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IP as Metaphor

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INTRODUCTION

Everybody hates intellectual property trolls. They are parasites, who abuse intellectual property by forcing innovators to pay an unjust toll. Even worse are intellectual property pirates. They are thieves, who steal intellectual property by using it without the consent of its owner. By contrast, everybody loves innovators. They are farmers, entitled to reap what they have sown and enjoy the fruits of their labor.

But trolls, pirates, and farmers are metaphors. A "troll" abuses intellectual property only if its ownership or use of that intellectual property is unjustified, a "pirate" steals intellectual property only if the ownership of that intellectual property is justified, and a "farmer" is entitled to own intellectual property rights only to the extent that they are justified.

In *Illness as Metaphor*, Susan Sontag observed that illness has historically been understood metaphorically as an expression of the personality of the patient.[1] Specifically, tuberculosis was used as a metaphor for refinement and cancer as a metaphor for corruption. Tuberculosis was the bohemian disease, associated with creativity and expression; cancer was the bourgeois disease, associated with timidity and repression.

Sontag objected to this metaphorical understanding of disease, because illness is not a metaphor, but a physiological phenomenon. We do not create disease, but are afflicted by it. She argued that we cannot understand illness until we abstain from thinking about it metaphorically:

> My point is that illness is *not* a metaphor, and that the most truthful way of regarding illness—and the healthiest way of being ill—is one

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1 SUSAN SONTAG, ILLNESS AS METAPHOR 30 (1978).

> most purified of, most resistant to, metaphoric thinking. Yet it is hardly possible to take up one's residence in the kingdom of the ill unprejudiced by the lurid metaphors with which it has been landscaped. It is toward an elucidation of those metaphors, and a liberation from them, that I dedicate this inquiry.[2]

The same is true of intellectual property, because the rhetoric of intellectual property is metaphorical.[3] In theory, intellectual property is justified on welfarist grounds, because it solves market failures in innovation and thereby increases the public surplus. But in practice, the scope of intellectual property rights is unrelated to their ostensible welfarist justification. Intellectual property metaphors prevent us from understanding intellectual property by obscuring the lack of connection between its theoretical justification and its actual scope.

Notably, illness metaphors and intellectual property metaphors even have a parallel structure. Much as tuberculosis became a metaphor for expression and cancer became a metaphor for repression, innovators have become a metaphor for expression and pirates and trolls have become metaphors for repression.

But intellectual property metaphors are even more pernicious than illness metaphors. The problem with illness metaphors is that they are false. Illness metaphors propose that disease is a product of uncontrolled emotion. But disease is not a product of emotion and cannot be cured by controlling our emotions. As a result, illness metaphors prevent us from understanding disease by obscuring its true physiological causes.

The problem with intellectual property metaphors is that they obscure the welfarist justification for intellectual property and encourage the creation of intellectual property rights inconsistent with that justification. Illness is a physiological phenomenon, but intellectual property is a political phenomenon. We do not create illness, but we do create intellectual property. As a result, intellectual property metaphors not only obscure the justification for intellectual property, but also induce us to grant intellectual property rights that are incompatible with that justification.

Intellectual property metaphors encourage us to apply property heuristics that promote the efficient regulation of rivalrous goods to the regulation of non-rivalrous goods. The metaphors are compelling because they evoke familiar heuristics, but their rhetoric obscures the fact that the justification for

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2 *Id.* at 3–4.

3 *See generally* Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes . . . The Metaphors of Intellectual Property*, 28 SYDNEY L. REV. 211 (2006).

creating property rights in rivalrous and non-rivalrous goods is totally different. Property rights that increase social welfare when applied to rivalrous property may decrease social welfare when applied to non-rivalrous property. Intellectual property metaphors induce us to ignore efficiency, by taking property rights for granted.

I. THEORIES OF INTELLECTUAL PROPERTY

Intellectual property provides exclusive rights to use ideas, expressions, and marks, among other things. Those exclusive rights are in tension with antitrust law and the right to free expression protected by the First Amendment. Accordingly, the proper scope of those rights depends on the justification for intellectual property.

A. The Economic Theory of Intellectual Property

The prevailing theory of intellectual property is the economic theory, which holds that intellectual property is justified because it solves market failures caused by free riding and transaction costs. Under the economic theory, patents and copyrights solve market failures caused by free riding by indirectly subsidizing innovation. Other forms of intellectual property, like trademarks and trade secrets, also solve market failures caused by transaction costs.[4]

A market failure exists when the market allocation of a good is not economically efficient. Free riding and transaction costs cause market failures by preventing the efficient allocation of goods. Free riding, or the ability to consume a good without paying the marginal cost of production, causes market failures by creating an incentive to overuse rival goods and underproduce non-rival goods. Transaction costs, or costs incurred incident to a market exchange, cause market failures by preventing economically efficient exchanges.

Innovation is vulnerable to free riding because, in the absence of intellectual property, it is a non-excludable, non-rival good. As a consequence, market participants have an incentive to underinvest in innovation and consume the innovations created by others, causing market failures. Rational marginal innovators will invest in innovation only if they can recover their sunk costs and opportunity costs by charging a premium price for their goods, but free riding by competitors would quickly reduce the market price of the good to marginal cost of production.

4 *See, e.g.*, RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS 78 (2013).

Intellectual property enables marginal innovators to recover their costs by providing an indirect subsidy in the form of a limited monopoly to use certain innovations. In other words, intellectual property solves market failures in innovation by making it partially excludable and thereby reducing free riding.

Marks and secrets are vulnerable to transaction costs because, in the absence of intellectual property, information costs and agency costs would increase. Trademarks reduce information costs by enabling consumers to identify the source of a product. Trade secrets reduce agency costs by making it easier for principals to prevent their agents from disclosing innovations.

Of course, these are only hypotheses. It may or may not be the case that without intellectual property free riding and transaction costs would cause underinvestment in innovation and quality. And it may or may not be the case that intellectual property actually provides salient incentives to invest in innovation and quality.

The economic theory is explicitly welfarist, holding that intellectual property is justified because it increases social welfare.[5] "Intellectual property rights, like other property rights, are justified where—and only where—the costs of exclusion and related costs are outweighed by the benefits attending additional creation or discovery and the benefits of better management, promotion, and allocation of property."[6] Intellectual property increases social welfare by solving market failures caused by free riding on innovation, thereby creating an incentive to invest in innovation. Trademarks and trade secrets increase social welfare by solving market failures caused by transaction costs, thereby creating an incentive to invest in quality and innovation. In other words, intellectual property is justified because it produces a social benefit that exceeds its social cost.

Under the economic theory, intellectual property is justified only to the extent that it is efficient. It follows that an intellectual property right is justified only if the marginal social cost of granting the right is smaller than the marginal social benefit generated by granting the right. It follows that the scope of intellectual property rights must be determined on a case-by-case basis, because an intellectual property right is efficient if and only if it causes its recipient to provide a social

5 Louis Kaplow & Steven Shavell, *Principles of Fairness Versus Human Welfare: On the Evaluation of Legal Policy* 15 (Harvard John M. Olin Ctr. for Law, Econ., and Bus. Discussion Paper, Paper No. 277, 2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=224946.

6 CASS & HYLTON, *supra* note 4, at 48.

benefit that is larger than the social cost of the right. In other words, the economic theory implies that intellectual property is justified only to the extent that each grant of rights provides the incentive necessary to cause its recipient to provide a social benefit and no more, and only if the social benefit is larger than the social cost of the right.

Of course, in practice, intellectual property rights are not and cannot be granted on a case-by-case basis. It is probably impossible to determine whether or not any particular intellectual property right is efficient, and it would certainly be impossible to administer an intellectual property system that required such case-by-case determinations. At best, an intellectual property system can adopt rules governing intellectual property rights that will provide the largest net social benefit.

It is difficult to determine the social benefit created by intellectual property, especially to the extent that it creates an incentive to invest in innovation. While solving market failures caused by transaction costs increases static efficiency, solving market failures caused by free riding on innovation increases dynamic efficiency, because innovation is associated with multiplier effects and often provides an increasing social benefit over time.

As a result, it could be dynamically efficient for an intellectual property system to incur large social costs in the short term, in exchange for larger social benefits in the long term. However, this "trickle-down" version of the economic theory does not account for diminishing marginal returns. While the economic theory predicts that increasing intellectual property rights will increase innovation, it also predicts that the marginal value of that innovation will decrease. At some point, the marginal social cost of increasing intellectual property rights will exceed the marginal social benefit of innovation.

Some scholars have argued that the existing intellectual property system may be justified under the economic theory because it appears to provide a net benefit to society. For example, Cass and Hylton point to a study showing that increases in the perceived strength of a country's protection of intellectual property are associated with increases in that country's rate of economic growth, acknowledging its vulnerability to omitted variable bias and failure to show

causation.[7] Other scholars have conducted similar studies and arrived at similar conclusions.[8]

However, many scholars have argued that the existing intellectual property system is not justified under the economic theory. Some argue that it is inefficient because the scope of the intellectual property rights is broader than necessary to solve the market failures caused by free riding and transaction costs.[9] Others argue that the existing intellectual property system is not just inefficient, but actually reduces social welfare and should be abolished.[10]

B. The Labor and Personality Theories of Intellectual Property

Of course, there are alternative theories of intellectual property. Most notably, the labor theory advanced by Locke holds that intellectual property is justified because people have a natural right to own the fruits of their labor, and the personality theory advanced by Kant and Hegel holds that intellectual property is justified because personal autonomy depends on the ability to control expressions of personhood.[11]

While the labor and personality theories may accurately describe popular intuitions about the justification of intellectual property, they have serious weaknesses. To begin with, they are incompatible with the Intellectual Property Clause, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[12] The Supreme Court has uniformly held that the Intellectual Property Clause adopts a welfarist theory of intellectual property. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by

7 *Id.* at 45–46 (citing WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2002–2003, at 603 (Peter K. Cornelius ed., 2003)).

8 *See, e.g.*, Albert G. Z. Hu & Ivan P. L. Png, Patent Rights and Economic Growth: Evidence from Cross-Country Panels of Manufacturing Industries 3 (Nov. 9, 2009) (unpublished paper) (CELS 2009 4th Annual Conference on Empirical Legal Studies Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339730 (finding that stronger patent laws are associated with increased economic growth).

9 *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE 161–62 (2004).

10 *See, e.g.*, MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 243–44 (2008).

11 *See* Peter S. Menell, *Intellectual Property: General Theories*, *in* 2 ENCYCLOPEDIA OF LAW & ECONOMICS 129, 156–63 (Boudewijn Bouckaert & Gerrit de Geest, eds., 2000) (outlining the labor and personhood theories, among others)*; see also* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 3 (2011) (providing a more detailed account of the Lockean and Kantian theories of intellectual property).

12 U.S. CONST. art. I, § 8, cl. 8.

personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"[13]

Moreover, neither the labor nor the personality theory provides a basis for determining whether or not intellectual property rights are justified. The labor theory justifies granting property rights in rivalrous goods, in order to prevent the tragedy of the commons, but cannot justify granting property rights in non-rivalrous goods. The personality theory justifies granting property rights in expressions of personhood in order to promote autonomy, but cannot explain when those property rights are justified and when they are not.[14] Indeed, some scholars have adopted the labor or personality theory only because they concluded that the existing intellectual property system is not justified under the economic theory.[15]

II. THE INTELLECTUAL PROPERTY SYSTEM

Surprisingly, the constitutional justification for the intellectual property system is explicitly welfarist, but the actual scope of intellectual property rights is not determined on welfarist grounds. Intellectual property advocates uniformly argue that intellectual property rights are justified because they promote innovation and reduce transaction costs. Congress consistently finds that increasing the scope and duration of intellectual property rights is justified because it will promote innovation and reduce transaction costs. And the Supreme Court inevitably defers to those findings when it evaluates the constitutionality of intellectual property rights. For example, copyright owners argue that Congress should extend the copyright term of existing works in order to promote innovation, Congress extends the copyright term of existing works in order to promote innovation, and the Supreme Court holds that Congress could rationally believe that extending the copyright term of existing works will promote innovation.[16]

Nowhere along the way does anyone feel obligated to show that particular intellectual property rights actually promote innovation or reduce transaction costs. On the contrary, it is

13 *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 219 (1954).

14 *See* CASS & HYLTON, *supra* note 4, at 17–31 (criticizing the natural rights and personality theories of intellectual property). *But see* MERGES, *supra* note 11 (defending the natural rights and personality theories of intellectual property).

15 *See, e.g.*, MERGES, *supra* note 11, at 3–4 ("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 they would be without it.") (citing Peter Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 14–15 (2006)).

16 *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 215–17 (2003).

taken for granted, and the theory that certain intellectual property rights may increase public welfare becomes the truism that all intellectual property rights necessarily increase public welfare. This rhetorical sleight of hand prevents critical assessment of the decision to create or expand particular intellectual property rights, and is obscured by the metaphors that we use to describe and understand intellectual property rights.

III. INTELLECTUAL PROPERTY METAPHORS

While the prevailing theory of intellectual property is welfarist, intellectual property rhetoric is overwhelmingly metaphorical.[17] Popular discussion of intellectual property abounds with metaphors: farmers, pirates, trolls, and so on. And those same metaphors are incorporated into scholarly discussion of intellectual property.

For example, intellectual property rhetoric uses agrarian metaphors to describe intellectual property owners. They are farmers, who expend the "sweat of the brow" in order to "sow the seeds" of innovation. As a consequence, they are entitled to "reap what they have sown" and "enjoy the fruits of their labor." The influence of the labor theory on these agrarian metaphors is obvious.

By contrast, it uses criminal metaphors to describe intellectual property infringers. Some infringers are "thieves," who "steal" intellectual property and use it for their own purposes. Others are "pirates," who "hijack" intellectual property on the "high seas" of commerce and distribute it on the black market. Still others are "bootleggers," who fix intellectual property in a tangible medium without permission.

And it uses disease metaphors to describe intellectual property abusers. They are "parasites," who abuse the intellectual property system in order to benefit themselves, at the expense of innovators. Or they are "trolls," who abuse intellectual property rights by forcing innovators to pay a toll.

These intellectual property metaphors subtly shape our understanding of intellectual property law. As Lakoff and Johnson observed, "The essence of metaphor is understanding and experiencing one kind of thing in terms of another."[18] Intellectual property metaphors encourage us to understand and

17 Loughlan, *supra* note 3, at 223–24.

18 GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 5 (1980) (emphasis removed).

experience intellectual property metaphorically, rather than in relation to its welfarist justification. Agrarian metaphors encourage us to believe that intellectual property owners are entitled to internalize all of the social surplus generated by innovation, even though the economic theory holds that intellectual property rights are justified only if they are efficient, and that the scope of intellectual property rights should depend on marginal incentives. Criminal metaphors encourage us to believe that intellectual property infringers are wrong, even if their actions increase public welfare, without decreasing anyone's welfare. And disease metaphors encourage us to believe that the justification of intellectual property depends on how it is used, rather than on whether it increases public welfare.

In fact, intellectual property metaphors obscure the welfarist justification for intellectual property even when they are used to explain limitations on the scope of intellectual property. For example, in *Feist v. Rural*, the Supreme Court used the "sweat of the brow" and "fruits of intellectual labor" metaphors to explain why copyright cannot protect a telephone directory.[19] Under the "sweat of the brow" doctrine, copyright protected factual compilations, in order to ensure that compilers could "enjoy the fruits of their labor." *Feist* rejected the "sweat of the brow" doctrine, holding that copyright can only protect the original elements of a work of authorship, and that originality requires independent creation and creativity. Facts cannot be protected by copyright, because they are not independently created, so a factual compilation can be protected by copyright only to the extent that its selection, coordination, or arrangement of facts is independently created and has some creative element. The alphabetical arrangement of a telephone directory lacks any creative element, so it cannot be protected by copyright. "As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark."[20]

However, while *Feist* held that copyright cannot protect a telephone directory,[21] it implied that copyright can protect a compilation of facts that incorporates any degree of judgment in its selection, ordering, or arrangement, no matter how trivial.[22] Moreover, while *Feist* held that copyright cannot protect the

19 *See* Feist v. Rural, 499 U.S. 340, 346, 359–60 (1991) (emphasis removed).
20 *See id.* at 363 (emphasis removed).
21 *Id.* at 340.
22 *Id.* at 358–59.

"sweat of the brow" of a compiler of facts, it implicitly assumed that copyright can protect the "sweat of the brow" of any other kind of author. The originality doctrine adopted by *Feist* provides no basis for denying copyright protection to anything other than a compilation of facts. In other words, *Feist* effectively narrowed the scope of copyright protection in one area, only to expand it in all others, and considered the welfarist justification for intellectual property rights only in order to dismiss it as irrelevant to whether copyright can protect facts.[23]

IV. INTELLECTUAL PROPERTY TROLLS

As noted above, intellectual property rhetoric is replete with metaphors. This Article will focus on the relatively novel "troll" metaphor, which made its first appearance in the mid-1990s, became popular in the 2000s, and has recently begun to enter the vernacular. The relative novelty of the "troll" metaphor provides an unusual opportunity to observe the emergence and dissemination of an intellectual property metaphor, to study its effect on intellectual property policy, and to consider how it frames our understanding and experience of particular intellectual property rights and owners. While each intellectual property metaphor has a unique history and rhetorical content, a similar analysis of other intellectual property metaphors would almost certainly provide similar results.

A troll is a mythical monster that lives under a bridge and charges a toll to use the bridge.[24] But what is an "intellectual property troll"?

A. Patent Trolls

The "troll" metaphor is used primarily in the context of patent law, in reference to "patent trolls." Apparently, the term "patent troll" was coined by patent lawyer Paula Natasha Chavez in a 1994 educational video titled *The Patent System*. In the video, Chavez describes owners of broad patents as "patent trolls," because they can use their patents to collect "tolls" from other innovators, and depicts a "patent troll" as a scruffy, green man under a bridge holding a sign reading "PAY HERE TO CROSS."[25]

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23 *See id.*

24 Transcript of Oral Argument at 26, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (No. 05–130), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-130.pdf.

25 *See The Original Patent Troll Returns*, PR NEWSWIRE, http://www.prnewswire.com/news-releases/the-original-patent-troll-returns-58004897.html (last visited Feb. 16, 2015); ROBERT FLETCHER, INTELL. PROP. INS. SERVS. CORP., A CONTINUED DISCUSSION

But the term "patent troll" was popularized by Peter Detkin in 2001. At the time, Detkin was assistant general counsel for Intel Corporation, which faced a congeries of patent infringement actions filed by an assortment of companies with a shared business model of buying and enforcing patents. Detkin referred to Intel's adversaries as "patent trolls" and kept a collection of troll dolls on his desk:

> Peter Detkin's spin sounds surprisingly like something out of the Brothers Grimm. In the sleepy village of Santa Clara, there lived a very wealthy but very frightened giant named Intel. Intel was plagued by a fearsome band of evil trolls—patent trolls, to be exact—who wanted a glittering pot of gold in exchange for doing absolutely nothing. And they were very powerful because they said they owned the patent on some of the magic Intel used to become rich.[26]

According to Detkin, "A patent troll is somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced."[27]

Detkin's use of the "patent troll" metaphor quickly caught on. Industry publications started using the term, and legal scholars followed suit. The term "patent troll" first appeared in a law review article in 2002, first appeared in the text of a law review article in 2004, and first appeared in the title of a law review article in 2005.[28] As of 2015, a Westlaw search for the term "patent troll" returned almost 1200 hits.

Eventually, general interest journalists recognized a story. Most notably, WBEZ's *This American Life* aired an hour-long episode titled "When Patents Attack!" on July 22, 2011, exploring the "patent troll" phenomenon.[29] And where journalists go, politics follows. Businesses affected by patent law have formed an assortment of lobbying groups, most notably "United for Patent Reform," a collection of technology companies and

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ON PATENT TROLLS (2013), *available at* http://www.patentinsurance.com/custdocs/A%20Continued%20Discussion%20on%20Patent%20Trolls.pdf; Paula Natasha Chavez, *The Original Patent Troll*, YOUTUBE (Jan. 28, 2007), https://www.youtube.com/watch?v=lOGoZFzHkhs.

26 Brenda Sandburg, *You May Not Have a Choice. Trolling for Dollars*, THE RECORDER (July 30, 2001), http://www.phonetel.com/pdfs/lwtrolls.pdf.

27 *Id.*

28 *See* Gregory F. Sutthiwan, *Prosecution Laches as a Defense to Infringement: Just in Case There Are Any More Submarines Under Water*, 1 J. MARSHALL REV. INTELL. PROP. L. 383, 383 (2002) (citing Sandburg, *supra* note 26); Derek C. Stettner, *Meet the Patent Enforcers*, 77 WISCONSIN LAW., Apr. 2004, at 18, 21 (quoting Peter Detkin); Elizabeth D. Ferrill, *Patent Investment Trusts: Let's Build a Pit to Catch the Patent Trolls*, 6 N.C. J. L. & TECH. 367 (2005).

29 *When Patents Attack!,* THIS AM. LIFE (July 22, 2011), http://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack.

retailers.[30] Various states have enacted or are considering "anti-patent troll" legislation.[31] Congress has also considered "anti-patent troll" legislation.[32] And President Obama has identified "patent trolls" as a problem:

> [O]ne of the biggest problems that we've been working on is how do we deal with these folks who basically are filing phony patents and are costing some of our best innovators tons of money in court; or, if they don't go to court, they end up having to pay them off, even though they're making a bogus claim just because it's not worth it for you to incur all the litigation costs.[33]

As of January 2015, the "patent troll" metaphor has begun to enter the vernacular, if it hasn't already arrived. There is a long Wikipedia entry for "patent troll."[34] And a Google search for "patent troll" returns 887,000 results.[35] In any case, almost everyone seems to agree that patent trolls are a big problem. For example, one study argues that patent trolls cost society about $30 billion per year.[36] Ironically, in 2000, Detkin co-founded Intellectual Ventures, which is widely considered the apotheosis of a patent troll.[37]

So, what is a patent troll, exactly? It's hard to say. Conventional wisdom defines "patent trolls" as patent owners who abuse the patent system in order to force innovators to pay a toll, as reflected in President Obama's comments. In other words, "patent trolls" are rent-seekers. But the conventional definition is obviously inadequate, as it provides no basis for identifying whether a patent claim is legitimate or abusive. Or rather, to put it in metaphorical terms, it does not explain how to distinguish "farmers" from "trolls."

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30 UNITED FOR PATENT REFORM, http://www.unitedforpatentreform.com/ (last visited Feb. 16, 2015).

31 Joe Mullin, *Ten States Pass Anti-patent-troll Laws, with More to Come,* ARS TECHNICA (May 15, 2014), http://arstechnica.com/tech-policy/2014/05/fight-against-patent-trolls-flags-in-the-senate-but-states-push-ahead/.

32 U.S. H.R. Judiciary Comm., *Goodlatte and Eshoo Call on the Senate to Pass Innovation Act,* HOUSE.GOV (July 17, 2014), http://judiciary.house.gov/index.cfm/press-releases?id=1F8AF0DB-E1DD-4A38-AE29-BB3F097746DE.

33 *Remarks by the President in a Town Hall on Innovation, Los Angeles, CA*, WHITEHOUSE.GOV (Oct. 9, 2014), http://www.whitehouse.gov/the-press-office/2014/10/09/remarks-president-town-hall-innovation-los-angeles-california.

34 *Patent Troll*, WIKIPEDIA, http://en.wikipedia.org/wiki/Patent_troll (last updated Mar. 21, 2015).

35 As of April 14, 2015.

36 James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 389 (2014).

37 *See* INTELLECTUAL VENTURES, INTELLECTUAL VENTURES FACT SHEET (2014), *available at* http://www.intellectualventures.com/assets_docs/IV_Corporate_Fact_Sheet_Sep2014.pdf.

Of course, scholars stepped into the gap, albeit with limited success. Initially, most commentators defined a "patent troll" as a "non-practicing entity," or an organization that owns a patent, but does not produce any products.[38] In other words, they adopted Detkin's definition.

However, as the Supreme Court recognized in *eBay Inc. v. MercExchange*, Detkin's definition is too broad, because organizations may efficiently specialize in producing and licensing innovation, rather than in producing products: "For example, some patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves."[39]

In theory, there is no reason to favor patents owned by practicing entities and disfavor patents owned by non-practicing entities. In fact, non-practicing entities should increase the efficiency of the patent system. If a patent owner has disclosed a valuable and patentable innovation, the patent system should be neutral as to whether the patent owner practices the patent itself, or licenses it to another party that can practice it more efficiently. The ability to make that choice may enable some entities to specialize in generating discoveries. Indeed, many non-practicing entities are organizations that specialize in research, like universities.[40]

As a consequence, most commentators have redefined "patent trolls" as "patent assertion entities," or non-practicing entities, with a business model of buying and asserting patents.[41] Critics of patent assertion entities argue that they abuse the patent system by refusing to bargain with practicing entities, asserting weak patents, increasing litigation costs, and making frivolous claims.[42] However, most of these criticisms of patent assertion entities are either unsupported by the evidence or apply with equal force to practicing entities.

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38 *See*, *e.g.*, 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, 1577–90 (2009).

39 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 393 (2006).

40 Mark A. Lemley, *Are Universities Patent Trolls?,* 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611, 612 (2008) (concluding that universities are not patent trolls).

41 Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 300 (2010) ("The most visible buyers of patents have been 'patent-assertion entities,' which I define as entities that use patents primarily to get licensing fees rather than to support the development or transfer of technology.").

42 Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2129 (2013).

In theory, both non-practicing entities and patent assertion entities should increase the efficiency of the patent market by providing liquidity. The purpose of the patent system is to solve market failures in innovation by providing an incentive to marginal innovators. But the patent system cannot provide a salient incentive unless patents are valuable. If the patent resale market is limited to practicing entities, the resale value of patents should decrease, and marginal innovators may be deterred from investing in innovation. Non-practicing entities and patent assertion entities can provide the liquidity necessary to ensure that marginal innovators can obtain the full market value of their patents. Indeed, many non-practicing entities and patent assertion entities seem to perform exactly that function, at least part of the time.[43]

The objection that patent assertion entities disproportionately assert weak patents is not supported by the evidence. There is no evidence that the patents owned and asserted by patent assertion entities are weaker than the patents asserted by practicing entities. In fact, practicing entities and patent assertion entities have similar litigation records and appear to assert patents of similar strength.[44] Or rather, similar weakness. About half of the patents asserted in patent infringement actions are found invalid.[45] This is particularly remarkable given the presumption of validity, which places the burden on the defendant to prove that a patent is invalid.

This should come as no surprise. Patents are valuable to both practicing entities and patent assertion entities, to the extent that they are enforceable. While both will claim weak patents to the extent that they are valuable, both prefer strong patents, because they are more valuable, either as a way of extracting rents from competitors or from practicing entities. In fact, if anything, patent assertion entities should have a stronger preference for strong patents than practicing entities, because they are more likely to assert their patents.

The objection that patent assertion entities increase litigation costs, even if true, is a red herring. Patent assertion entities increase litigation costs because their business is litigation, or at least the threat thereof. If the patents they assert are valid, they are entitled to litigate. If the patents are invalid,

43 *Id.*; David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 428–29 (2014).

44 *See generally* Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457 (2012).

45 Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, 19 J. ECON. PERSP. 75, 76 (2005).

the problem is not the litigation, but the fact that the patents were granted in the first place.

In practice, the problem is that many patents are not justified and should not have been granted. As several scholars have explained, patent examiners have strong incentives to grant patent applications, and strong disincentives to deny them. As a result, the Patent Office grants many unjustified patents, the most absurd of which are the subject of much ridicule.[46] But they are only the tip of the iceberg. And the fecklessness of the Patent Office has been exacerbated by the excessively permissive doctrines developed by the Federal Circuit. While the Supreme Court has finally begun to push back against the most egregious abuses, it has done little to address the problem, and remains unfortunately deferential to both the Patent Office and the Federal Circuit.[47]

Patent assertion entities are merely a symptom of these unjustified and inefficient patents. Practicing entities have an incentive to enter licensing pools and form cartels with their competitors because the bulk of their profits come from selling products to the public. By contrast, patent assertion entities are indifferent between licensing and litigating their patents. They have little incentive to enter licensing pools, because they have no intention of practicing their patents. While practicing entities collect rents from both the public and their competitors, patent assertion entities can only collect rents from practicing entities.

The hypocrisy of the practicing entities that complain about patent trolls is remarkable. They themselves hold and assert many more patents of dubious quality than the so-called trolls. Moreover, in many industries, large companies use shared patent portfolios to form de facto cartels. Patents become a method of blocking entry into patent-heavy markets. Members of the cartel will license to each other, but not to new entrants. As these entities grow larger and larger, many begin to assert their patents more aggressively. The result is an avalanche of inefficient patent litigation over unjustified patents.

Some scholars argue that these patent pools are not cartels because they reduce transaction costs related to licensing patents and thereby enable patent owners to use their patents and

46 *See* PATENTLY SILLY, http://www.patentlysilly.com/ (last visited Mar. 21, 2015).

47 *See generally* Robin Feldman, *Coming of Age for the Federal Circuit*, 18 GREEN BAG 2D 27 (2014).

produce goods using their discoveries more efficiently.[48] While patent pools reduce transaction costs for patent owners, and therefore benefit consumers by enabling the use of discoveries that might otherwise be blocked, it does not follow that the underlying patents are justified. Indeed, to the extent that the underlying patents are inefficient, the transactions costs at issue could be eliminated just as well, and with more public benefit, by eliminating patent protection.

As many scholars have suggested, if "patent trolls" are a problem because they tend to own and assert weak patents that should not have issued, then the patents are the problem, not the trolls:

> Patent trolls alone are not the problem; they are a symptom of larger problems with the patent system. Treating the symptom will not solve the problems. In a very real sense, critics have been missing the forest for the trolls. Exposing the larger problems allows us to contemplate changes in patent law that will actually tackle the underlying pathologies of the patent system and the abusive conduct they enable.[49]

Unsurprisingly, the magnitude of the patent troll problem tracks the difficulty and expense of obtaining patents in various areas. The technology sector, where patents issue broadly and costs are relatively low, is rife with patent trolls. The problem is even worse with respect to software patents, which are overbroad by definition and almost uniformly of trivial value. By contrast, in the pharmaceutical sector, where patents issue more narrowly and costs are very high, the patent troll problem is much more muted.[50]

So, if "patent trolls" abuse the patent system, what is the nature of that abuse? To the extent that they assert frivolous claims, criticism is warranted. But that is less a criticism of their use of the patent system than an allegation that they engage in fraud. And fraud is the basis for much of the state legislation against patent trolls.

But criticism of "patent trolls" on the ground that they assert unjustified patents is unwarranted, or at least misdirected. While so-called "patent trolls" may assert unjustified patents, so do their accusers. Indeed, the patent system is replete with unjustified patents, precisely because the actual scope of patent

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48 Henry Delcamp, *Are Patent Pools a Way to Help Patent Owners Enforce Their Rights?*, 41 INT'L REV. L. & ECON. 68, 75 (2015); Steven Carlson, *Patent Pools and the Antitrust Dilemma*, 16 YALE J. ON REG. 359, 379 (1999).

49 Lemley & Melamed, *supra* note 42, at 2121.

50 *Id.* at 2172–73.

protection is unrelated to its theoretical justification. "Patent trolls" are merely patent owners who refuse to bargain with the dominant cartel. If they are rent-seekers, so are their targets.

The "troll" metaphor focuses criticism on certain patent owners on the basis of how they use patents. But it discourages recognition of the fact that all patent owners are merely exercising rights granted to them by the Patent Office and by extension by Congress. In other words, patent trolls are exercising presumptively valid patents, just like any other patent owner.

In other words, the "troll" metaphor is a rhetorical way of deflecting criticism from the patent system as a whole onto particular patent owners. So-called patent trolls are just exercising presumptively valid patents, granted by the same system that grants all other patents. The "troll" metaphor discourages criticism of the patent system and discourages us from asking whether the patents exercised by trolls are any different from the patents exercised by their "victims."

More to the point, the "troll" metaphor encourages us to internalize and accept as justified industry norms regarding the use and abuse of patents, without asking whether those norms promote the interests of the public or the industry.

B. Copyright Trolls

While the "troll" metaphor is overwhelmingly used in relation to patents, it has gradually been applied to other forms of intellectual property as well, especially copyright. The term "copyright troll" first appeared in a law review article in 2011.[51] As of April 14, 2015, a Westlaw search for the term "copyright troll" returns 118 hits, and a Google search returns about 65,000 hits.

Unsurprisingly, a "copyright troll" is generally defined as a copyright owner who abuses the copyright system. However, no consensus has emerged as to what counts as "abuse." Some scholars have used the term to refer to copyright owners who use the threat of infringement litigation to obtain unjust settlements.[52] Some have used it to refer to copyright owners who issue infringement notices without determining whether any

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51 *See* Nicole Downing, *Using Fair Use to Stop a Copyright Troll from Threatening Hyperlinkers*, 12 N.C. J.L. & TECH. ONLINE 155, 155 (2011).

52 *See* Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 55 (2014) (arguing that copyright trolls "exploit enforcement rights by using the threat of statutory damages to extract quick settlements from secondary users, regardless of whether the use was legally protected").

infringement has actually occurred. Some have used it to refer to copyright owners who use their copyrights to silence speech that they disapprove of. And some have used it to refer to copyright owners with improper incentives to litigate.[53]

It should come as no surprise that scholars have found it difficult to define "copyright trolls," because the scope of copyright protection is so much broader and less justified on welfarist grounds than the scope of patent protection. Unlike patents, which require an application, have a reasonably short duration, and—at least theoretically—are only granted if the application discloses a bona fide innovation, copyrights issue automatically, last practically forever, and protect all works that include an original element, no matter how trivial.

While inventors must apply for a patent, authors automatically receive a copyright in every work of authorship they create, merely by fixing it in a tangible medium. As a result, inventors must anticipate whether an invention will become valuable, and invest in a costly and burdensome process in order to obtain a patent, which may or may not provide a return on investment. By contrast, authors can simply wait and see whether anything they create becomes valuable, and extract a tax if it does.

As a consequence, the scope of copyright protection is essentially impossible to defend on welfarist grounds. More often than not, copyright is irrelevant. Because copyright automatically protects the original elements of any work of authorship, the overwhelming majority of copyright owners don't even realize that they own a copyright. Obviously, copyright cannot provide an incentive to innovate to those who did not realize they had created a copyrighted work, or who did not need the incentive in order to innovate.

And the scope of copyright protection is ridiculously overbroad. As Justice Breyer has explained, the duration of copyright protection is wildly excessive.[54] But equally as bad, the adaptation right provides copyright owners the right to claim returns far in excess of what could possibly be an incentive, and it enables them to improperly prevent speech. It requires only the barest shred of cynicism to observe that the subject matter

53 *See* Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 730 (2013) (arguing that copyright trolls are copyright owners with "incentives to sue for copyright infringement [which] emanate from motivations that diverge rather fundamentally from the social reasons for the very existence of the copyright system").

54 Eldred v. Ashcroft, 537 U.S. 186, 266 (2002) (Breyer, J., dissenting).

and scope of copyright protection are drawn to maximize the opportunities for the copyright owners of already valuable works to engage in rent seeking, rather than to maximize the incentive to innovate. Indeed, the adaptation right is on its face calculated to provide rent-seeking opportunities at the direct expense of innovation.

While the inefficient and unjustified scope of copyright protection is mitigated by various exclusions and defenses, especially the fair use exception, they are effective only on the margins. As many scholars and judges have observed, the exclusive rights of copyright owners and the exceptions to copyright protection are in direct tension with each other. And while there is some consideration of efficiency in determining whether or not a particular use of a work is protected by an exception, the primary purpose of the exceptions is to protect First Amendment values and prevent the most absurd implications of the exclusive rights granted to copyright owners.

Once again, the "troll" metaphor performs the rhetorical function. Copyright owners use copyright to enforce their right to "enjoy the fruits of their labor." Copyright trolls abuse copyright to collect a toll. But both are just asserting rights granted by the Copyright Act. And abuse is a matter of perspective.

Expanding the exceptions to copyright or targeting the most egregious abuses of copyright protection can at best mitigate the problem on the margins. Once again, the only way to address the problem squarely is to re-evaluate the efficiency of the subject matter and scope of copyright protection, and to make efficiency an explicit requirement of copyright protection.

Of course, as in the case of patents, the efficient level of copyright protection almost certainly depends on the factors surrounding a particular work. Different kinds of works have different levels of sunk costs and opportunity costs, and sell into very different markets. But restricting the kinds of works that can be protected, limiting the scope of the exclusive rights of copyright owners, and reducing the duration of copyright protection would far more effectively address the problem of copyright trolls and increase the efficiency of the copyright system.

C. Trademark Trolls

On its face, it would seem that the term "trademark troll" is an oxymoron. Indeed, some commentators have argued that

"there is no such thing as a 'trademark troll.'"[55] Unlike the other forms of intellectual property, which pay lip service at best to the public interest, trademark depends on the public interest. Trademarks are intended to prevent consumer confusion. In theory, a trademark can be claimed and enforced only if a trademark owner proves a likelihood of consumer confusion. A trademark exists and can be enforced only if the user of the mark shows that it has secondary meaning to the public and that protecting the mark will thereby benefit the public by preventing consumer confusion. This would seem to preclude the inefficiency and rent seeking that characterize all of the other forms of intellectual property.

However, some commentators have pointed to "trademark bullies" as a form of trademark trolls.[56] Large trademark owners may use their financial resources and social clout to assert weak trademark claims. Likewise, smaller trademark owners may use weak marks to extract a settlement from a large trademark owner.[57]

Trademark trolls are also a symptom of excessive trademark protection. Courts are unfortunately sympathetic to trademark claims that do not present adequate evidence of consumer confusion. Moreover, they have created doctrines like disparagement and dilution that are largely inconsistent with the consumer protection rationale.[58]

That said, the explicit consumer focus of trademark law significantly limits the problem of trademark trolls by requiring an implicit efficiency analysis. This suggests that a similar focus on efficiency could effectively reduce trolls in other areas of intellectual property.

D. Design Patent Trolls

Commentators have not yet coined the term "design patent troll," probably because its redundancy renders it pointless.

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55 David H. Bernstein & Andrew Gilden, *No Trolls Barred: Trademark Injunctions After* Ebay, 99 TRADEMARK REP. 1037, 1064–65 (2009).

56 Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 628–29 (2011).

57 Jason Vogel & Jeremy A. Schachter, *How Ethics Rules Can Be Used to Address Trademark Bullying*, 103 TRADEMARK REP. 503, 510–11 (2013).

58 *See, e.g.,* Ringling Bros.-Barnum & Bailey Circus Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 451 (4th Cir. 1999) ("This case requires us to interpret and apply the dauntingly elusive concept of trademark 'dilution' as now embodied in the Federal Trademark Dilution Act of 1995."); *see also* Christine Haight Farley, *Why We Are Confused About the Trademark Dilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1175, 1175 (2006).

Design patents effectively combine elements of patent and copyright into an even less defensible amalgam of the two. Design patents provide patent-like protection for what are effectively plans for sculptural objects intended for use in an industrial context. While design patents have existed since the first Patent Act, they have recently seen a resurgence in use.

There is no evidence that design patents provide any public benefit, or even motivate any additional investment in innovation. Indeed, defenders of design patents tend to ignore the public benefit that justifies intellectual property, arguing that design patent owners are entitled to protection simply because they invested in innovation, whether or not they would have done so in the absence of design patent protection.

Design patents are routinely granted for designs remarkable only for their banality and lack of novelty. To make matters worse, design patent claims are then enforced with an expansiveness far in excess of what they disclose, in a manner reminiscent of the derivative works right of copyright.

The predictable result is a deluge of worthless design patents enforced by competitors against each other, with no discernable public benefit whatsoever. It is a toxic stew of rent seeking, with no apparent justification.

E. Publicity Trolls

Likewise, the term "publicity troll" is redundant. The "right of publicity" consists of state common law rights enabling individuals who are famous to control the use of their personality. To the extent that it prohibits fraud or misrepresentation, it is largely unobjectionable, although it is unclear that mistakenly believing a celebrity uses or endorses a product causes a substantial public harm. But to the extent that the right of publicity exceeds fraud, it is simply an endorsement of naked rent seeking. In other words, celebrities are trolls by definition.

F. Trade Secret Trolls

Trade secrets may be one area in which trolls are unusual, not least because Congress and the courts seem to so disfavor them. The one area in which trolling is common is the so-called hot news doctrine, which is little more than naked rent seeking, blessed by the courts. Thankfully, the hot news doctrine is heavily disfavored by the courts, and largely unenforced.[59]

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59 *See, e.g.*, Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 906 (2d

In addition, one might question the use of injunctions in the case of trade secret protection. If the purpose of trade secret protection is to prevent misappropriation, it would seem that the burden of enforcement should be borne by the misappropriator, rather than the public. Trade secret injunctions effectively force the public to subside the trade secret owner, and absolve the misappropriator from making good on some of the damages it caused. In theory, trade secret protection would be more efficient if the misappropriator were obligated to pay liquidated damages and injunctions did not issue.

V. RHETORIC AND METAPHOR

The "troll" metaphor, like other intellectual property metaphors, enables a form of social cathexis. It justifies the scope of intellectual property protection by identifying "bad" intellectual property owners who "abuse" their intellectual property rights and implicitly distinguishing them from "good" intellectual property owners, while obscuring the fact that all intellectual property owners receive and assert similar rights. Most importantly, the "troll" metaphor once again encourages us to ignore the lack of connection between the ostensible welfarist justification of intellectual property rights and the actual scope of the rights granted.

Scholars have applied similar criticisms to the most fundamental concepts in intellectual property. For example, many scholars have criticized the "author" metaphor of copyright, essentially arguing that it relies on the personality theory of intellectual property, rather than the economic theory.[60] As a consequence, the scope of copyright protection expands beyond its welfarist justification. And some scholars have extended that criticism to the "inventor" metaphor of patent.[61]

Shubha Ghosh has argued that the "quid pro quo" metaphor should be abandoned because it "rests on a theory of social contract that has little relevance to the economics and

Cir. 2011). *But see* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

60 *See* James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 626 (1988); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 457 (1991); *see also* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property Shamans, Software, and Spleens: Law and the Construction of the Information Society*, 75 TEX. L. REV. 873, 874 (1996) (reviewing James Boyle); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1322 (1996). *See generally* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author*,' 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

61 *See generally* Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008).

administration of patent law."[62] Essentially, Ghosh argues that patent law is simply a form of regulation intended to increase public welfare, and that the scope of patent protection should depend on efficiency, rather than on an exchange metaphor.[63]

Similarly, Mark Lemley has argued that "property" is an unhelpful metaphor, as intellectual property is more like regulation than physical property.[64] According to Lemley, the scope of intellectual property should be determined on the margins, and innovators should only be granted intellectual property rights entitling them to consume as much of the positive externalities or "spillovers" generated by their innovation, as are necessary to provide the marginal incentive to innovate. "We are better off with the traditional utilitarian explanation for intellectual property, because it at least attempts to strike an appropriate balance between control by inventors and creators and the baseline norm of competition."[65]

Of course, this is also true of property law in relation to physical property. Property law is always a system of regulation. The problem is that the metaphor of property relies on heuristics derived in relation to physical property, which is rivalrous and excludable. As a consequence, it naturalizes rules that tend to be efficient in relation to the regulation of goods that are rivalrous and excludable. But those same heuristics may suggest less efficient rules when the goods in question are non-excludable or non-rivalrous. For example, when applied to common pool resources, they may help normalize rules that benefit incumbents, at the expense of the public. And when applied to public goods like innovation, they may help normalize rules that benefit producers, at the expense of the public.

Metaphors are powerful when they mobilize heuristics. Intellectual property metaphors resonate with the justification for physical property and with heuristics around the enforcement of social norms. It feels natural that if you create something, you are entitled to consume some of the social surplus you generate, and that if you create something profitable based on something created by someone else, they ought to be entitled to share in the proceeds. Of course, while these heuristics and intuitions produce reasonably efficient property rules when applied to rivalrous

62 Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After* Eldred, 19 BERKELEY TECH. L.J. 1315, 1369 (2004).

63 *Id.*

64 Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1036–37 (2005); *see also* Tom W. Bell, *Author's Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 258 (2003).

65 Lemley, *supra* note 64, at 1032.

goods, they are poorly calculated to produce efficient rules when applied to the non-rivalrous goods protected by intellectual property.

However, intellectual property metaphors provide the best of both worlds for rent seekers. They enable rent seekers to rely on the ostensible welfarist justification for intellectual property, in order to claim that it is efficient in theory, without actually ever considering what the efficient scope and term of intellectual property actually is. And they enable intellectual property owners to draw on moral intuitions intellectual property ownership, without being obligated to actually justify the scope and duration of intellectual property in moral terms.

In order to understand intellectual property, we must abandon intellectual property metaphors, and evaluate intellectual property in welfarist terms. Of course, it is probably impossible to abandon metaphor entirely, because it performs such a fundamental role in our conceptual systems.[66] But we can certainly adopt metaphors that emphasize the welfarist justification of intellectual property, rather than obscuring it. For example, we could use the metaphor of "privilege" rather than "property" to describe those rights.[67] Or we could use the metaphor of "charity" to think of the relationship between innovators and the public.[68]

CONCLUSION

While the justification for intellectual property is welfarist, intellectual property rhetoric is overwhelmingly metaphorical. Intellectual property metaphors encourage us to understand and experience intellectual property in terms of physical property. And they obscure the welfarist justification for intellectual property by encouraging us to draw on heuristics drawn from physical property. Those heuristics are inefficient, because physical property is rivalrous and intellectual property is not.

66 LAKOFF & JOHNSON, *supra* note 18, at 210–211.

67 *See generally* TOM BELL, INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD (2014).

68 Brian L. Frye, *Copyright as Charity*, 39 NOVA L. REV. (forthcoming 2015).