Book Review [Steal This Idea: Intellectual Property Rights and the Corporate Confiscation of Creativity]

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BOOK REVIEW

PROTECT THIS WORK OF EXPRESSION: CLARIFYING THE UNIQUE ECONOMICS OF INTELLECTUAL PROPERTY RIGHTS


Reviewed by Lee Bollinger*

I. INTRODUCTION

The debate over the proper scope of the intellectual property laws—particularly copyright and patent law—has become more vigorous and relevant every day.¹ This is due in part to the rise of the “New Economy,” one increasingly dependent upon and driven by the value of information, ideas, and technology rather than tangible goods, manufacturing and manual labor.² Opinions vary strongly over how the in-

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2. See, e.g., Richard A. Posner, Antitrust in the New Economy, 68 Antitrust L.J. 925 (2001) (referring to the “New Economy” as embodying three distinct industries: computer software, Internet-based businesses, and communications services and equipment); see also Robert Pitofsky, Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy, 16 Berkeley Tech. L.J. 535 (2001) (stating that the “essential feature that is new about the ‘New Economy’ is its increased dependence on products and services that are the embodiments of ideas”).

1287
Intellectual property (or IP) laws should best evolve to promote innovation in this new environment, and the extent to which these laws may reasonably take credit for the economic progress associated with the New Economy.  

Intellectual property law has become increasingly controversial due in part to its more widespread impact on the everyday lives of millions of people who now enjoy, and increasingly rely on, the technological developments associated with the New Economy. Advances in technologies related to the digitalization of information and media, the Internet, and the entertainment and the telecommunications industries in particular, have fundamentally changed certain aspects of the American culture and basic norms of human interaction. The technological developments in the entertainment industry, particularly those involving music and film, have been accompanied by equally notable progress in producing tools that allow consumers, rather than producers, to control the access to and ownership of copyrighted content. The affected industries and the IP laws have struggled to keep up, with varying success. However, some of the responses of lawmakers and producers to reassert control over protected content have created a cultural backlash against the scope and even the basic necessity of the intellectual property laws.

3. See, e.g., COPYFIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE (Adam Thierer & Wayne Crews eds., 2002) [hereinafter COPYFIGHTS] (presenting various authors debating over, inter alia, how intellectual property law should be revised to meet the unique conditions of the “digital” or “information” age and the proper scope and subject matter of patent law).

4. See, e.g., Harry First, Online Music Joint Ventures: Taken for a Song (forthcoming 2004) (describing how technological progress involving the Internet, broadband technology, computer software, and the digitalization of music have fundamentally altered the ways in which consumers may now listen to and/or own prerecorded music).

5. Id. Professor First points out that the rise of illegal file-sharing software that allowed consumers to make free copies of music in violation of copyright law has given rise to a quickly evolving online music industry that has greatly increased the ways in which consumers may consume and/or own prerecorded music (by, for example, unbundling individual songs from albums, the use of online subscription services that permit consumers to listen to music “streams” for a fee, and the emergence of legal counterparts to the original Napster website that permit the downloading and/or burning of individual music files for a fee). See generally id

6. See generally Boynton, supra note 1. Boynton describes the backlash as a response to several recent events, including the copyright infringement lawsuits filed recently by the Recording Industry Association of America against thousands of individuals over their use of file-sharing software to acquire and
II. AN INTRODUCTION TO PERELMAN'S CRITIQUE OF THE INTELLECTUAL PROPERTY LAWS

A rather extreme outgrowth of this movement is represented by the views expressed by Michael Perelman, an economist, in *Steal This Idea: Intellectual Property Rights and the Corporate Confiscation of Creativity.*\(^7\) Perelman provides a scathing critique of the IP laws, ultimately advocating their total abolition and replacement by a regime based on a "public goods" model in which innovation would be publicly funded through taxes and accessed or "owned" by all.\(^8\) It is difficult to find any aspect of the IP laws that the author is willing to praise. Perelman's views are well summarized in the title of his introduction, "How Intellectual Property Rights Enrich the Few While Undermining Liberty, Science, and Society."\(^9\)

Perelman's basic claim is that the intellectual property laws have actually done more harm than good in promoting their expressed goals of fostering innovation and technological progress.\(^10\) Further, he believes that the technology-driven economic prosperity enjoyed by the U.S. over the past three decades occurred in spite of the intellectual property laws, rather than because of them.\(^11\) According to Perelman, the most recent technological and scientific discoveries have been based upon a preexisting public domain of knowledge and information.\(^12\) Further, Perelman claims that this rich body of public domain knowledge was largely created by government-financed research rather than previously proprietary intellectual property whose protection had merely lapsed.\(^13\) Perelman believes that scientific progress was much more efficient when researchers—unconcerned with the

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8. *See id.* at 165. *See also infra* Part VIII.
9. *Id.* at 1.
10. *Id.* at 29.
11. *Id.* at 4.
12. *Id.*
profit-making potential of the IP rights they could secure—worked in a more collaborative and open environment, routinely sharing their thoughts and discoveries. On a much broader level, Perelman argues that IP rights have exacerbated inequalities of wealth both within and between different countries.

Why have the intellectual property laws failed so miserably in Perelman’s view? In short, because the laws function within a market-based system that is fundamentally at odds with the “public goods” nature of intellectual property works. To fully understand Perelman’s critique (and its flaws), it is necessary to describe the unique characteristics of “public goods” and the challenges they pose to traditional economic models of production and consumption.

III. “PUBLIC GOODS” AND THE MARKET

In the language of economics, private property is distinguished from “public goods” in two fundamental ways. First, whereas restricting access to private property is typically relatively easy (by, for example, building a fence, attaching a lock, or merely retaining physical possession of the property), regulating access to “public goods” is much more difficult. The economic exploitation of certain property largely depends on the ability of the owner to regulate (and “tax”) its use by others. The value of “public goods” property is therefore often substantially reduced due to the owner’s inability to either exclude or charge free-riders who reap the benefits of access without bearing any costs.

Secondly, the possession and consumption of private property is considered to be “rival,” meaning that possession necessarily deprives others the opportunity to simultaneously possess the property. By contrast, the possession and consumption of “public goods” is deemed “non-rival” because one person’s possession or consumption of the property does not typically affect the ability of others to simultaneously possess

14. See id. at 48, 103.
15. See id. at 6, 26.
16. Id. at 7.
or derive utility from the property.\textsuperscript{18} For example, the disclosure by an inventor of the details of a patentable invention to others does not reduce the utility that the innovator may personally derive from his invention. However, in the absence of either a practical or legal limit to the theoretically inexhaustible supply of the idea, the market value of the right to "own" the idea or access an additional copy of the idea is very low.

Therefore, as a general matter, left to an open market without government regulation or special legal protection, investments in "public goods" are uniquely risky and unappealing. In the face of a product whose accessibility is not easily regulated and whose supply is largely unaffected by consumption, producers have few incentives to invest in products with "public goods" characteristics.

The subject matter of intellectual property law – innovation and intellectual creations – is correctly recognized as a species of "public goods" due to the difficulty owners face of regulating access (and charging for use) and the "non-rival" nature of its possession and consumption. While products of innovation are typically embodied in physical (or "rival") form, the unusually low marginal cost\textsuperscript{19} of producing additional copies effectively re-establishes their "non-rival" nature. Indeed, one of the predominant justifications of the intellectual property laws is to avoid the "market failure" (or the unacceptably low level of production as a matter of public policy) that would otherwise occur due to the insufficient incentives to create goods that have little profit-making potential to their creators but which have potentially high social and economic value to society.

Perelman turns this core justification on its head, using the "public goods" characteristics of IP as a starting point in building arguments that purport to demonstrate that the IP laws have "failed" because of their fundamental incompatibility with free markets. However, Perelman arrives at this flawed conclusion only by (1) falsely assuming that innovation is naturally abundant in society and would remain abundant in the absence of the incentives provided by IP law, (2) ignor-

\textsuperscript{18} See Ghosh, supra note 17, at 797-98.

\textsuperscript{19} "Marginal cost" is the cost to a firm of producing one additional unit of a given good. See, e.g., HERBERT HOVEMKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 1.1b, at 9 (1994).
ing the unusually high pre-inventive fixed costs that must be recovered by an innovator to justify his efforts (and encourage future investment), focusing instead on the unusually low marginal cost of reproducing IP works, which Perelman argues justifies the treatment of innovation as a “public good” that should be “given away” and owned by all,20 and (3) adopting a flawed view of both the economic power conferred by IP rights and of the relationship between intellectual property and competition policy. Each problem is discussed in sequence below.

IV. PERELMAN’S MISLEADING NOTION OF “LACK OF SCARCITY”

According to Perelman, conventional economic theory dictates that “goods with zero marginal costs should be treated as public goods, meaning they should be given away without cost rather than be sold as commodities.”21 This conclusion stems from an otherwise uncontroversial economic truism: it is economically inefficient to charge consumers for something that is costless to access or reproduce.

Perelman shifts his focus to intellectual property as a type of “public good,” arguing that “[i]nformation is the ultimate non-rivalrous public good.”22 Indeed, he claims that information is a “metapublic good,” meaning that it is not merely costless to reproduce or access but “goes beyond this neutral cost, because it actually enriches the community.”23 Perelman underscores the incompatibility of markets with “information” by pointing out that the primary function and value of markets is to efficiently price and distribute scarce resources. There is no purpose in trading and exchanging “information” in markets because it is not a scarce resource.24 Perelman writes, “[t]he concept of scarcity is absolutely irrelevant to information. The more the law restricts people’s access to information, the less information will be available.”25

20. Perelman, supra note 7, at 165.
21. Id. at 165.
22. “Information” is the term Perelman uses to refer to intellectual property works generally. See id. at 176.
23. Id. at 165.
24. Id. at 178.
25. Id. at 177.
Therefore, in Perelman's view, by restricting the public's access to creative works, the intellectual property laws impose artificial conditions of scarcity that "serve no social purpose whatsoever. In fact, using the market to exclude people from access to information is self-defeating. It does not increase the supply of information. It only spreads ignorance."

Of course, as a general matter of social policy, it is hard to quibble with Perelman's claim that we should avoid enacting laws that "spread ignorance" and restrict the flow of information. However, when Perelman substitutes the term "information" for works protected by intellectual property law, brevity is not his only motivation. By using the term "information," the author contributes to the false premise that works protected as intellectual property are not scarce. While information, the life-blood of innovation, is admittedly plentiful, the intellectual property laws are not fundamentally directed towards maximizing the quantity of information; rather, their purpose is to encourage the creation of works of expression and inventive works (often based on ideas, facts, and information in the public domain) that would indeed be scarce in the absence of such laws. By failing to distinguish between works of innovation and mere information, the author inflates his claims about the extent to which the IP laws restrict the public's access to information and their incompatibility with markets.

Further, in order to ensure that a rich public domain of ideas and information exists from which authors and inventors may draw, IP law strives to exclude such subject matter from its reach. To give just a few examples, copyright law protects an author's work of expression, but none of the work's ideas, facts, or concepts; patent law restricts eligible patentable subject matter and excludes from its protection laws of nature, scientific principles, and abstract ideas; and trademark law provides no protection for generic terms and only conditional protection to marks that are in some way descriptive of the goods or services with which they are used.

27. Id. at 177.
28. See id. at 176.
V. THE TRUE SOURCE OF ABUNDANCE: THE UNUSUALLY LOW COST OF POST-INVENTIVE REPRODUCTION

Works protected as intellectual property, particularly those that are socially or economically productive, are indeed rare. The privatization of the rights to such works and their exchange in a market is therefore socially and economically efficient, given the market's commonly accepted value of efficiently allocating scarce resources, a characterization Perelman accepts. Rare and valuable intangible inventions and works of expression, to which the IP laws attach private property rights, will be most efficiently allocated through a market-based system. Throughout Steal This Idea, Perelman overlooks this aspect of rarity among IP works and, as a result, overstates his claim that IP and markets are at odds.

Admittedly, however, after the inventor or author has invested the time and effort to create a work and obtain intellectual property rights, the scarcity of the work is capable of being lost because the cost of its reproduction is unusually low. Intellectual property's vulnerability to free-riders partially explains why the market "fails" to produce a socially desirable level of innovative works in the absence of intellectual property protection. In short, one must recognize a critical distinction: there is, on the one hand, the abundance of information, which places information outside the domain of the market; and, on the other, the potential abundance of IP works, once produced, due to their low marginal cost of reproduction. The fact that innovative works, once created, are capable of being produced cheaply is not evidence of the general incompatibility of markets with IP; rather, it is the very cause of the mar-

§ 1064(3) and § 1052(e), (f) (2004).
32. See supra text accompanying note 22.
33. Although Perelman describes the "market failure" justification for the intellectual property laws, see PERELMAN, supra note 7, at 13, it is unclear if he truly understands it in practice. Discussing the efficiency of markets and their compatibility with intellectual property, Perelman remarks, "[o]f course . . . if markets really worked as well as the dogmatic advocates of laissez faire would have us think, we would have no need for intellectual property rights at all." Id. at 188. Perelman overlooks that markets function differently depending on the larger legal framework in which they exist. In the absence of IP laws, markets for intellectual creations would fail to emerge as forcefully as they would in an IP-friendly market because authors and inventors would produce fewer works than they would in markets where rights to such works were privatized and intellectual property laws were enforced.
ket failure that the IP laws are designed to correct and that
give us reason to be particularly vigilant in protecting IP
rights in light of the ease with which free-riders may approp-
riate them. While Perelman’s proposed “public goods” (uni-
versal access) solution is a desirable model of rights in a
world of abundant information, its application to works of in-
tellectual property—which are inherently scarce—would de-
stroy the balance between access and incentives upon which
the intellectual property system is based.

Of course, the ideal system would be one that produces
both high levels of innovation and universal access. However,
the “public goods” model that Perelman proposes—which ele-
vates universal access to the paramount and near-exclusive
goal—would undermine the inventor’s ex ante (pre-inventive)
incentives to innovate, paradoxically creating less public ac-
cess in the end. After all, the public can access only those
works that have been created; a public goods model stunts the
incentive to create, as the inventor no longer sees the poten-
tial pot of gold at the end of the rainbow that the IP laws of-
fer.

Perelman thus overlooks the counterintuitive nature of
the IP laws to the extent that they restrict public access to
innovative works as a means of maximizing the amount of in-
novation that a society produces, ultimately maximizing total
social access. The intellectual property laws recognize inno-
vation as a zero-sum game—if you err on the side of exces-
sively favoring access, you correspondingly diminish the re-
wards future authors can expect to reap from their works,
which reduces innovation. Conversely, if the desire to create
incentives results in IP rights that are too strong, access to
innovation by the public and future authors and inventors
will be proportionately limited. Perelman’s insensitivity to
the IP laws’ design to delicately balance incentives to inno-
vote and public access is evidenced by his unqualified conclu-
sion that “[t]he more the law restricts people’s access to in-
formation, the less information will be available.”

VI. THE HIGH FIXED COSTS OF PUBLIC GOODS AND
INTELLECTUAL PROPERTY

The privatization of “public goods” poses this basic prob-

34. Id. at 178.
lem: How do we justify charging for something that costs virtually nothing to reproduce? In the case of intellectual property, the answer is clear: while the post-inventive cost of reproduction may be very low, the pre-inventive "fixed costs" and risks of failure are unusually high. The "fixed costs" are illustrated by the years it takes a writer to complete a novel, a movie studio to produce a film, or a pharmaceutical company to invent a new drug. The risk of commercial failure is demonstrated by how few novels, movies and new drugs are commercially successful. Therefore, despite the inventor's low costs of reproduction, the justification for charging users to access the invention is clearly grounded in the inventor's need to recover the substantial pre-inventive costs.

Perelman's misguided critique of the privatization of innovation examines only the latter half of the innovation process involving the unusually low marginal costs of reproducing certain IP works, ignoring the unusually high pre-inventive fixed costs that must be recovered by an innovator to justify his efforts (and encourage future investment).

The consequences of following Perelman's logic would be disastrous to the entire incentive structure underlying the IP laws. Areas of innovation that involved end-products with low marginal costs of reproduction would be decimated because prospective inventors and investors in those areas would be deterred by the economic disasters of their predecessors.

By focusing on the post-inventive marginal costs of production, Perelman overlooks the IP laws' purpose of safeguarding the unusually high investment cost and risk that authors and inventors bear when engaged in the process of innovation—a burden increased by the ease with which the works may be appropriated once created. On a broader level, Perelman's analysis further weakens his general conclusion that the intellectual property laws are incompatible with free markets.

VII. PERELMAN'S FAILURE TO APPRECIATE THE UNIQUE ECONOMICS OF INTELLECTUAL PROPERTY

Inconsistent with his predominant conception of intellectual property's "lack of scarcity," Perelman acknowledges at various points throughout Steal This Idea that the process of creating innovative products requires substantial investment
and cost. The author admits that "the initial production of public goods consumes resources." For that reason, he acknowledges that markets for intellectual creations will fail "without some sort of special protection." To Perelman, however, that "special protection" consists of only two alternatives: "making information a public good or a private monopoly." Perelman defends the former, while insisting that most economists and all defenders of intellectual property "prefer the latter."

Putting aside the "public goods" alternative for the moment, Perelman's critique of privatizing innovation (and of the current regime of intellectual property laws) rests on flawed assumptions about the economics of intellectual property and the potential competitiveness of IP markets.

First, Perelman argues that because the marginal cost of producing another copy of an intellectual property work is near zero, it is socially and economically inefficient not to provide additional copies to purchasers willing to purchase the work at its marginal cost—the traditional benchmark of competitive pricing under antitrust law. Such marginal cost pricing would undermine the economic structure—and incentive base—upon which IP laws are based. Second, Perelman repeatedly asserts that intellectual property rights give their owners, at the very least, market power, if not an economic monopoly. As a result, he argues that high technology and other IP-dominated markets are incapable of being even marginally competitive.

Much of Perelman's critique of the IP laws rests on these flawed assumptions. Accordingly, the validity and persuasiveness of the author's arguments and proposed alternative are severely weakened.

A. Marginal Cost Pricing of Intellectual Property Goods

In support of his theory that the intellectual property

35. Id. at 166.
36. Id.
37. Id. at 180; see also id. at 39.
38. Id. at 182.
39. PERELMAN, supra note 7, at 182.
41. See PERELMAN, supra note 7, at 188-89.
laws have increased the concentration of wealth in the U.S., Perelman asserts: "[I]ntellectual property is probably the most important vehicle for increasing the gap between sales price and the cost of production in the present economy." This observation reflects the author's lack of understanding of the peculiar economics of intellectual property rights and of the need to modify traditional tests of market power, monopoly power, and the assessment of competitive markets when such rights are concerned.

The relationship between price and cost is a common barometer of a firm's market power and the competitive landscape of a market in general. Most commonly, this test focuses on the extent to which the price of a firm's good deviates from its marginal cost. However, for the same reasons that intellectual property creations are considered "public goods," marginal cost pricing has been recognized as an economically flawed approach both to evaluate the degree of competition in markets dominated by IP and to assess a particular firm's market power in a relevant market.

Consider this issue from the standpoint of a particular firm marketing IP products. Marginal cost pricing is typically not going to generate profits and attract investors, as it would in other industries. Such pricing fails to offset the unusually high fixed or "sunk" costs that the firm has invested (and, as is common in IP-dominated industries, to offset the losses absorbed from failed investments in other products that never reached the market). The inadequacy of marginal cost pricing as a means to assess market power is worsened by the unusually low cost of producing an additional unit of the product. As a result, an intellectual prop-

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42. Id. at 173.
43. See infra text accompanying notes 42-56.
45. Id.
48. Id.
49. Id.
An owner must typically charge more than marginal cost to be sufficiently profitable to sustain investment in the company and recover its fixed costs.\(^5\) What may be considered a highly profitable, "super-competitive" price/cost ratio in a traditional industry may be just enough for a firm in an IP industry to survive. For this reason, examining the relationship between price and cost and the use of marginal cost pricing are generally disfavored tools for assessing market power in such industries.\(^5\) Instead, courts examine the extent to which alternative technologies exist and the number of firms that offer such technology, both of which constrain the ability of a firm to price its product above the level needed to recover its fixed and marginal costs. These constraints are the hallmarks of a competitive market.\(^5\)

Looking more broadly at IP-dominated industries (i.e., pharmaceuticals, computer software, biotechnology, and entertainment), a vigorously competitive market may exist despite each firm's pricing well above marginal cost.\(^5\) This simply reflects the collective behavior of numerous firms in the same position as the individual firm described above: each firm is seeking to recover its unusually high investment costs by pricing above marginal cost. Logically, therefore, marginal cost pricing is not considered an accurate measure of the market's competitiveness. Rather, product substitutability, the extent to which alternative technologies exist, and other market conditions are examined to make that determination.\(^5\)

Perelman overlooks the unique economics of intellectual property goods, instead concluding that charging well-above marginal cost for such goods must necessarily be economically inefficient.\(^5\) Perelman declares, without explanation, that the common pricing of IP products above marginal cost "distort[s] the economy" and represents a "market failure."\(^5\)

In fact, antitrust enforcement agencies (among others) recognize the efficiency and indeed the necessity of permitting

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50. Id.
51. See id.
52. See, e.g., HOVENKAMP ET AL., supra note 45, § 4.1c.
53. Id.
54. Id.
55. PERELMAN, supra note 7, at 166-67.
56. Id. at 167.
above-marginal cost pricing for products protected as intellectual property. This reflects a nuanced understanding of both the unique way in which IP is produced, as well as the signals that the IP laws are designed to send to current and future authors and inventors to encourage them to innovate.\textsuperscript{57} Investment in IP works is often uniquely risky, time-consuming, and expensive. Only by modifying the relevant price/cost framework to account for these differences will the competitiveness and concentration of IP-dominated industries be accurately measured. Thus, the antitrust authorities do not approach IP markets as an "exception" under antitrust law; rather—while never compromising the fundamental goals of antitrust of ensuring open, competitive markets that benefit consumers—the authorities revise the economic lens through which IP markets are scrutinized in order to account for their differences from other markets.\textsuperscript{58}

\textbf{B. Intellectual Property and Monopoly Power}

Contrary to the modern view of intellectual property rights expressed by antitrust regulators and commentators, Perelman repeatedly equates such rights with economic monopolies that confer market power on their owners.\textsuperscript{59} Similarly, Perelman believes that IP rights are fundamentally inconsistent with competitive markets.\textsuperscript{60} As noted, this false assumption undermines the credibility of his broader argument and analysis.

Nearly ten years ago, the Department of Justice and the Federal Trade Commission issued the "Antitrust Guidelines for the Licensing of Intellectual Property."\textsuperscript{61} One of its three guiding principles is that the agencies would \textit{not} presume that an owner of an intellectual property asset necessarily has any market power.\textsuperscript{62} This principle was based on the widely accepted view that IP products (and the IP rights to specific components of certain products) most often have

\begin{itemize}
\item \textsuperscript{57} See, e.g., HOVENKAMP ET AL., supra note 45, § 4.1c.; see also Gilbert & Tom, supra note 46, at 45-46.
\item \textsuperscript{58} See, e.g., HOVENKAMP ET AL., supra note 45, § 4.1c.
\item \textsuperscript{59} See PERELMAN, supra note 7, at 29, 189, 191.
\item \textsuperscript{60} \textit{Id.} at 188.
\item \textsuperscript{62} \textit{Id.} § 2.2.
\end{itemize}
commercial substitutes that constrain the ability of the intellectual property owner to price above competitive levels.63

Perelman recounts the well-known economic and social inefficiencies caused by monopoly power, linking those ills to the rise of intellectual property and its alleged immunity from antitrust scrutiny.64 However, given the consensus among antitrust authorities that intellectual property grants do not typically create market power, let alone monopoly power, Perelman’s critique of the IP system is again exposed as overdrawn.

Perelman’s reference to intellectual property rights as “monopolies” is understandable for several reasons. If the term “monopoly” is interpreted loosely, an IP right is a type of “monopoly” right insofar as it confers exclusive rights to its owner to a particular work or product.65 Further, IP rights are admittedly capable of conferring market or even monopoly power to its owners. The Microsoft antitrust case is one well-known example,66 but the monopoly power Microsoft acquired and maintained in part due to the strength of its IP rights is not at all representative of the typical market power created by an intellectual property grant.

By re-examining the economics of intellectual property, further flaws may be found in Perelman’s criticism of what he characterizes as lax antitrust enforcement of high technology industries and other IP-dominated markets. The author writes, “[u]nfortunately, rather than maintaining even a pretense of a meaningful antitrust policy, government agencies are now tripping over themselves to strengthen intellectual property rights.”67 Perelman advances the theory that the government, and in particular the antitrust enforcement agencies, have largely been captured by the highly profitable and powerful IP industries, whose growth has been

63. Id.; see also HOVENKAMP ET AL., supra note 45, § 4.1a (concluding, based on similar reasoning, that “market power sufficient for any antitrust violation, including tying, should never be inferred from intellectual property ownership alone”).
64. PERELMAN, supra note 7, at 198.
65. However, the author does not use the term colloquially, but rather to refer to an economic monopoly; as noted, this usage is inaccurate. See supra text accompanying notes 59-63.
67. PERELMAN, supra note 7, at 173.
“[f]ostered by the absence of any meaningful antitrust actions.”

Perelman’s assumption that intellectual property grants typically create market or monopoly power, coupled with his misunderstanding of the economics of intellectual property pricing and competitive markets, leads him to mistakenly characterize the antitrust treatment of high technology and IP-dominated industries as lax and ineffectual. In fact, however, antitrust agencies have kept a watchful eye on these industries, challenging them when appropriate. Antitrust regulation and enforcement has also faced the challenging task of modifying traditional antitrust principles to accommodate the unique characteristics of the New Economy. While traditionally antitrust law has pursued the twin goals of low prices and high output, modern regulators recognize that consumer welfare may be better off in some cases if higher levels of innovation can be achieved by tolerating short term price hikes and lower output. Antitrust law has prudently incorporated the value of innovation and technological progress (and the indispensable role IP law plays in promoting them) into its calculus of “economic efficiency” and consumer welfare.

VIII. PERELMAN’S PROPOSAL: INTELLECTUAL PROPERTY AS A “PUBLIC GOOD”

Based on the ideal of community ownership of society’s creative output, Perelman’s proposed alternative to the current system of intellectual property is appealing on its face: the public would have a fundamental right to all intellectual creations. Not surprisingly, however, the details of this alternative regime are ill-defined. Perelman would make innovation—and its products—a true public good, like national defense or the U.S. mail; that is, innovation would be publicly funded through taxes and accessed or “owned” by all. Under

68. Id.
69. See generally Gilbert & Tom, supra note 46 (detailing numerous antitrust actions against IP-centered corporations during the 1990s).
70. See Carrier, supra note 17, at 810-15; see also Gilbert & Tom, supra note 46, at 44 (finding that innovation’s “role has become increasingly important and has been decisive in several merger and non-merger enforcement actions that have potentially very significant impacts for consumer welfare”).
71. PERELMAN, supra note 7, at 12.
such a system, society (presumably through a representative government body), rather than the market, “will still have to decide how much of its resources will be devoted to opening new theaters, making new films, or adding new long-distance capacity.”

Perelman continues: “The public will somehow have to develop new institutions appropriate for making such decisions. Perhaps most of all, society will have to raise the level of education so that the public will be prepared to make such decisions in an intelligent manner.”

Perelman is touching on one of the most fundamental questions in the fields of political science, economics and the law: How are a society’s resources most efficiently allocated? Some, like Perelman, would argue they are most efficiently allocated through the well-intentioned directives of a centralized government body, while others would defend a “laissez-faire” economic environment in which larger trends are merely the cumulative result of a series of individual transactions that take place in open and competitive markets. There are well-reasoned arguments of the type Perelman presents in _Steal This Idea_ that have merit, but Perelman’s particular “public goods” model is a flawed approach to encouraging innovation for two basic reasons.

First, Perelman argues that our only choices to protect and encourage innovation consist of two mutually exclusive approaches: treating innovation as a private monopoly or as a public good. This is a gross oversimplification, which also ignores the fact that the intellectual property laws, for as long as they have existed, have struggled to find an optimum balance between the competing interests of access (Perelman’s “public good”) and incentives (Perelman’s “private monopoly”). Further, underlying that struggle is the assumption

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72. Id. at 166.
73. Id.
74. Id. at 82.
75. Intellectual property law is replete with examples of how to balance the rights of the inventor/owner with the interests of the public: Copyright law protects only works of expression, excluding facts and ideas, see 17 U.S.C. § 102(b) (2004); the fair use doctrine, often referred to as a “safety valve,” protects against cases in which the routine application of copyright law would unduly restrict public access to the work, see id. § 107; and the Copyright Act contains compulsory licensing provisions, see id. §§ 107-118. Trademark law provides no protection for generic marks or, with some qualification, descriptive marks. See 15 U.S.C. § 1064(3) (2004) (stating that registered marks that become generic terms are subject to cancellation at any time); id. § 1052(e), (f) (stating that de-
that the alternative that Perelman proposes—which elevates universal access as the paramount and nearly exclusive concern—would significantly undermine the incentives to innovate, paradoxically creating less access in the end.\footnote{See supra text accompanying notes 30-31.}

Secondly, even apart from an approach that seeks to optimally balance access and incentives, Perelman fails to consider yet another alternative, best articulated by Professor Lawrence Lessig.\footnote{LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001).} Lessig argues that in some contexts innovation may best flourish in an environment unencumbered by both public and private interests.\footnote{See id. at 40.} For example, the Internet has proven, particularly in its infancy, to be an extremely fertile medium through which innovation has flourished. Lessig argues that innovation has the best chance of continuing at this rate if the Internet’s basic architecture remains as neutral as possible in terms of its accessibility and compatibility with the varied universe of applications and content-providers that depend in some form on the Internet.\footnote{See id. at 40.} This presumably requires some level of public oversight, but merely to ensure that no group—public or private—configures the Internet to favor any particular applications or content-provider, group, or interest.

Lessig’s proposal reminds us not to paint innovation policy with too broad a brush. “Innovation” captures an incredibly broad and diverse array of industries and products. At the very least, therefore, when considering the best policy for a particular area of innovation, it seems best to consider a range of alternatives with varying degrees of private and public sector involvement, in addition to the neutral, hands-off approach articulated by Lessig in the context of Internet-related innovation.

By contrast, Perelman’s “public goods” approach is not merely inflexible and vague, but riddled with other potential

\footnote{76. \textit{See supra} text accompanying notes 30-31.}
problems, including the risk of government censorship and the difficulty of anticipating consumer demand for innovative products and works of expression in the absence of a competitive market that provides some measure of supply and demand.

Despite these flaws, the author does highlight significant shortcomings of the current intellectual property system, including the arguably unethical practice of converting natural resources from developing countries into patentable medicines and other products without adequate compensation, the U.S. Patent & Trademark Office's minimal scrutiny of patents and the resulting overbreadth of many intellectual property grants; and, in contrast to real property, the difficulty of defining an idea or invention (or, in the case of most patents, the component of an invention) with any meaningful precision.

Perelman also provides an interesting theory about the origin of the modern expansion of intellectual property rights in the U.S., claiming that the deteriorating economic conditions and trade deficit of the 1960s led major U.S. corporations to successfully pressure the government to strengthen the IP laws. This, he argues, led not only to an intellectual property trade surplus of twenty-five billion dollars, but in fact to a fundamental change in the nature of the domestic economy, as capital and production was outsourced to other countries and intellectual property became one of the most lucrative domestic exports, a politically controversial trend that continues today.

IX. CONCLUSION

The views presented in Steal This Idea illustrate how

80. PERELMAN, supra note 7, at 46-47.
81. Id. at 60-62.
82. Id. at 82. In regard to the last point: By extension, a system of awarding legal rights to such ill-defined concepts may be reasonably challenged on fairness and efficiency grounds. See id.
83. Id. at 31-32.
84. Id. at 36.
85. See, e.g., Saritha Rai, An Outsourcing Giant Fights Back: Reluctant Spokesman for a Reviled Industry, N.Y. TIMES, Mar. 21, 2004, § 3, at 1 (profiling Azim Premji, chairman of Wipro, a major Indian technology outsourcing company that the U.S. and other countries "increasingly denounce as a major cause of job losses").
easy it is to forget what gave rise to the intellectual property laws initially and what would be lost in their absence. On the surface, Perelman's theory is intuitively appealing. If society produces a reservoir of information and innovation, why do we enact and continue to defend a set of laws that have the effect of restricting the public's access to it? The simple answer is that we are examining a society's creative output that is a product of the existing intellectual property laws. By failing to credit the current IP laws with any role in society's innovative output, Perelman and other critics can more easily overlook the potential problems with eliminating or substantially reducing the laws' reach. In addition, there is an inherent complexity to a system that confers private property rights to owners of intangible property, which Steal This Idea, like many critiques of IP law situated within the contemporary debates over the "fairness" of IP law generally, fails to appreciate. Unlike other areas of the law where one's moral instinct coincides with the law's directives, intellectual property law is counterintuitive because it balances two equally appealing yet inherently conflicting interests, one of which is often overlooked: (a) maximizing the total amount of social innovation in society generally and (b) providing the optimum degree of public access to it. The ingenuity of IP law is its recognition that only by balancing these two goals, rather than blindly pursuing one without regard to the consequences to the other, will the optimum amount of both total innovation and social access be achieved. No one disagrees with the idealistic notion that society desires to grant the public as much access to the fruits of innovation as possible. However, the IP laws recognize that granting indiscriminate public access to intellectual property will undermine innovators' incentives to write, produce, or invent, thus reducing absolute levels of innovation. Conversely, giving innovators excessive rewards and control over their creations will unnecessarily restrict public access.

Perelman's analysis is further weakened by his mistaken characterization of the ability of IP rights to create market power and of the relationship between antitrust and IP law generally. As even Perelman acknowledges, markets have proven to be the most efficient means of allocating scarce resources. However, Perelman argues that IP rights are inherently monopolistic and at odds with open, competitive mar-
kets, contrary to the views of modern antitrust regulators and many courts, who have recognized that vigorous, open, and competitive markets are entirely consistent with strong intellectual property rights and that a complementary relationship exists between the two fields of law. Indeed, by protecting rights in intangible property, the law stimulates competition to secure the benefits of the rights conferred. This is not to deny that high technology and IP-dominated markets have unique characteristics that have forced antitrust experts to update traditional antitrust analysis.

The intellectual property laws have much room for improvement. However, meaningful reform can only be based on a more nuanced understanding than that provided by Perelman in *Steal This Idea* of the economic significance of intellectual property rights, the unique characteristics and underlying economics of IP-dominated markets, and the modern relationship between competition policy and intellectual property law.