

## Faith-Based Intellectual Property

Mark A. Lemley



### ABSTRACT

The traditional justification for intellectual property (IP) rights has been utilitarian. We grant exclusive rights because we think the world will be a better place as a result. But what evidence we have doesn't fully justify IP rights in their current form. Rather than following the evidence and questioning strong IP rights, more and more scholars have begun to retreat from evidence toward what I call faith-based IP, justifying IP as a moral end in itself rather than on the basis of how it affects the world. I argue that these moral claims are ultimately unpersuasive and a step backward in a rational society.

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## I. THE RISE OF FAITH-BASED IP<sup>1</sup>

We live in an age of reason. Or at least, we're supposed to. Science has explained most of the things that in a prior era seemed like magic or the will of the gods, from the seasons to lightning and thunder to the diversity of the natural world. And even when science leads us to things that themselves seem magical—the curvature of light, quantum entanglement, or tens of millions of transistors loaded onto a tiny chip—they nonetheless work according to the predictable, if not always logical-seeming, rules of science.

The age of reason has extended to the economy. Gone are the days when there was any serious debate about the superiority of a market-based economy over any of its traditional alternatives, from feudalism to communism. True, there is plenty of room to fight about the proper role of government and of regulatory limits on private action, but almost all that debate takes place at the margins of the fundamental discovery that market mechanisms supplemented with some infrastructure investment and health and safety regulation generally work better than anything else in providing most goods and services.

That consensus for markets and rationality extends to regulation when it does happen. We've done a pretty good job in most areas of regulation of at least thinking in terms of cost-benefit analysis. The days of command and control regulation, in which the government directed you to do something regardless of cost and benefit, are long gone. And rightly so. If the Environmental Protection Agency (EPA) is to impose a regulation on the release of toxins in the drinking water, it needs to assess the harm of the toxin, the cost of compliance, and whether there are cheaper alternatives that would achieve the same end. More generally, any new government regulation must pass through the White House Office of Information and Regulatory Affairs (OIRA), a government office that assesses the costs and benefits of any new regulation.<sup>2</sup> We don't always get the balance right, but we have learned to ask the right questions.

IP rights are a form of government regulation of the free market designed to serve a useful social end—encouraging innovation and creation.<sup>3</sup> IP rights

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1. © 2015 Mark A. Lemley.

2. *Office of Information and Regulatory Affairs*, WHITE HOUSE, [http://www.whitehouse.gov/omb/inforeg\\_default](http://www.whitehouse.gov/omb/inforeg_default) (last visited Apr. 7, 2015). For a discussion of cost-benefit analysis in regulation, see EDITH STOKELY & RICHARD ZECKHAUSER, *A PRIMER FOR POLICY ANALYSIS* 134–39 (1978).

3. *See, e.g.*, Thomas Macaulay, Speech Before the House of Commons: Copyright (Feb. 5, 1841), in *SPEECHES ON POLITICS AND LITERATURE* 176, 182 (1924) (stating that copyright imposes a “tax on readers for the purpose of giving a bounty to writers”); Shubha Ghosh, *Patents and the*

represent government interventions in the marketplace that seek to achieve that desirable social end by restricting the freedom of some people (consumers, reusers, critics) to do what they want with their own real and personal property in order to improve the lives of other people (inventors and creators). My freedom to make art or build a new phone is constrained by a government requirement that my art or my phone not be too similar to someone else's. In the case of patents, that's true even if I have never heard of the other person or seen their phone or their patent, and indeed even if they never built a phone at all.<sup>4</sup>

The fact that IP is government regulation of the marketplace doesn't mean it is a bad thing. Many regulations are desirable, and I think IP rights of some form are among them. But it does mean that it is not an inherently good thing. In a market-based economy, regulation requires some cost-benefit justification before we accept it.

For a long time, evidence that might support that justification was in short supply. We had a plausible-sounding theory: Rational actors won't spend a lot of money to create something if others can just copy it more cheaply.<sup>5</sup> But we had very little evidence one way or the other to bolster that theory. Fritz Machlup, commissioned by Congress in the 1950s to evaluate the patent system, came to the strikingly wishy-washy conclusion that if we didn't have a patent system, the evidence wouldn't justify creating one, but since we already had one the evidence

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*Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred*, 19 BERKELEY TECH. L.J. 1315, 1322–25 (2004); Mark A. Lemley, *Taking the Regulatory Nature of IP Law Seriously*, 92 TEX. L. REV. 107, 107–08 (2014); Mark A. Lemley, *The Regulatory Turn in IP*, 36 HARV. J. L. & PUB. POL'Y 109, 110 (2012); Mark A. Lemley, *What's Different About Intellectual Property?*, 83 TEX. L. REV. 1097, 1097 (2005); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004); Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship*, 34 ECOLOGY L.Q. 713, 725–31 (2007); Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 903 (2007).

4. It is true that we sometimes declare government limits on market entry to confer property rights on the protected firm. Taxi medallions are an example; a restriction on government entry into that market has given rise to a property right to be one of the privileged few allowed to participate in the market. See, e.g., Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. REG. 125, 128 (2013). But that does not make it any less regulatory, any more than the British grant to the East India Trading Company of the exclusive right to do business in India was anything other than a market entry restriction. See Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J.L. & TECH. 25, 25–27 (2002). A “property” right to be the exclusive provider of airline service to a particular city is regulation whether or not we say you have a property right in the exclusivity the regulation has given you. As Tom Bell explains, “copyright and taxi medallions more resemble privileges than property.” Tom W. Bell, *Copyright Porn Trolls, Wasting Taxi Medallions, and the Propriety of “Property”*, 18 CHAPMAN L. REV. (forthcoming 2015).
5. See, e.g., WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993–97 (1997).

didn't justify abolishing it.<sup>6</sup> In short, we just didn't know very much about whether patents survived cost-benefit analysis. Things were no better by the 1980s; George Priest famously wrote that economists could tell lawyers virtually nothing about IP because there had been virtually no empirical study of IP regimes.<sup>7</sup>

That is no longer true. In the past three decades there has been an unprecedented—indeed, astonishing—outpouring of sophisticated empirical work on virtually every aspect of IP law and innovative and creative markets.<sup>8</sup> We now have empirical studies on who obtains IP rights, who enforces them, and who wins.<sup>9</sup> We have studies on how IP rights affect stock performance.<sup>10</sup> We have industry-specific studies that examine what drives creativity in virtually every field imaginable, including those protected by patents, by copyright, and by no IP right at all.<sup>11</sup> We have evidence about how innovation in various industries has

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6. SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 85TH CONG., AN ECONOMIC REVIEW OF THE PATENT SYSTEM, STUDY NO. 15, at 80 (1958) (prepared by Professor Fritz Machlup).
  7. George L. Priest, *What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung*, 8 RES. L. & ECON. 19, 21 (1986).
  8. For a discussion of much of this work, see Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1065 n.137 (2005); see also DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 38 (2009).
  9. See, e.g., John R. Allison, Mark A. Lemley & David L. Schwartz, *Our Divided Patent System*, 82 U. CHI. L. REV. 3 (forthcoming 2015); John R. Allison, Mark A. Lemley & David L. Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769, 1782 (2014); John R. Allison, Mark A. Lemley & Joshua Walker, *Extreme Value or Trolls on Top? The Characteristics of the Most-Litigated Patents*, 158 U. PA. L. REV. 1, 3 & n.3 (2009); James Bessen & Michael Meurer, *Lessons for Patent Policy From Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. 1 (2005); Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1577 (2009); Colleen V. Chien, *Predicting Patent Litigation*, 90 TEX. L. REV. 283, 287 (2011); Paul M. Janicke & LiLan Ren, *Who Wins Patent Infringement Cases?*, 34 AIPLA Q.J. 1, 10 (2006); Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 261 (2006); Richard C. Levin et al., *Appropriating the Returns From Industrial Research and Development*, 1987 BROOKINGS PAPERS ON ECON. ACTIVITY 783, 794–95; Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios* 154 U. PA. L. REV. 1, 5–6 (2005); Mark Schankerman, *How Valuable Is Patent Protection? Estimates by Technology Field*, 29 RAND J. ECON. 77, 79 (1998); Wesley M. Cohen et al., *Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (or Not)* 3 (Nat'l Bureau of Econ. Research, Working Paper No. W7552, 2000).
  10. JAMES BESSEN & MICHAEL MEURER, PATENT FAILURE: HOW JUDGES, LAWYERS, AND BUREAUCRATS PUT INNOVATION AT RISK (2008). But see Glynn S. Lunney, Jr., *On the Continuing Misuse of Event Studies: The Example of Bessen and Meurer*, 16 J. INTELL. PROP. L. 35, 37, 49–56 (2008); David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 447–48 (2014) (criticizing the Bessen-Meurer methodology).
  11. See, e.g., BURK & LEMLEY, *supra* note 8, at chs. 4–5; YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 2–3 (2006); KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW

fared under changes in IP regimes, the growth of the Internet, internationalization, and various other exogenous shocks.<sup>12</sup> We have experimental evidence that explores how test subjects view the sale of things they have actually created,<sup>13</sup> and iterative-play games that model economies with different IP regimes.<sup>14</sup> We have surveys of creators and inventors that ask about their motivations.<sup>15</sup> And we have psychological studies that explore both why and how people create and how money affects (or does not affect) that creative impulse.<sup>16</sup>

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IMITATION SPARKS INNOVATION 4 (2012); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1693 (2006); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1787–88 (2008); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* (MIT Sloan Sch. of Mgmt., Working Paper No. 4576-06, 2006), available at <http://ssrn.com/abstract=721182>; David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1099 (2012); Matthew Beasley, *Who Owns Your Skin: Intellectual Property and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137, 1141 (2012); Aaron Perzanowski, *Tattoos and IP Norms*, 98 MINN. L. REV. 511, 525 (2013); Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 323 (2011). *But see* C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1177 (2009) (disputing Raustiala and Sprigman's claim that the lack of IP protection drives innovation in fashion).

12. *See, e.g.*, Mark A. Lemley, *IP in a World Without Scarcity*, N.Y.U. L. REV. (forthcoming 2015) and sources cited therein.
13. *See, e.g.*, Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 33 (2011); Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1, 25 (2010).
14. *See, e.g.*, Andrew W. Torrance & Bill Tomlinson, *Property Rules, Liability Rules, and Patents: One Experimental View of the Cathedral*, 14 YALE J.L. & TECH. 138, 149–52 (2011).
15. *See, e.g.*, JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015).
16. *See, e.g.*, JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 50–57 (2012); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1152 (2007); Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1443–44 (2010); Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 627 (2012); Gregory N. Mandel, *Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 U.C. DAVIS L. REV. 283, 285–86 (2010); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2000 (2011) [hereinafter Mandel, *To Promote*]; Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and "Work-Makes-Work," Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2093 (2011); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 436 (2007); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009); Diane Leenheer Zimmerman, *Copyright as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES IN L. 29, 31 (2011); *cf.* Laura G. Pedraza-Farina, *Patent Law and the Sociology of Innovation*, 2013 WIS. L. REV. 813, 856 (documenting the various sociological factors that play into scientific discovery and how quickly that discovery is accepted). *But see* Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents-Prizes Debate*, 92 TEX. L. REV. 303, 353–55 (2013) (challenging the

The upshot of all this evidence is something rather less than a complete vindication of the theory of IP regulation. As Lisa Ouellette puts it, “none of these studies resolves whether patents have a net positive effect on innovation, much less their net welfare effect, or whether alternative innovation incentives such as grants, prizes, and tax credits are inferior.”<sup>17</sup> This doesn’t mean that we are no better off than we were in Fritz Machlup’s day. The problem isn’t that we don’t have enough evidence, or the right kind of evidence. The problem is that the picture painted by the evidence is a complicated one. The relationship between patents and innovation seems to depend greatly on industry; some evidence suggests that the patent system is worth the cost in the biomedical industries but not elsewhere.<sup>18</sup> Copyright industries seem to vary widely in how well they are responding to the challenge of the Internet, and their profitability doesn’t seem obviously related to the ease or frequency of piracy.<sup>19</sup> The studies of the behavior of artists and inventors are similarly complicated. Money doesn’t seem to be the prime motivator for most creators, and sometimes it can even suppress creativity.<sup>20</sup> And an amazing number of people seem perfectly happy to create and share their work for free now that the Internet has given them the means to do so. At the same time, the money provided by IP allows the existence of a professional creative class that may be desirable for distributional reasons or because we like the sorts of things they create more than we do the work of amateurs.<sup>21</sup>

The decidedly ambiguous nature of this evidence should trouble us as IP lawyers, scholars, and policymakers. It is one thing to say in Fritz Machlup’s day that we should trust in theory because the evidence isn’t in yet. In the absence of evidence, he might well have been right that the best thing to do is maintain the

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idea that creation is driven by nonmonetary motivations by noting that they often coexist with monetary ones).

17. Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. 8 (forthcoming 2015).

18. BESSEN & MEURER, *supra* note 10.

19. *See, e.g.*, Lemley, *supra* note 12 (collecting evidence).

20. *See, e.g.*, TERESA AMABILE, CREATIVITY IN CONTEXT 33 (1996); MIHALY CSIK-SZENTMIHALYI, CREATIVITY 107–08 (1996); Fromer, *supra* note 16, at 1483; Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1777 (2012) (“[C]reators’ beliefs in their moral rights typically seem to dominate their pecuniary interests in creating . . .”); Beth A. Hennessey & Teresa M. Amabile, *Reward, Intrinsic Motivation, and Creativity*, 53 AM. PSYCHOLOGIST 674 (1998); William Hubbard, *Inventing Norms*, 44 CONN. L. REV. 369 (2011); Mandel, *To Promote*, *supra* note 16, at 2010 (“As motivation moves from the extrinsic toward the intrinsic side of the motivation spectrum, individuals’ work product tends to become more creative.”); John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 214–15 (2008). For an empirical test of this question, see Christopher Buccafusco et al., *Empirical Studies of Incentives in Intellectual Property* (forthcoming 2015) (on file with author).

21. *Cf.* Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141 (arguing that IP law may be more about motivating corporate creativity than individuals).

status quo. But it is quite another thing to continue trusting in theory when we have gone out, collected the evidence, and found that it is far from clear that IP is doing the world more good than harm.

Further, we are not just maintaining the status quo. We have been passing a host of new IP laws in recent decades, almost all directed at expanding IP rights, even as the evidence casts substantial doubt on the efficacy of those laws. Patent law has recently become an important exception; after a dramatic expansion in the powers of patent owners in the first 25 years of the Federal Circuit Congress and the courts are starting to cut back on those powers in various ways.<sup>22</sup> But copyright still seems to be expanding. And patent law is still much more powerful today than it was thirty years ago. If the evidence has a hard time justifying the existing regulatory structure we have built around IP, it has an even harder time justifying wave after wave of new laws that departs further from the free market in the name of protecting IP owners from Internet piracy.

If we had evidence that any other kind of government regulation—or medical advice, for that matter—probably wasn't helping much, or was only helping people in a few specialized areas, and might in fact be making things worse, the enlightened, reasonable thing to do would be to reassess that policy. When you are spending a lot of time and money every year in a government-sponsored departure from the free market, even maintaining the status quo ought to require some evidentiary support. And doubling down on that policy certainly should.

Instead of questioning the theory of IP in light of this evidence, however, a number of people have instead sought ways to ignore the evidence and keep on doing what they have always been doing. Some of those ways are time-honored traditions in dealing with adverse evidence. Sometimes the approach is to attack the messenger. A lesson I learned early in my academic career is that while people will dispute, ignore, or shrug off policy arguments they disagree with, they get really incensed when the data disagrees with them. And one way they can justify ignoring that data is to persuade themselves that the source of that data must be biased in some way and so the numbers cannot be trusted. The most vitriolic attacks I have experienced in more than twenty years as a law professor were directed at the most innocuous-seeming papers—papers that presented data that revealed some uncomfortable facts about the status quo.<sup>23</sup>

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22. See, e.g., *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2359 (2014) (restricting patent-eligible subject matter).

23. This is a well-established psychological phenomenon in dealing with adverse evidence. See, e.g., Lisa Larrimore Ouellette, *Cultural Cognition of Patents*, 4 IP THEORY 28 (2013), <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1030&context=ipt>.

Unfortunately, sometimes the numbers can't be trusted. A second reaction to data you don't like is to try to go out and buy some of your own. Companies with a vested interest in a system that empirical evidence calls into question have been spending a great deal of money to fund studies written (sometimes preposterously) to lead to the conclusion they support.<sup>24</sup> That makes it all the easier to rationalize ignoring evidence regardless of the form in which it comes.

Neither of these approaches is unique to IP law. We see them in efforts to deny the reality of climate change, for example. What is notable is that as evidence has come to IP law—a development that I naively thought all would welcome—more and more people have fought to keep it out. Indeed, when the Federal Trade Commission released its report on the patent system a decade ago, sparking the first wave of legislative patent reform, the report concluded with what its authors thought of as a good-government filler recommendation: that we should further study the relationship between patents and innovation.<sup>25</sup> To its surprise, that turned out to be its most controversial recommendation.<sup>26</sup> If you like the status quo, the very last thing you want, it seems, is to take a good hard look at whether it's working.

The resistance to evidence doesn't stop there, however. Participants on both sides of the IP debates are increasingly staking out positions that simply do not depend on evidence at all. That is, their response to evidence that doesn't accord with their beliefs is not to question their beliefs, or even to question the evidence, but to retreat to a belief system that doesn't require evidence at all. An example is Rob Merges at Berkeley, the leading patent scholar of the last generation and the strongest voice for economic analysis of the patent system. After decades at the forefront of economic analysis of the patent system, Merges threw up his hands: "Try as I might, I simply cannot justify our current IP system on the basis of verifiable data showing that people are better off with IP law than

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24. One example is Alexander Galetovic et al., *Patent Holdup: Do Patent Holders Holdup Innovation?* 2–3 (Hoover IP<sup>2</sup>, Working Paper Series No. 14011, 2014), available at <http://www.hoover.org/sites/default/files/ip2-wp14011-paper.pdf> (purporting to find no innovation loss from patent holdup in software by declaring bananas and sugar to be "textbook holdup industries" and finding that prices fall faster for technologies subject to holdup than they do in bananas or sugar, despite the rather different characteristics of bananas and smartphones and the absence of any systematic holdup in bananas or sugar).

25. FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 2 (Oct. 2003), <http://www.ftc.gov/reports/promote-innovation-proper-balance-competition-patent-law-policy>.

26. AM. INTELLECTUAL PROP. LAW ASS'N, AIPLA RESPONSE TO THE OCTOBER 2003 FEDERAL TRADE COMMISSION REPORT: "TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY" 40–44 (2003), <http://www.aipla.org/advocacy/executive/Documents/ResponseToFTC.pdf>.

they would be without it.”<sup>27</sup> While one might think that the logical thing to do if the evidence doesn’t support one’s theory is to question the theory, Merges instead observes that “through all the doubts over empirical proof, my faith in the necessity and importance of IP law has only grown.”<sup>28</sup> IP rights, he decides, are Rights in the moral sense: things to which people have some intrinsic entitlement that “social utility alone is not reason enough to override.”<sup>29</sup>

Merges is not alone; as he notes, “I seem to have a lot of company” in jettisoning utilitarianism for talk of morality.<sup>30</sup> Richard Spinello and Maria Bottis, for instance, take the position that IP rights are “primarily . . . a requirement of natural law and justice.”<sup>31</sup> And there are many others.<sup>32</sup> Even many economists have begun to talk not in terms of evidence and cost-benefit analysis, but of property in ideas as an end in and of itself.<sup>33</sup>

Merges refers to his “faith” in IP law, and that is exactly the right word. I call this retreat from evidence faith-based IP, both because adherents are taking the validity of the IP system on faith and because the rationale for doing so is a form of religious belief.<sup>34</sup> The adherents of this new religion believe in IP. They

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27. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 3 (2011). Consistent with the avoidance approaches just discussed, Merges acknowledges that “[t]his is a truth I avoided over the years, sometimes more subtly (for example, heavily weighing the inconclusive positive data, showing IP law is necessary and efficient, discounting inconclusive data on the other side), and sometimes less so (ignoring the data altogether[ . . . ].)” *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. RICHARD A. SPINELLO & MARIA BOTTIS, A DEFENSE OF INTELLECTUAL PROPERTY RIGHTS 3 (2009).
32. For other examples, see ; Adam D. Moore, *Intellectual Property, Innovation, and Social Progress: The Case Against Incentive-Based Arguments*, 26 HAMLIN L. REV. 601, 630 (2003) (“Hopefully, upon recognized the difficulties that infect rule-utilitarian intellectual property, we may begin to move away from our current system—a system that views intellectual property rights as state-created entities—and toward institutions that acknowledge and uphold the natural rights of authors and inventors.”) (emphasis in original); Alina Ng Boyte, *Finding Copyright’s Core Content*, 10 U. ST. THOMAS L.J. 774, 775 (2013); David Opderbeck, *Beyond Bits, Memes, and Utility Machines: A Theory of Intellectual Property as Social Relations*, 10 U. ST. THOMAS L.J. 738 (2013).
33. See, e.g., Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 456 (2010) (same). Cf. RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS 211–18 (2013) (acknowledging that the IP tradeoff is ultimately an empirical question while articulating a property-based justification for IP that is based in theory, not evidence); Daniel F. Spulber, *How Patents Provide the Foundation of the Market for Inventions*, NW. U. SCH. L. & ECON. SERIES 1, 2 (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2487564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487564) (arguing for patents as property rights on the basis of theory, not evidence).
34. Cf. Katya Assaf, *Magical Thinking in Trademark Law*, 37 L. & SOCIAL INQUIRY 595, 596 (2012) (arguing that brands operate as a form of religion that trademark law endorses). This is distinct from those who seek guidance in existing religions to evaluate IP doctrines. For a discussion and collection of sources, see Thomas C. Berg, *Foreword: Intellectual Property and Religious Thought*, 10

don't believe it is better for the world than other systems, or that it encourages more innovation. Rather, they believe in IP as an end in itself—that IP is some kind of prepolitical right to which inventors and creators are entitled. Because that is a belief, evidence cannot shake it any more than I can persuade someone who believes in the literal truth of the bible that his god didn't create the world in seven days. Sure, there may be geological and archeological evidence that makes the seven-day story implausible. But faith is not just ambivalent about evidentiary support; it is remarkably resistant to evidentiary challenge. Indeed, many proponents of this new religion even tout that as an advantage for their faith, claiming that it “avoids the need for empirical validation demanded by the utilitarian approach.”<sup>35</sup>

## II. THE PROBLEMS WITH FAITH-BASED IP

Now, you can think what you like about religion. I know lots of people who find value in it. But IP strikes me as an odd thing to make the basis of one's faith, for several reasons.

First, once one abandons utilitarianism it is hard to find a basis for a prepolitical right to IP. Natural law theories used to owe their origin to a belief that a god not only made the world and the people in it, but also made the rules we take for granted. But even the die-hard natural law theorists have mostly abandoned that way of thinking.<sup>36</sup> Instead, they turn to some version of the “I made it and so I own it,” often attributing that sentiment to John Locke, or Hegel, or,

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U. ST. THOMAS L.J. 579, 580 (2014); Bashar H. Malkawi, *The Alliance Between Islamic Law and Intellectual Property: Structure and Practice*, 10 U. ST. THOMAS L.J. 618, 619 (2013) (justifying IP under Sharia law); Neil W. Netanel & David Nimmer, *Is Copyright Property?—The Debate in Jewish Law*, 12 THEORETICAL INQUIRIES L. 241, 242 (2011).

35. SPINELLO & BOTTIS, *supra* note 31, at 150; *see also* STEPHEN ANG, THE MORAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS 112–13 (2013) (rejecting utilitarianism for IP because it is indeterminate). For a more critical view of this approach, *see* Sonia K. Katyal, *Trademark Cosmopolitanism*, 47 U.C. DAVIS L. REV. 875, 929 (2014) (“thinking about intellectual property as a fundamental right . . . makes further justification of intellectual property unnecessary . . .”).

36. *See Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (“[C]opyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations . . . .”) Notably, both Christian and Jewish law were ambivalent at best about IP rights. *See, e.g.*, PAUL J. GRIFFITHS, INTELLECTUAL APPETITE: A THEOLOGICAL GRAMMAR 139 (2009) (quoting Augustine as distinguishing ideas from property; ideas were public things to be shared, not sequestered); Jeremy Stern, *Spiritual Property, Intellectual Property, and a Solution to the Mystery of IP Rights in Jewish Law*, 10:3 U. ST. THOMAS L.J. 603, 604 (2013) (arguing that Jewish law does not require obedience to copyright). *Cf.* Netanel & Nimmer, *supra* note 34 (suggesting that the issue is more complicated under Jewish law).

more recently, Rawls.<sup>37</sup> But those theories have more than their fair share of problems, starting with the fact that none of these latter-day prophets of IP actually included IP at all in their theories.<sup>38</sup> Rather, they spoke of real property and chattels, not ideas. Whether or not Locke makes a convincing case that you make an apple your property by investing labor in picking it from a tree—and I wouldn't advise you to try it with the next apple tree you come across unless you want to be arrested or shot—the fact is that ideas are not much like apples. For the IP faithful, it is important to elide this difference in order to give the rather recent doctrines of IP some historical roots in property theory.<sup>39</sup> But, leaving aside the fact that real property is hardly dictated from on high either,<sup>40</sup> as I have explained at length elsewhere, IP is not like real property or chattels in any meaningful sense.<sup>41</sup> Even if we want to grant Locke “his” apple, it is a big further step to say that by discovering that he can pick an apple from a tree, Locke has a moral claim to deprive anyone else from doing the same thing.

But that is exactly what IP does. It intervenes in the market to interfere with the freedom of others to do what they want in hopes of achieving the end of encouraging creativity. If we take that purpose out of the equation, we are left with a belief system that says the government should restrict your speech and freedom of action in favor of mine, not because doing so will improve the world, but simply because I spoke first.<sup>42</sup> But why do we think there is some entitlement

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37. See generally MERGES, *supra* note 27; Eric R. Claeys, *On Cowbells and Rock Anthems (and Property in IP)*, 49 SAN DIEGO L. REV. 1033 (2012); Kenneth Einar Himma, *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property*, 49 SAN DIEGO L. REV. 1105 (2012); Adam D. Moore, *A Lockean Theory of IP Revisited: A Review of Justifying Intellectual Property*, 49 SAN DIEGO L. REV. 1069 (2012).

38. Indeed, when John Locke wrote of IP, it was to condemn it, not to treat it as an inherent part of the natural order. See Seana Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138–67 (Stephen R. Munzer ed., 2001).

39. See, e.g., Oskar Liivak, *Maturing Patent Theory from Industrial Policy to Intellectual Property*, 86 TUL. L. REV. 1163, 1180–84 (2012).

40. Some government granted those property rights at some time. Cf. Pierre-Joseph Proudhon, *WHAT IS PROPERTY? OR, AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND GOVERNMENT* (1840) (arguing that “property is theft” because it involves government allocation of land formerly held in common to one individual). Real property has the advantage that it was generally created by a political body a long time ago, so it is easier to take it for granted as an entitlement rather than recognize it as a political decision that had distributional consequences.

41. Lemley, *supra* note 8, at 1032.

42. Rochelle Dreyfuss has derided this sort of thinking of “if value, then right.” Rochelle Cooper Dreyfuss, *Expressive Generosity: 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

to be the only one allowed to say a particular thing, or to make a particular product, simply because I did so first? Why not give the right instead to the last person to do so, or the person with the longest last name, or with the longest eyelashes? Most often, the answer turns out to be a utilitarian one—because we believe that doing so privileges creativity and therefore encourages someone to strive to be first. But that is an empirical prediction, not one we can simply assume to be true.

Perhaps the answer is that we value work for its own sake, and so the fact that you did work means you own the results of that work. After all, we call Locke's articulation the labor theory of value.<sup>43</sup> Leaving aside the underlying utilitarian justifications there—why exactly do we value work if not for the results it generates?—IP turns out not to map particularly well to a labor-reward instinct. We grant extremely valuable patents to accidental discoverers<sup>44</sup> and extremely valuable copyrights to photographers who happened to be in the right place at the right time.<sup>45</sup> Further, we allow those rights to be enforced even against people who put more productive work into the final product than the IP owner—the companies who actually make products based on an idea sketched out by a patent troll<sup>46</sup> and the artists who remake a photo into an iconic image.<sup>47</sup>

The answer cannot be that other people don't have the same kind of interest in the idea as the first creator does. That may sometimes be true—I have a connection to the words I write, surely—but that connection does not require exclusivity. It might justify moral rights of attribution or integrity, but those are the smallest portions of the rights IP law confers.<sup>48</sup> IP imposes rather serious limits

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protected." Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

43. See, e.g., Kenneth Einar Himma, Information Scarcity and the Legitimacy of Legal Protection of Intellectual Property Rights (Oct. 6, 2014) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2506212](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506212) ("[A] proper analysis of the legitimacy of intellectual property rights must take into account the morally protected interests that content-creators have . . . in the expenditure of their limited resources . . .").
44. See, e.g., Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 733 (2012) (citing examples of important accidental inventions, including photography and penicillin).
45. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 133 (S.D.N.Y. 1968) (involving the copyright in the Zapruder film of the JFK assassination); see also *L.A. News Serv. v. Trullo*, 973 F.2d 791 (9th Cir. 1992) (involving the copyright in a news film of the Reginald Denny beating that led to the Los Angeles riots).
46. Most patent lawsuits are filed against independent inventors, not copyists. See Christopher A. Cotropia & Mark A. Lemley, *Copying in Patent Law*, 87 N.C. L. REV. 1421, 1423 (2009).
47. William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243, 244 (2012) (discussing the suit by the Associated Press against Shepard Fairey for infringement of the photo that became the basis for the Obama Hope poster).
48. Even the justification for moral rights seems to me more utilitarian than moral—we should give rights of attribution and integrity to creators if those are in fact the things that motivate them to create, as some recent scholarship suggests. See Fromer, *supra* note 16 and sources cited therein.

on what other people can do with the speech they encounter, even if they can make productive use of it and even if their connection to the speech is every bit as strong as the author's (as is the case in much fan fiction, for instance).

We don't tolerate that kind of speech restriction anywhere else in society. I have the right to wear a T-shirt that says "fuck the draft"<sup>49</sup> whether or not I came up with the phrase—unless, that is, someone copyrights it or trademarks it, as people have done with the smiley face, the phrase "class of 2000," the letter pi, and a host of other terms. A utilitarian IP framework has a metric for deciding whether we should give control over those terms to the people who claim them. But if IP is a Right, granted to the first creator not for a purpose but simply because they are first, it is hard to find a similar limiting principle.<sup>50</sup>

The problem is even worse when the copyright or trademark defendant has herself done something creative: retelling a story, mocking a song, or otherwise transforming a work. Now we have creators on both sides. A utilitarian system will give us some way to parse the competing claims of those two creators. But a moral claim that "I created it and so I own it" doesn't help very much.<sup>51</sup> We could imagine a natural rights theory of IP that said, "I created it and so I own it unless you yourself added to it," but where does that theory come from? Not from John Locke, surely.<sup>52</sup> Nor from real property law, in which the rule of accession usually works the other way.<sup>53</sup> Perhaps the moral rule is some form of "whoever added the most value to a work gets to own it," a theory that would account for fair use. But how are we to decide who added the most value without some sort of utilitarian calculus? And even if we did decide that maximizing value was a moral rather

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49. *Cohen v. California*, 403 U.S. 15, 15 (1971).

50. *See, e.g.*, Katyal, *supra* note 35, at 929 ("classifying intellectual property as a fundamental right gives us very little insight as to how to balance such a right against other fundamental rights, like freedom of speech."). Lockeans point to the proviso that "enough and as good" be left for others, *see* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1538 (1993), but that won't help much here, not only because it doesn't describe what IP law actually does but also because the fact that I could say something other than "fuck the draft" is cold comfort. Often it is the expression, not just the idea, that matters in communication. Indeed, Gordon's thesis is that a natural law theory of copyright that took Locke seriously would provide substantially more speech protection than IP law in fact does.

51. *See, e.g.*, Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 *MICH. L. REV.* 137, 184 (2010) ("Saying 'someone must (or deserves to) own this,' even if true, doesn't help answer the question of who should own it and what the scope of their ownership right should be. Those questions can be answered only by resort to social welfare.")

52. *See* SPINELLO & BOTTIS, *supra* note 31, at 158 (conceding that a fair use defense can't be derived from Locke).

53. *See, e.g.*, Thomas W. Merrill, *Accession and Original Ownership*, 1 *J. LEGAL ANALYSIS* 459, 459 (2009) ("[A]ccession . . . awards new resources to the owner of existing property most prominently connected to the new resource.")

than a utilitarian principle, it would quite often lead to results that are radically different than existing IP law. Whatever value J.K. Rowling gets from ownership of her works is surely far outweighed by the collective value her readers and fan fiction writers get from them.<sup>54</sup> That is even more true of Apple's iPhone, the value of which, while considerable to Apple, is surely dwarfed by the collective social value that accrues to its millions of users. But we do not declare the Harry Potter novels or the iPhone to be in the public domain merely because doing so will give ownership to the people—consumers and reusers—who collectively value the works more than their creators do. The IP faithful resist that analysis, not because it is economically wrong, but because they are not really about maximizing value at all. Sure, more people might be better off with weaker IP rights, but IP rights still trump because they are, well, rights.<sup>55</sup>

The problem is worse still in patent law. In most industries the overwhelming use of patents is not to sue people who copy the plaintiff's invention, but to sue independent inventors—people who themselves used their own ideas and their own private property to make things, and who often had never heard of the plaintiff or their patent.<sup>56</sup> If “I created it and so I own it” is true, why don't I own, or even have the right to make, the thing I invented when it turns out someone halfway around the world invented it a few days before? There may be a utilitarian reason to impinge on someone's freedom in this way in the service of encouraging transactions or making patent rights stronger and therefore encouraging people to strive for them,<sup>57</sup> though one can reasonably question whether doing so is good public policy.<sup>58</sup> But it is awfully hard to come up with a moral theory of IP that can explain why the first inventor has a right to prevent all independent inventors from developing their own ideas regardless of the social cost that granting that right imposes.

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54. For an effort to try to measure the “units of joy” Rowling's book offers to her and to a reader, see Shubha Ghosh, *Managing the IP Sprawl*, 49 San Diego L. Rev. 979, 1013–14 (2012).

55. See, e.g., MERGES, *supra* note 27, at 294 (“Readers have an interest in books and book publishing; users and adapters of technology have an interest in relevant technologies; and so on. But authors and inventors should have *rights*: strong, deep claims that take precedence over mere interests.”) (emphasis in original).

56. Cotropia & Lemley, *supra* note 46.

57. See, e.g., Lemley, *supra* note 44, at 712 (arguing for a theory of patent law that encourages patent races).

58. For arguments for some form of independent inventor defense in patent law, see, for example, Carl Shapiro, *Prior User Rights*, 96 AM. ECON. ASS'N PAPERS & PROCEEDINGS 92, 95 (2006); Samson Vermont, *Independent Invention as a Defense to Patent Infringement*, 105 MICH. L. REV. 475, 482 (2006). *But cf.* Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525, 1527 (2007) (offering some cautions about such a defense).

IP rights, then, impose significant costs on freedoms we value, from free speech to the ability to make and sell products in a market economy to the freedom to make the very kinds of inventions that give rise to the right in the first place. And they do so because the government has selected, sometimes arbitrarily, particular individuals to be deserving of those rights.<sup>59</sup> Having the government limit the freedoms of some people in order to channel more money to other people might be a good idea in some circumstances—if, for instance, it encourages the privileged ones to create things that they share with the ones whose freedom is limited. But it is a very odd thing to believe in as some intrinsic good in itself, regardless of whatever evidence there might be to the contrary.

Part of the faith people place in IP regardless of the evidence seems to come from a faith in the status quo—a feeling that IP must be a good thing because we always did it that way and it worked. But “don’t mess with success” is itself a utilitarian, not a faith-based, story. We should not mess with something only if it has in fact succeeded. The status quo is not a good in and of itself, to be protected no matter what evidence accumulates that it is rotten.

Perhaps the IP faithful hope to use the status quo as a sort of burden-shifting presumption, demanding stronger evidence to justify changing it. This is a particularly effective argument when the evidence is inconclusive or contradictory, or when (as with IP) it leads mostly to the conclusion that “it’s complicated.” But it doesn’t work very well to justify IP in its current form, for the simple reason that IP rights look rather different today than they did even a few decades ago, generally in the direction of more and more powerful IP protections. Trademark rights extend to prevent uses that would happily have coexisted fifty years ago. We have added a slew of new copyright statutes, expanding the term as well as the scope of protection, increasing penalties, and reaching conduct further and further removed from actual infringements. We issued six times as many patents in 2014 as we did three decades before, and most of the patent suits filed are brought by patent trolls, a category of plaintiffs that didn’t even exist forty years

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59. IP law is quite inconsistent in who it treats as deserving. Copyright deems the makers of fabrics and the takers of photos eligible for protection, for instance, but not chefs or the makers of dress designs. See, e.g., RAUSTIALA & SPRIGMAN, *supra* note 11, at 19; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 972 (1990). Patent law draws remarkably fine distinctions between the first to invent and later inventors—or, since 2013, between the first inventor to file or publicly disclose and then file within one year and everyone else. 35 U.S.C. § 102(b) (2012). And its concept of invention is complex and sometimes contingent on where the inventor lives and whether she went on vacation, for instance, and privileges those who run to the patent office over those who actually take the time to make a product first. See *id.* § 102(g); Griffith v. Kanamaru, 816 F.2d 624, 629 (Fed. Cir. 1987); Christopher A. Cotropia, *The Folly of Early Filing in Patent Law*, 61 HASTINGS L.J. 65, 88 (2009); Mark A. Lemley, *Ready for Patenting* (April 13, 2015) (unpublished manuscript) (on file with author).

ago and that one might think has a weaker moral claim on IP than people who actually make products. If your religion is really conservatism—not in the political sense but in the sense of resisting change because you like things pretty much the way they are—you ought to hate what modern IP law has become. And indeed in their more candid moments, the faithful admit that the move to moral justifications is designed to bias the analysis in favor of the IP owner.<sup>60</sup>

While I have focused my attention here on faith-based theories of IP, I should be clear that the flight from evidence toward belief is a problem that is not limited to proponents of IP. The “information wants to be free” crowd is often guilty of the same sort of conduct, substituting a freedom-based or cultural vision of the way they think the world should be for reasoned analysis based on the evidence.<sup>61</sup> Information doesn’t want to be free any more than it wants to be owned. What we as a society want the rules for information to be should depend on whether those rules will do more harm than good, not on our instincts or our beliefs. And while it is surely right that we need to take account of what people want and how they actually behave in answering that question, doing so is at base a utilitarian inquiry not advanced by a priori talk of Rights.

### III. THE CONSEQUENCES OF FAITH-BASED IP

Maybe—hopefully—I have persuaded you that we need to take seriously the evidence we have about how well or poorly the IP system works. That doesn’t mean I have persuaded you that we should abandon IP. Indeed, I haven’t tried to do so; I don’t think the evidence justifies that conclusion. As Dan Burk and I have argued, the evidence may well lead to different conclusions for different

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60. See, e.g., MERGES, *supra* note 27, at 294 (“I believe the position of creative persons should be a privileged one when it comes to the works they create. The most appropriate and most sensible way to embody this is to grant those persons a true legal right.”).

61. See, e.g., HUGH BREAKEY, INTELLECTUAL LIBERTY: NATURAL RIGHTS AND INTELLECTUAL PROPERTY 1, 3–4 (2012); Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 977 (2012) (rejecting utilitarianism in an attempt to move beyond price in evaluating IP). Anupam Chander and Madhavi Sunder (approvingly) describe what they see as the “cultural turn” away from economics on the part of low-protectionist scholars. Anupam Chander & Madhavi Sunder, *Copyright’s Cultural Turn*, 91 TEX. L. REV. 1397, 1398 (2013) (reviewing COHEN, *supra* note 16); see also Madhavi Sunder, *Novartis v. Myriad: The Indian and U.S. Courts on Patents and Public Health*, 12 EUR. INTELL. PROP. REV. 711, 714 (2013) (“[T]he purpose of intellectual property law need not be seen in narrow terms of incentives for innovation alone.”).

To be fair, though, even the most stalwart critics of IP in software, like Richard Stallman, often ground their critique in utilitarian if not explicitly economic terms. See, e.g., Richard Stallman, *Why Software Should Be Free*, GNU PROJECT (Apr. 12, 2014), <https://www.gnu.org/philosophy/shouldbefree.html>; see also MICHAEL BOLDRIN & DAVID LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (2006).

industries.<sup>62</sup> Nor do I want to make you focus exclusively on money or the rational actor assumptions of classical law and economics. A number of scholars have usefully reminded us that a utilitarian calculus can and should value more than simply dollars.<sup>63</sup> And many—too many—law and economics scholars seem to believe the optimal rules of IP can be derived from the theory of real property rather than from evidence.

For that matter, you can reject the classic incentive-based justification for IP and still articulate an evidence-based argument. It could conceivably be, for instance, that people are more creative if they think the world will treat them fairly, and that they view free riding as inherently unfair. Or perhaps your theory is that people will create only if they know that their grandchildren will be well-provided-for after they are gone. On the other side, you might oppose IP protection not because you think it won't drive innovation but because you think society focuses too much on innovation and not enough on other values.<sup>64</sup> I'm skeptical of all three theories, but they are theories that might justify IP protection that one could articulate and then test against the evidence. If your theory is one that can be tested, and if you will update your beliefs as new evidence comes in, good for you. You're not my target in this Essay.

Rather, the line I hope to draw here is between theories of IP that are responsive to evidence and those that are impervious to it. The evidentiary support for the current IP regime is dubious enough that it should prompt us to have a serious conversation as a society about when IP is serving the goals of encouraging the creation and dissemination of new content and when it isn't. At the very least, one would hope, I could persuade you to look at the evidence.<sup>65</sup>

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62. BURK & LEMLEY, *supra* note 8; *see also* Dan L. Burk, *Law and Economics of Intellectual Property: In Search of First Principles*, 8 ANN. REV. L. & SOC. SCI. 397, 411 (2012) (arguing that we may need diverse economic theories to explain legal protection for “the vast range of creative activity that is potentially subject to intellectual property protection . . . . [I]t seems likely that exclusive rights are performing different roles in different economic sectors.”).

63. *See, e.g.*, Cohen, *supra* note 21; Fromer, *supra* note 16, at 1457. Oren Bracha and Talha Syed have even gone so far as to articulate a utilitarian but non-efficiency-based theory of IP, one they call “consequence-sensitive” because it requires an analysis of costs and benefits. Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 229 (2014).

64. *Cf.* Madhavi Sunder, FROM GOODS TO THE GOOD LIFE: INTELLECTUAL PROPERTY AND SOCIAL JUSTICE (2012) (arguing for less focus on innovation and a greater focus on the cultural and social effects of IP).

65. For other calls for evidence-based IP rulemaking, see WILLIAM PATRY, HOW TO FIX COPYRIGHT 50–51 (2011); Mark P. McKenna, *Fixing Copyright in Three Impossible Steps*, 39 J. COLL. & UNIV. L. 715, 719–23 (2013) (reviewing PATRY, *supra*). For an argument that antitrust law, which is more explicitly experimentalist, can help IP law learn from evidence, see Tim Wu, *Intellectual Property Experimentalism by Way of Competition Law*, COMPETITION POL'Y INT'L, Autumn 2013, at 30, 31.

But if you are one of the faithful, I probably haven't persuaded you. The psychology literature suggests that while people are willing to be corrected about factual inaccuracies—things they think are true but are not—they are essentially impervious to correction once the thing that turns out to be untrue crosses the line into a belief.<sup>66</sup> And that leads me to the last—and, to me, most worrisome—problem with faith-based IP. If you are a true believer, we have nothing to say to each other. I don't mean by that that I am giving up on you, deciding that you're not worth my time to persuade. Rather, I mean that we simply cannot speak the same language. There is no principled way to compare one person's claim to lost freedom to another's claim to a right to ownership. Nor is there a way to weigh your claim of moral entitlement against evidence that the exercise of that right actually reduces creativity by others. Faith-based IP is at its base a religion and not a science because it does not admit the prospect of being proven wrong.<sup>67</sup> The inevitable result of a move toward faith-based IP is that we will make policy based on our instincts without being able to engage in a meaningful conversation about the wisdom of that policy.<sup>68</sup> And whether your instincts support IP or oppose it, hopefully we can agree that that is not a recipe for success.

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66. See, e.g., Maria Konnikova, *I Don't Want to Be Right*, NEW YORKER (May 16, 2014), <http://www.newyorker.com/science/maria-konnikova/i-dont-want-to-be-right>.

67. Karl Popper defines “falsifiability” as the critical trait that distinguishes a science from a belief. KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 17 (2005). As David Attenborough puts it, “[t]he correct scientific response to something that is not understood must always be to look harder for the explanation, not give up and assume a supernatural cause.”

68. Rochelle Dreyfuss and Susy Frankel have argued that this mindset has already made reasoned solutions more difficult in the context of international IP treaties. Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property* 2–4 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 14-53, 2014).