important to collect all the good ideas, even if some bad ones get mixed in. The information environment in these cases is more chaotic, and patent-

⁵⁷ *Id.*

⁵⁸ See Kitch, *supra* note 48, at 276.

⁵⁹ Wu, *supra* note 42, at 130–31.

⁶⁰ *Id.*

⁶¹ See *id.*

based exclusivity, by favoring a hierarchical decisionmaking model, hampers actors' ability to find and try all the good ideas.

Professor Kitch's second advantage—the incentivization of maximal investment in a patent—can be used to reframe Palmer's discussion of the loss of liberty suffered by non-patentees barred from practicing the patent using their own resources.⁶² What Palmer describes as a moral problem—restrictions placed on the liberty of non-patentees—Kitch interprets as a utilitarian advantage in the form of decreased fear for inventors.

The third and fourth advantages of patents in a prospect theory framework are, respectively, the lowering of communication and collaboration costs among patent-holding actors and other entities, and the creation of an infrastructure that allows firms to signal each other.⁶³ These advantages arise from the use of patents as signals, facilitating the communication of information about what sorts of patents exist and increasing efficiency in conveying or licensing specific patents amongst firms. The importance of patents as a signaling mechanism for economic actors has been discussed by several scholars.⁶⁴ Clarisa Long has argued that patents, rather than sequestering information, publicize it.⁶⁵ For the purposes of this note, the significance of patents-as-signals lies in how they incentivize and enhance efficient knowledge and information flows between independent economic actors.

Returning to Hayek's distilled test for a given system of rules,⁶⁶ I think a legal regime that encourages the transfer of innovation-related information between parties who are able, separately or collaboratively, to effectively exploit that information qualifies as maximizing a given actor's ability to accomplish his goals—assuming

⁶² See *supra* Part I.A.

⁶³ See Kitch, *supra* note 48, at 278.

⁶⁴ See, e.g., Clarisa Long, *Patent Signals*, 69 U. CHI. L. REV. 625 (2002).

⁶⁵ *Id.*

⁶⁶ See *supra* note 51 and accompanying text.

those goals are rational and directed towards increasing efficiency, value, or wealth. Palmer has a counterargument for this: he looks to the period *prior* to the issuance of a patent, and he argues that collaboration and information flow may be reduced at this stage due to a desire to beat one's competitors to the patent office.⁶⁷ It seems to me, however, that once a patent issues, the communication advantages conferred by the existence of those patents may negate and overwhelm the disincentive to communicate prior to patent issuance.

Professor Kitch's fifth advantage is that patents significantly reduce the cost of protecting one's innovations from appropriation by others. In a trade-secret regime, assuming the holder of a trade secret wishes to restrict access, the holder must invest funds in secrecy which could have been re-invested in the trade secret itself. "Resources devoted to keeping the technology secret are saved, just as legal protection of property rights generally reduces the need for investment in self-help."⁶⁸ Palmer treats trade secrets as a legitimate extension of traditional property in line with his reading of Locke; as such, he prefers them as a method for actors to retain exclusivity in their innovations.⁶⁹ The problem is that Palmer's view does not give actors much recourse when their trade secrets are illegally appropriated—what Palmer describes as a "contractual nexus"⁷⁰ is weak protection compared to that offered by intellectual property law. Under Palmer's trade-secret approach, a secret, once divulged, would give inventors a cause of action against the individual who, in violation of some contractual obligation, appropriated and distributed the secret, but would do nothing to prevent third parties

⁶⁷ See Palmer, *supra* note 50, at 293.

⁶⁸ Kitch, *supra* note 48, at 279.

⁶⁹ See Palmer, *supra* note 19, at 854.

⁷⁰ *Id.*

exposed to the secret from utilizing it.⁷¹ It is doubtful that the trade secret holder's cause of action against the original misappropriator would do much to alleviate the economic harm done by the loss of the trade secret. Assuming the trade-secret holder had a moral right to withhold this information, I think more is needed than trade-secret law to protect that right, assuming the holder was diligent in protecting it.

Trade-secret regimes also favor certain types of industrial information over others. They can provide no protection at all for secrets that might be revealed by a cursory inspection, or even the reverse-engineering, of a product. Insofar as differences between products (such as Coca-Cola, which is difficult to reproduce, and a toaster, which is easy to reproduce) are inherent and not imposed, there may be no real reason to suppose such differences are worthy of legal consideration. However, trade secret regimes emphasize that difference, and in a patent-free world, makers of difficult-to-reproduce products would have a strong advantage over makers of more straightforwardly analyzable goods. It is difficult to conceive of a justification for such disparate treatment. This brings us to Kitch's sixth advantage of patent systems: that they tend to normalize the incentives for, and benefits from, innovations across multiple industries. By reducing the favoritism trade-secret law displays for goods that can be sold without disclosing the composition or process of manufacture, this advantage comports with Hayek's distilled test for legal systems. It effectively levels the playing field, making the available legal protections equivalent regardless of what invention is being protected.

⁷¹ *Id.* Palmer makes the trade-secret argument in response to Murray Rothbard's formulation of intellectual property as the retention of certain "traditional" property rights when selling instances of "ideal goods" to the public.

C. SYNTHESIS

It is impossible to arrive at a clear-cut philosophical acceptance or rejection of intellectual property based purely on abstract theory. Moral arguments are vulnerable to subtle alterations in basic assumptions, and consequentialist arguments give no generally applicable answers at all. But perhaps there is more mutual support between moral and consequentialist arguments than might be seen at first glance.

Writing in defense of copyrights, Professor Epstein combines analyses of moral and consequentialist thought, arguing that the validity of natural rights (i.e., moral arguments) for property generally are founded “on their implicit utilitarian (broadly conceived) foundations, which require some empirical evaluation of why given institutions promote human flourishing and through it general social welfare.”⁷² This is not entirely dissimilar to the Hayekian test for determining the utilitarian justification for any system of rules. Developing his case, Professor Epstein finds that Locke’s labor theory of property, contrary to what scholars such as Palmer have found, is perhaps *more* applicable to intellectual property on some level, as it removes the semantic problems that arise when one considers whether “labor” and tangible resources are of a sufficiently compatible kind to be mixed in the manner that Locke suggests is necessary.⁷³ In Professor Epstein’s paradigm (restricted for the moment to copyrights), the property to be protected is composed purely of labor, so the conundrum posed by the “mixing” metaphor is neatly sidestepped.⁷⁴

We may use this joint moral–consequentialist reasoning as a response to anti-intellectual property scholars. Professor Epstein’s analysis rests in part on the observation that “any system of private

⁷² See Epstein, *supra* note 31, at 28.

⁷³ *Id.* at 21.

⁷⁴ See *id.*

property imposes heavy costs of exclusion,"⁷⁵ and if we accept that natural-rights arguments must be founded on implicit utilitarian concerns, then the case for copyright must be found in an empirically supported comparison of benefits and costs.⁷⁶

One key distinction between the legal treatment of intellectual and tangible property is that intellectual property rights expire after a set number of years. Rather than construing this as evidence that the protection of ideal goods is implicitly acknowledged, on society's part, as distasteful, we may take Professor Epstein's view:

In the general analysis, the first contrast between copyrights and real property is that there is no obvious reason to limit the duration of rights in real property. The long period of ownership spurs development, but since only one person can farm at any time, it does little to crimp utilization at the back end. With copyright, the possibility of multiple utilizations of the item, without exhaustion of its physical properties, allows for a realization of gain if the term is cut short. This gain is not found in real property, and makes copyright unique. But even here the point is not by any means decisive.⁷⁷

Although the uniqueness of copyright, in that what is protected is non-rivalrous and therefore not subject to the possibility of physical exhaustion, is unquestioned, Professor Epstein's analysis allows us to treat it as a mere characteristic of copyright, rather than its defining quality. Thus, the fact that the "store" of a given ideal good cannot be depleted in the conventional sense is reason to modify our application of property-rights allocation (by including a limited

⁷⁵ *Id.* at 28.

⁷⁶ *See id.*

⁷⁷ *Id.* at 25.

duration provision), rather than declaring it outside the bounds of property rights altogether.

Professor Epstein ultimately concludes that intellectual property rights—specifically copyrights—are compatible with liberty interests, but may warrant restrictions that are not found in tangible property rights.⁷⁸ Like Nozick, Landes, and Posner, Epstein expresses reservations about the implementation of intellectual property rights, notably the duration of such rights. However, he does find utility in a stable intellectual property protection regime.

Whether one takes a moral, consequentialist, or some combined view of the matter, intellectual property rights present a series of major conceptual hurdles. We must address whether intellectual creations can be considered property at all, and—if we concede that point—we must then work through several consequentialist hurdles, most notably the utilitarian justifications for certain aspects of any proposed intellectual property policy. One may adopt Professor Palmer's view that there are no fundamental, philosophical reasons for intellectual property rights; or one may adopt Professor Epstein's view that Palmer-type moral analyses fail to consider deeper utilitarian underpinnings that *do* approve of intellectual property rights as conducive to social welfare.

II. NATURAL AND IMPOSED SCARCITY

A key issue to keep in mind when considering property rights in general is scarcity, which for tangible goods may be described as the ability of a given unit of property to engender conflicting uses.⁷⁹ More precisely, it is the possibility that two proposed uses for a given resource are mutually exclusive. But can ideal goods, lacking physical exhaustibility, be characterized as possessing scarcity? Palmer concisely states the central importance of scarcity:

⁷⁸ See *id* at 25–28.

⁷⁹ See Palmer, *supra* note 19, at 864.

The key to all of this is scarcity. Without scarcity, an argument based either on the realization of freedom or on finding a solution to coordination games cannot generate a property right. Tangible goods are clearly scarce in that there are conflicting uses. It is this scarcity that gives rise to property rights. Intellectual property rights, however, do not rest on a natural scarcity of goods, but on an “artificial self created scarcity.”⁸⁰

The importance of scarcity cannot then be overstated; but is Palmer correct in his assertion that intellectual property rights are founded solely on “artificial” scarcity? I believe physical scarcity is not the only natural occurrence of the phenomenon, and when we deal with ideal goods that are discovered or created by human minds, we must also accept that human nature and society may create analogues of physical scarcity that are also “natural.”

Kinsella argues that, in a “Garden of Eden, where land and other goods were infinitely abundant, there would be no scarcity and, therefore, no need for property rules; property concepts would be meaningless.”⁸¹ Yet even in this ideal world, if we imagine its denizens as being recognizably human, scarcity might still be found. Though it seems reasonable to declare items like lawnmowers are not scarce when they are “infinitely abundant,”⁸² it is hard to say people would not find some way to *make* a certain variety of lawnmower scarce. As Kinsella argues, “[p]roperty rights are not applicable to things of infinite abundance, because there cannot be conflict over such things.”⁸³ But that leads to the questions of whether ideal goods are actually infinitely abundant, and whether property rules are in fact unnecessary if physically incompatible

⁸⁰ Palmer, *supra* note 19, at 864.

⁸¹ N. STEPHAN KINSELLA, AGAINST INTELLECTUAL PROPERTY 31 (2008).

⁸² *Id.*

⁸³ *Id.*

uses are nonexistent. Scarcity may be imposed upon resources as well as being an inherent quality in them, and if this imposed scarcity arises as a natural consequence of human preferences, then it is no less important than the fact of physical rareness.

When addressing the question of scarcity, one must also consider the question of whether conflict over use can truly be overcome simply by increasing the availability of a good. It is important to note that, for patents, “availability” cuts two ways. Rejecting intellectual property protection may increase availability in the sense that anyone capable of practicing an unprotected innovation may do so. However, embracing intellectual property forces first innovators to codify and formalize their knowledge, increasing availability for those incapable of repeating the innovation. James Bessen discusses the communication costs incurred in both scenarios.⁸⁴ He notes, “ideas are economically worthless without the necessary associated knowledge.”⁸⁵ This necessary knowledge, then, should be interpreted as part and parcel of the intangible “resource” the intellectual property interest represents. It follows that any scarcity of this knowledge becomes a natural attribute of the idea–knowledge package.

Thus, in the case of complicated technical innovations, natural scarcity—scarcity that is not purely a product of legal constraints—certainly exists, in that there are relatively few people that are capable of “accessing” such innovations. Thus, the scarcity of a complicated innovation arises from the unavailability of talent—a physical scarcity of qualified personnel can help cause innovation scarcity. For patents, then, we may argue that natural scarcity does exist because it is imposed by factors inherent to the process of obtaining and utilizing the ideal good represented by a given patent.

⁸⁴ James E. Bessen, *From Knowledge to Ideas: The Two Faces of Innovation* (Boston Univ. Sch. of Law Working Paper No. 10-35, 2010).

⁸⁵ *Id.* at 9.

People may tend to believe that a given thing is scarce, despite an abundance of interchangeable alternatives. This brings us to the argument that intellectual property rights regimes impose scarcity where none exists. In a 1975 study, researchers Worchel, Lee, and Adewole conducted experiments attempting to determine how imposed scarcity affected the desirability of chocolate-chip cookies.⁸⁶ They found the perception of scarcity played upon consumer attraction as follows: “Thus the results obtained . . . suggest that simple scarcity may enhance the desirability of a commodity but that an object whose supply is diminished is valued more than an object whose supply has been consistently low.”⁸⁷ Returning to Kinsella’s Garden of Eden, the factual abundance of lawnmowers would soon be eclipsed by perceived scarcity, which would be imposed, most likely, by some variety of intellectual property added on—something like flames painted on the chassis (copyright or trademark) or a “better” rotary blade (patent). Kinsella puts forward the argument that such a scenario represents an artificial imposition of scarcity where none exists; my counterargument would be that intellectual property rights are a recognition of a *natural* tendency to recognize scarcity in any possible form.

Much has been made of the non-rivalrousness of ideal goods, but there is an argument to be made that intellectual creations are not necessarily inexhaustible resources. The idea of non-rivalrousness is perhaps most pervasive in the context of creative works; although inventions and technological innovations may be of finite utility, there is an intuitive sense that Shakespeare’s plays, for example, will retain their value indefinitely. However, Professor Barton Beebe has argued there are ways in which creative works may be consumed to exhaustion as a consequence of the human

⁸⁶ Stephen Worchel, Jerry Lee & Akanbi Adewole, *Effects of Supply and Demand on Ratings of Object Value*, 32 J. PERSONALITY & SOC. PSYCHOL. 906, 908 (1975).

⁸⁷ *Id.* at 913.

tendency to seek out and value “distinctiveness.”⁸⁸ Scarcity, then, is not merely a characteristic intrinsic to a given tangible or ideal good. Particularly with respect to creative works, society itself may impose limits on how widely a work may be distributed before its perceived value falls away. Essentially, if a valuable non-rivalrous resource loses its value when everyone can obtain it, that resource is scarce to the extent that there is a “critical mass” of instantiations that can be made available. If that critical mass is exceeded, no one will desire the resource, and we can perceive such a state of affairs as effectively equivalent to a depletion of the resource. This situation is worse than the depletion of a physical resource, because those already in possession of the ideal good are deprived of the value of their particular copies of it.

I think Professor Beebe’s reasoning, in combination with the results of Worchel, Lee, and Adewole’s study, supports the notion that imposed scarcity is as natural a phenomenon as physical scarcity, at least where consumption by humans is the primary concern.

III. INTELLECTUAL PROPERTY RIGHTS IN THE MODERN CONTEXT

A. TRADEMARKS: THE ODD MAN OUT?

It is useful to segregate patents and copyrights from trademarks. As Landes and Posner note, trademarks are the great triumph of American intellectual property law,⁸⁹ and this may well be because what our trademark law seeks to protect is not creations per se, but the labels attached to those creations. As such, though the creation of trademarks requires an exertion of creative powers arguably similar to that required by copyrights, the legal protection of trademarks in America—though it creates a set of rights in

⁸⁸ See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 815 (2010).

⁸⁹ See LANDES & POSNER, *supra* note 38, at 9.

marks—serves more to preserve information flows to consumers than to give “property” to producers. Landes and Posner note the peculiarities of the American trademark regime that give it this quality.⁹⁰ They note that our system predicates trademark rights on usage⁹¹ and forbids the sale of trademarks apart from the goods they denote.⁹² As Stacey Dogan and Mark Lemley note, “trademarks have never been freely alienable.”⁹³

Landes and Posner also note the contrast between the American use-based system and others, such as Japan’s, that distribute trademarks to the first to register.⁹⁴ First-to-register systems commoditize trademarks to a greater degree than American law, and may implicate philosophical questions of justification similar to those faced by copyright and patent protection. Japan, however, appears to sidestep this problem because of collectivist social tendencies expressed in how Japanese laws tend to be enforced.⁹⁵ This may result in Japanese courts adopting fairly pure social-utility analyses in interpreting statutes, which may appear to confer a property right.⁹⁶ In any event, Landes and Posner’s positive appraisal of American trademark law rests upon its effectiveness as a means of reducing con-

⁹⁰ *Id.* at 180.

⁹¹ *Id.*

⁹² *Id.* The Lanham Act provides that “a mark . . . shall be assignable with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark.” 15 U.S.C. § 1060(a)(1) (2012).

⁹³ Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 65, 82 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008)

⁹⁴ LANDES & POSNER, *supra* note 38, at 180.

⁹⁵ See Masumi Anna Osaki, Comment, *A Look at Damage Awards Under Japan’s Trademark Law and Unfair Competition Prevention Law*, 8 PAC. RIM L. & POL’Y J. 489, 492–93 (1999).

⁹⁶ See *id.* at 493–94.

sumer search costs, rather than as a means of protecting private property interests.⁹⁷

B. NOVEL PROBLEMS AND INTERNATIONAL CONSIDERATIONS

Modern developments have provided an opportunity to examine the philosophical underpinnings of intellectual property rights in light of novel international problems that have become entangled with questions of ownership of intangible goods. One particularly interesting issue is the rising concern about what rights indigenous and tribal groups should retain over their own traditional knowledge and cultural expressions. Scholarship on this front seeks to reconceptualize normative and utilitarian justifications for intellectual property rights. The goal is to fulfill a perceived moral obligation to modify and expand legal regimes to serve groups historically marginalized by Western colonial activities.⁹⁸ Through this lens, the protection of traditional knowledge should prevent exploitation and stimulate creative endeavors based on traditional knowledge and culture. From a classical liberal perspective, this might be argued for as a remedy for demonstrated market failure: because of their disconnect with industrialized Western societies, these societies are unable to engage naturally with established markets and are at a tremendous disadvantage in bargaining positions.

Once again applying Hayek's test for rule systems, insofar as existing intellectual property regimes do not accommodate indigenous groups, they may be seen as biased, and thus do not maximize the opportunities available to a given anonymous actor, since indigenous status is implicitly disfavored. Extending the moral analysis, it may be argued that if intellectual property can be construed as a natural right founded upon broad utilitarian concerns (as Pro-

⁹⁷ See LANDES & POSNER, *supra* note 38, at 422.

⁹⁸ See, e.g., JANE E. ANDERSON, *LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW* (2009).

fessor Epstein might say), there is no reason to support a system that denies those rights to certain classes on procedural grounds.⁹⁹ From a utilitarian perspective, the cost of enforcing a new variety of intellectual property right may be outweighed by the active insertion of potentially novel and useful knowledge into the global market by indigenous groups previously barred from participation. This argument is perhaps less compelling than the moral argument because it may be reasoned that, after an initial period of high contribution, indigenous groups' participation in socially useful creative activity would plateau and settle down somewhere around the level of industrialized groups' contributions. However, one may argue that a properly formulated adjustment to intellectual property law should not *favor* indigenous groups. Rather, the goal would be to create a properly generalized standard for issuing intellectual property rights.

C. DECONSTRUCTING A VOLUNTARY-CONTRACT REGIME FOR PROTECTING INNOVATION

Professor Epstein presents what may be the clearest possible statement of the problem of intellectual property/monopoly management:

Quite simply, any system of private property imposes heavy costs of exclusion. However, these costs can only be eliminated by adopting some system of collective ownership that for its part imposes heavy costs of governance. The only choice that we have is to pick the lesser of two

⁹⁹ The procedural grounds here relate to the fact that the requirements for protection imposed by intellectual property law tend to favor Western-style formulations of knowledge, and do not address the means by which indigenous groups may transmit, collect, and codify knowledge, such as through spoken words.

evils. There is no magic solution for liberty or property that creates benefits without dislocations.¹⁰⁰

Thus, the issue is whether or not the absence of intellectual property rights presents a lesser evil. What alternatives do anti-intellectual property scholars offer? The first option is, of course, the unregulated market. Tom Palmer explores the market for “ideal objects” in a world without intellectual property rights.¹⁰¹

Palmer draws upon history to explore his market for ideal goods, as well as speculating on new distribution techniques for ideal goods (such as a fairly accurate model of current digital “stores” like iTunes or Amazon).¹⁰² He posits the void created by the removal of intellectual property rights would be filled by a series of contractual frameworks and new marketing models based on complementary goods.¹⁰³ To a certain extent, Palmer’s arguments have been borne out by recent developments, particularly in the personal-computing industry.¹⁰⁴

However, in a system of voluntary exchange, without the mediation of intellectual property rights, creators would have to deal with the varying nature of created “products” on their own. Some types of ideal goods are easier to copy than others, and the rapid evolution of technology makes it difficult for creators to determine how easily and how quickly their creations may be duplicated. For example, it is easy for anyone with a home computer to create any number of copies of a song at almost no cost. It is more difficult for the average citizen to perform a metallurgical analysis on a new and improved steel alloy. Intellectual property rights can be seen as lev-

¹⁰⁰ Epstein, *supra* note 31, at 28.

¹⁰¹ See Palmer, *supra* note 50, at 287.

¹⁰² *Id.* at 299–300.

¹⁰³ *Id.*

¹⁰⁴ I explore the new paradigms provided by the rise of the Internet and “copyleft” advocacy in the following subsection. Part II.C.1, *infra*.

eling the playing field across a wide swath of creations, allowing creators to know how long they will keep their competitive advantage. Creating a bundle of rights is also, incidentally, a way of allowing market-type valuations to occur where the alternative (assuming an unchanging policy of encouraging innovation through government incentives) might be a straightforward “reward” scheme, where the government would itself determine the value of a given innovation, likely incorrectly.¹⁰⁵

Another potential issue is that of forced exchanges. Without intellectual property protection, parties may have no choice but to enter into contractual arrangements with potential competitors. As an example, consider the small business entity SmallCo, which—existing in a society bereft of intellectual property rights—conceives of Doodad X, an entirely novel and desirable, but easily reverse-engineered device. Lacking patent protection, SmallCo has few options. Trade secrets are not a viable regime; as soon as Doodad X hits the shelves it will be purchased and dismantled by BigCo. SmallCo may choose to try to maximize its first-day sales by stockpiling a tremendous inventory of Doodad X prior to offering them for sale. This forces SmallCo to take the risk of a large loss if Doodad X is not very popular immediately after launch, or if BigCo manages to use its superior resources to get its copy to the market in an extremely short time. Assuming SmallCo does not care to risk its existence on consumers’ unknown preferences or on BigCo’s failing to copy Doodad X, it must seek some sort of agreement with BigCo. But SmallCo is in a poor bargaining position. The low cost of reverse engineering makes BigCo relatively indifferent to contracting with SmallCo—they can pay SmallCo a fee to teach them how to make Doodad X, or they can pay their own engineers to figure it out, and then they can sell their version without restrictions.

¹⁰⁵ RICHARD A. SPINELLO & MARIA BOTTIS, A DEFENSE OF INTELLECTUAL PROPERTY RIGHTS 7 (2009).

Palmer's conception of an ideal-goods market includes protective schemes that do not involve intellectual property rights: technological deterrence, tie-in merchandising, contractual arrangements, and effective marketing.¹⁰⁶ Technological deterrence may consist of such things as anti-copying protection on software and media. Recent history has demonstrated that the technically proficient consuming public is quite capable of defeating such protections, leading to inefficiency as corporations sink investments into copy-protection technologies that are quickly defeated.

Instead of using technological deterrence to prevent *any* copying, a practical creator can try to capitalize on the inevitable copying of his work. The massive increase in the ability of individuals to create and distribute creative works via the internet has led to the rise of creator communities who seek to use intellectual property rights in novel ways. One of the more prominent groups is the Creative Commons, which Niva Elkin-Koren characterizes as echoing a "libertarian sentiment,"¹⁰⁷ noting that its use of contractual licenses allows creators more flexibility in the bundle of rights they choose to retain or discard when distributing their work.

Jonathan Barnett has written about the viability of intellectual property rights forfeiture, in conjunction with complementary-goods strategies, as a market strategy for corporations.¹⁰⁸ This is a partial confirmation of Palmer's model of how markets would operate in the absence of intellectual property rights. However, it is important to note that Professor Barnett's argument applies most credibly to the software market, where success is measured by how

¹⁰⁶ See Palmer, *supra* note 50, at 288–300.

¹⁰⁷ Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 325, 333 (Lucie Guibault & P. Bernt Hugenholtz, eds. 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885466.

¹⁰⁸ Jonathan M. Barnett, *The Host's Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods*, 124 HARV. L. REV. 1861 (2011) available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1177&context=usclwps>.

ubiquitous the adoption of a given software platform is (i.e., Microsoft Windows). In markets where the adoption of a company's platform is a prerequisite for success, forfeiture of intellectual property rights may be a good strategy.¹⁰⁹ Despite this showing that certain markets have naturally developed in a manner that eschews intellectual property protection, it is instructive to note that companies that have adopted this strategy are frequently the largest players in the patent arms race. IBM, for example, is both the world's leading patentee and the leading contributor to the Linux Foundation, which "disclaims the use of patents and other intellectual property."¹¹⁰ This seemingly paradoxical situation is, as Professor Barnett argues, resolved by the understanding that this open-source behavior creates an expanded market for complementary and proprietary goods.¹¹¹ In other words, unprotected intellectual property can create markets for protected goods down the line.

D. PHARMACEUTICALS

Unlike other fields where innovation and intellectual creation pervade, pharmaceuticals invokes moral issues of health and the continuation of life itself. As such, it seems the debate becomes a strictly consequentialist one: what sort of regime best encourages the proliferation of lifesaving treatments and the distribution of such treatments to those in need of them?

Here, more so than in any other field, the concerns of intellectual property detractors seem to be well-expressed and dangerous to established social policies. Heidi Williams has produced an empirical study of the short-term effects of gene patents on subsequent innovation, specifically in the case of genes patented by a company

¹⁰⁹ See *id.* at 1865.

¹¹⁰ *Id.* at 1910.

¹¹¹ *Id.* at 1911.

called Celera.¹¹² Her findings indicate “Celera genes have lower scientific research and product development outcomes relative to non-Celera genes.”¹¹³ This seem to bear out the argument put forth by Boldrin and Levine that “patents are particularly harmful in this case, since the increased incentive to innovate that they may generate is, as in the chemical industry, more than offset by the increased difficulty of doing so.”¹¹⁴

Pharmaceuticals, then, seem to represent an example of the failure of intellectual property rights to produce any measurable beneficial effects whatsoever for the public at large, while also failing to promote the policy of encouraging innovation within the field. In a utilitarian analysis, then, it seems pharmaceutical patents do not, under Professor Epstein’s analysis of trade-offs, or Hayek’s test for systems of rules, deliver the net positive consequences required. It is interesting to note, however, that under Nozick’s analysis, Locke’s proviso is not violated, because as Nozick states, “[a] medical researcher who synthesizes a new substance that effectively treats a certain disease and who refuses to sell except on his terms does not worsen the situation of others by depriving them of whatever he has appropriated.”¹¹⁵ We may, however, consider this to be an anomaly created by the progress of technology and the fact that much of modern pharmaceutical progress is based on isolating existing compounds rather than new ones. Thus, in addition to highlighting the practicality of a utilitarian approach, the case of pharmaceuticals may be viewed as an object lesson in the questionable durability of moral approaches that appeal to natural and eternal truths, rather than to empirical observations.

¹¹² Heidi Williams, *Intellectual Property Rights and Innovation: Evidence from the Human Genome* (Nat’l Bureau of Econ. Research, Working Paper No. 16213, 2010), available at http://www.nber.org/~heidiw/papers/5_12_10a_hlw.pdf.

¹¹³ *Id.* at 25.

¹¹⁴ BOLDRIN & LEVINE, *supra* note 5, at 250.

¹¹⁵ NOZICK, *supra* note 13, at 181.

IV. CONCLUSION

Although classical liberal thought can be applied to arguments both for and against intellectual property protection at a conceptual level, I believe the balance of moral and utilitarian arguments favors the retention of intellectual property regimes, with the caveat that such regimes, as presently implemented, possess numerous and serious flaws. It is also clear to me that the bundling of copyright, patent, and trademark laws into the catchall category of intellectual property is less than desirable, as each presents a distinct set of concerns in a utilitarian analysis, and each may well be grounded (if supported at all) by different moral considerations.

Intellectual property rights may represent nothing more than a poor approximation of an “ideal solution” to the problem of “ideal goods,” but legal regimes incorporating such rights do have the potential to yield beneficial results in at least a subset of cases. Copyrights, for example, seem to fare well in Professor Epstein’s analysis. In other cases, such as pharmaceuticals, the balancing of producer incentives and monopoly costs seems to tilt, for public-health reasons, toward an avoidance of monopoly costs. As discussed earlier, empirical work in the field seems to raise serious questions about the utility of pharmaceutical patents, and leaves the industry with the burden of proving innovation is fostered, and not hampered, by patent regimes.

Unfortunately, it seems impossible to conclude with a strong endorsement of intellectual property rights. Though moral justifications of such rights are possible, they face a strong assault by scholars like Tom Palmer and Stephan Kinsella. The utilitarian arguments for intellectual property are similarly vulnerable to counterarguments. Although it may well be that, in retrospect, a clear and unqualified justification (or rejection) of intellectual property rights is possible, the vast and changing landscape of ideal, intangible

goods and their prominent role in our economy makes it difficult to draw clear and universal conclusions. We are left in a situation that parallels Professor Wu's "period of great change and uncertainty."¹¹⁶ In such circumstances, Wu argues, polyarchical decisionmaking is superior because of its ability to aggregate a greater number of innovative ideas. Applying this reasoning in a sort of meta-analysis, it seems, as a policy matter, we might be well-advised to allow firms to continue operating within the status quo—a situation that has led to the rise of Creative Commons licensing schemes and the platform marketing strategies Professor Barnett has described. The relevant polyarchy here would be the market, the decisionmakers, and the firms. In this context, intellectual property rights are simply another potential project on the table for firms. It is clear that economic actors will forego intellectual property protection when it is expedient, and this consequently might lead policymakers to a market-guided understanding of where economic actors prefer property rights and where such rights are invidious to progress. At the end of the day, it is uniquely fitting that self-organizing behavior, mediated by market realities, may provide practical answers to a question that academic analysis fails to resolve.

¹¹⁶ Wu, *supra* note 42, at 130.