

INTELLECTUAL PROPERTY'S LEVIATHAN

AMY KAPCZYNSKI*

Neoliberalism is a complex, multifaceted concept. As such, it offers many possible points of entry into my primary field of study, that of intellectual property (IP) law. We might begin by investigating tensions between IP law and a purely economic conception of neoliberalism, for example.¹ Or we might consider whether or how IP law might be “insulated from democratic governance” while also being rapidly assembled.² In these few pages, I want to focus instead on a different line of inquiry, one that reveals the powerful grip that one particular neoliberal conception has on our contemporary imaginary: the neoliberal conception of the state. Today, both those who defend robust private IP law and their most prominent critics, I will show, typically describe

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* Associate Professor of Law, Yale Law School. Many thanks to Talha Syed, David Grewal, and Jed Purdy for helpful conversation and comments. This paper is licensed under a Creative Commons Attribution-Non-Commercial 4.0 International license and should be reproduced as “first published in 77 LAW & CONTEMP. PROBS 131 (Fall 2014).”

1. Neoliberalism is commonly understood in economic terms. See, e.g., David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014 at 1. David Harvey has argued, however, that neoliberalism as “a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites” tends to prevail over the “economic utopian” conception of neoliberalism. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 19 (2007). Though I will not explore the issue here, this seems to be particularly powerfully exemplified in the IP field. There are serious tensions between conceptions of “free markets” and “free trade” and the muscular, transnational regime of exclusion rights in information that we have today. IP rights can be readily conceived of not as property, but as regulation, and their insertion into international law not as a move toward free trade, but instead as the result of protectionism and rent-seeking. The law as it is, and the common defense of that law as serving economic interests, may thus be more the result of political ordering than of any purely economic logic.

2. Grewal and Purdy associate neoliberalism with a political intervention that operates to “settle the terms of accommodation between the market and broadly democratic politics,” in particular by “defining and regulating market relations in ways that insulate them from democratic governance.” Grewal & Purdy, *Introduction: Law and Neoliberalism*, *supra* note 1, at 14. But IP law is very much under construction, raising a puzzle about how IP law might be made but at the same time shielded from democratic claims-making. One way that this may occur is through the internationalization of IP law. Historical accounts show that the Clinton Administration, for example, deliberately sought to insert provisions into international treaties that it failed to move through Congress. See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 428–30 (1997). The United States Trade Representative (USTR) also presses aggressive interpretations of U.S. law in new international instruments, which constrain the policy space available to the United States as well foreign counterparts. In the process, the USTR also regularly keeps draft agreements secret from the public, while sharing them with a privileged group of industry advisors. See Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977 (2014).

the state in its first instance as inertial, heavy, bureaucratic, ill-informed, and perilously corruptible and corrupt.

This depiction of the state as a neoliberal Leviathan has become commonsensical. I will not here attempt to defend an alternative account of the modern state, but I do want to suggest grounds to suspect that this neoliberal image does not serve us well. For example, as I will show, neither side in the current debates over IP sustains an image of the state as irredeemably neoliberal because a capable, flexible, and responsive state is essential to each side's competing vision of the good life. Insofar as our theories require a decent state, it seems important to be able to describe one and to offer an account of the conditions that might sustain it. Moreover, there is some evidence in the domain of information policy that the modern state *can* be capable and efficacious, as well as open to democratic claims-making.

In the domain of IP scholarship, and undoubtedly also beyond, we need a serious, curious engagement with the state of the modern state. That engagement ought not ignore evidence that the modern state is vulnerable to ineptitude, and can be commandeered to achieve undemocratic aims. It should insist, instead, that we better understand the conditions in which this is more or less likely to be true. Ultimately, the field of IP law needs a postneoliberal imaginary of the state, not because we are sure that we can bring such a state about but because we cannot bring it about if we assume it away.

I

The dominant contemporary justification for IP law turns critically on a particular conception of the modern state—a conception that is easily recognizable as neoliberal. Today, IP law is primarily analyzed and justified in welfarist terms, and more particularly through the lens of economics, with efficiency posited as the primary goal.³ This account begins by characterizing information as typically expensive to produce but cheap to reproduce. Absent property rights, then, it is said to be difficult to recoup investments in the creation of information in competitive markets. For example, without patents, pharmaceutical companies that spent millions on research and development would be immediately undercut by generic competitors. Without copyrights, Hollywood studios would ostensibly face the same problem. When more finely tuned, this account recognizes that, even in competitive markets, companies may have some ways to recoup their investments in information in the absence of IP rights. For example, innovative companies may enjoy critical lead time over copiers and, in some industries, secrecy is still possible. But such alternative means are described as both diminishing in our networked digital age and as insufficient to generate the degree of investment in information that

3. See, e.g., ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 11 (6th ed. 2012) (“Utilitarian theory, and the economic framework build upon it, has long provided the dominant paradigm for analyzing and justifying the various forms of intellectual property protection.”).

is socially desirable. Absent a state-created right to exclude, the traditional account suggests that markets will invest too little in information. IP laws thus are intended to provide incentives to innovate by allowing those who create informational goods to recoup their investment in the marketplace.

This describes one half of the so-called “public-goods problem” of information: In the absence of state-backed property rights, it is difficult for someone who has invested in information production to exclude others from its benefits.⁴ The second component of the public-goods problem makes the story more complicated still: information is understood as not only “nonexcludable,” but also as “nonrivalrous,” because it can be shared without being depleted. Information is not like pizza. If you and I both want a slice of pizza, a slice must be produced for each of us. In a competitive market, the price of a slice will be the marginal cost of producing the additional slice. If you and I both want to sing a song, or make use of a mathematical formula, or deploy a basic public health precept (wash your hands!), we can do that without the other having less of it, or without an additional “unit” of that information having to be produced. Information thus has a marginal cost of zero, which in economic parlance means that for efficient uptake, it should be priced only at its cost of distribution.

Private intellectual property, however, is designed to render information excludable and to increase its price beyond marginal cost so that innovators can recoup their investments. In economic terms, this supramarginal cost pricing is expected to generate static and dynamic inefficiencies (absent perfect price discrimination, which is costly, difficult, and not expected in practice). Some people are willing to pay \$2 but not \$10 for the new Beyoncé album; others are willing (or able) to pay only \$100 for a textbook priced at \$200. If people are excluded from the good, their lost consumer surplus is counted as deadweight loss. Dynamic inefficiencies are associated with exclusion rights, too, because information is an input and output of its own production and because “there is no guarantee that the research effort will be delegated efficiently to the most efficient [developers].”⁵ For this reason, many leading economists—including, most famously, Nobel Prize winner Kenneth Arrow—have suggested that the most efficient means to promote information production involves not exclusion rights but public procurement.⁶

The lynchpin of the dominant justification for IP law, it turns out, is

4. See Peter S. Menell & Suzanne Scotchmer, *Intellectual Property Law*, in HANDBOOK OF LAW AND ECONOMICS 1473, 1477 (A. Mitchell Polinsky & Steven Shavell eds., 2007). It is not obvious that material goods are in fact so distinct from information in this regard, because they may also be difficult to exclude without sanctions backed by a state or other social authority. The idea that information is unusual in this regard relies upon a peculiar hypostatization of the law and norms that support private property in material goods.

5. *Id.*

6. Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 623 (Richard R. Nelson ed., 1962) (stating that “for optimal allocation to invention it would be necessary for the government or some other agency not governed by profit-and-loss criteria to finance research and invention”).

therefore an argument not about property but about the modern state. The leading IP-law casebook summarizes it this way:

Numerous institutional mechanisms exist for addressing the public goods problem inherent in the production of ideas and information—direct government funding of research, government research subsidies, promotion of joint ventures, and prizes. The case for intellectual property rights ideally compares all of these options. Intellectual property rights have the advantage of limiting the government's role in allocating resources to a finite set of decentralized decisions: whether particular inventions are worthy of a fixed period of protection. The market then serves as the principal engine of progress. Decentralized consumers generate demand for products and competing decentralized sellers produce them. By contrast, most other incentive systems, especially large-scale research funding, require central planning on a mass scale.⁷

William Landes and Richard Posner put the point similarly; government prizes or rewards should be avoided because they “would be hopelessly politicized, with grossly debilitating effects on economic efficiency.”⁸

In this account, then, the state is not absent but called forth in a very particular image. It is expected to effectively generate the conditions of private-market ordering, in particular by creating private property rights in information and by facilitating their enforcement. But the state is also characterized as incapable of effectively engaging more directly in the organization of information production. Why would the state be well-suited to the crafting of property rights, but ill-suited to directing innovation policy in other ways? On this point, the conventional theory is often vague but implicitly invokes a Hayekian hypothesis about information asymmetries.⁹ On this account, the state is unlikely to have sufficient information to determine what goods ought to be created. But when creating property rights, the state need not know what kinds of goods should be created; rather, it need only create generally applicable rights and then allow market actors to decide how to allocate investment.¹⁰ As the Landes and Posner quote suggests, the state here is also imagined to be uniquely vulnerable to capture, a problem that is described as more acute when the state is directly doling out rewards than it is when the state is merely establishing general rules of conduct.

This image of the state is easily recognized: it is the state as it is described in neoliberal discourse. As David Harvey has written, in the “first instance,”

The role of the state [in neoliberal theory] is to create and preserve an institutional framework appropriate to [neoliberal] practices. . . . State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state

7. MERGES, MENELL & LEMLEY, *supra* note 3, at 18. As this paragraph also illustrates, the dominant justification for IP law does not consider nonmarket, nongovernment alternatives for information production, such as the commons-based strategies discussed below.

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

9. See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521 (1945).

10. For the canonical description of this particular virtue of IP, written as a rejoinder to Arrow's famous account of the need for state investment in information production, see Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

interventions (particularly in democracies) for their own benefit.¹¹

II

Over the last decade or so, a powerful set of critiques has emerged to contest the dominant account just sketched out as well as the contemporary state of IP law.¹² These arguments have come from many directions, some even arising from scholars who previously were champions of the dominant account.¹³ The most prominent and potent line of theoretical critique in the legal literature has come in the guise of arguments for free culture and the “information commons” and has been most influentially articulated by Lawrence Lessig and Yochai Benkler.¹⁴ Both have stressed the problems with expansive exclusive-rights regimes in information and have also sketched a set of actually existing alternatives to market-based exclusionary forms of information and cultural production.

Lessig has written a series of influential books that have made him a “rock star of the information age,”¹⁵ particularly for young Internet and free-culture activists. He has argued powerfully, for example, that existing copyright law is in deep conflict with the radical new possibilities for creativity in the digital age. As he points out, when a mother posting a video of her toddler dancing to a Prince song on YouTube is threatened with a \$150,000 fine for copyright infringement, something has gone seriously awry.¹⁶ Lessig also contends that copyright law today is too long, too expansive, and instantiates a “permission culture” that is antithetical to free expression in the age of the remix.¹⁷ As he puts it, “the Internet has unleashed an extraordinary possibility for many to participate in the process of building and cultivating a culture that reaches far

11. HARVEY, *supra* note 1, at 2.

12. See generally Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008) (discussing the political and social factors culminating in the access to knowledge movement and some of the ideas of that movement); see generally ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY (Gaëlle Krikorian & Amy Kapczynski eds., 2010) (collecting multiple pieces on this movement).

13. Most notable here is Richard Posner's recent suggestion that “both patent and copyright protection, though particularly the former, may be excessive.” Richard Posner, *Do Patent and Copyright Law Restrict Competition and Creativity Excessively?* Posner, THE BECKER-POSNER BLOG (Sept. 30, 2012), <http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html>.

14. See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

15. So named by no less an authority than *The Economist*. *Free Mickey Mouse*, ECONOMIST (Oct. 10, 2002), <http://www.economist.com/node/1378700> (“Law professors rarely boast an army of ‘fans,’ but Lawrence Lessig is no run-of-the-mill academic. Now at Stanford University, formerly at Harvard, Mr. Lessig has become a rock star of the information age, mixing scholarly inquiry with barnstorming activism on many issues.”).

16. See Lawrence Lessig, *In Defense of Piracy*, WALL. ST. J. (Oct. 11, 2008), <http://online.wsj.com/news/articles/SB122367645363324303> (discussing the “Let’s Go Crazy” lawsuit).

17. For a discussion of the conflict between free and permission culture, see LESSIG, *supra* note 14, at 192–93.

beyond local boundaries,” creating the possibility of markets that “include a much wider and more diverse range of creators,” if not stifled by incumbents who use IP law to “protect themselves against this competition.”¹⁸

Benkler’s work has also been extraordinarily formative in the field, particularly for his insights into the multiplicity of modes of information production. As he has stressed, the conventional justification for IP does not account for the many successful and longstanding modes of market nonexclusionary information production.¹⁹ For example, attorneys write articles to attract clients, software developers sell services customizing free and open-source software for individual clients, and bands give music away for free to increase revenues from touring or merchandise.²⁰ More pathbreaking still is Benkler’s account of the importance of “commons-based peer production,” a form of socially motivated and cooperative production exemplified by the volunteer network that maintains Wikipedia or the groups of coders who create open-source software products such as the Linux operating system.²¹ In the digital networked age, as Benkler describes, the tools of information production are very broadly distributed, “creating new opportunities for how we make and exchange information, knowledge, and culture.”²² These changes have increased the relative role in our information economy of nonproprietary production and facilitate “new forms of production [that] are based neither in the state nor in the market.”²³ Because commons-based peer production is not hierarchically organized and is motivated by social dynamics and concerns, it also offers new possibilities for human development, human freedom, a more critical approach to culture, and more democratic forms of political participation.²⁴

This line of critique has been profoundly generative and has helped launch an important new conceptualization of the commons as a paradigm. That paradigm, as a recent book puts it, “helps us ‘get outside’ of the dominant discourse of the market economy and helps us represent different, more wholesome ways of being.”²⁵ Proponents of the commons concept draw upon contemporary articulations of successful commons-based resource management by Elinor Ostrom and her followers.²⁶ They do mobilize retellings of the political and economic history of the commons in land in Europe before

18. *Id.* at 9.

19. *See* BENKLER, *supra* note 14, at 41–49.

20. *Id.* at 43.

21. *Id.* at 60.

22. *Id.* at 2.

23. Yochai Benkler, *The Idea of Access to Knowledge and the Information Commons: Long-Term Trends and Basic Elements*, in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY*, *supra* note 12, at 217, 229.

24. *Id.*

25. David Bollier & Silke Helfrich, *Introduction: The Commons as a Transformative Vision*, in *THE WEALTH OF THE COMMONS: A WORLD BEYOND MARKET AND STATE* xi, xvii (David Bollier & Silke Helfrich eds., 2012).

26. *See, e.g.*, ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

enclosure,²⁷ and recent evidence from psychology and behavioral economics that suggests that humans have deep tendencies toward cooperation and reciprocity.²⁸ They argue that

A key revelation of the commons way of thinking is that we humans are not in fact isolated, atomistic individuals. We are not amoebas with no human agency except hedonistic “utility preferences” expressed in the marketplace. No: We are commoners—creative, distinctive individuals inscribed within larger wholes. We may have unattractive human traits fueled by individual fears and ego, but we are also creatures entirely capable of self-organization and cooperation; with a concern for fairness and social justice; and willing to make sacrifices for the larger good and future generations.²⁹

This stands, of course, as a powerful rebuke to the neoliberal imaginary, which “constructs and interpellates individuals as . . . rational, calculating creatures whose moral autonomy is measured by their capacity for ‘self-care’—the ability to provide for their own needs and service their own ambitions.”³⁰

III

Given this radical—and, in my view, critically important—attempt to rethink the subject at the core of neoliberal accounts, it is all the more striking that proponents of the commons often appear to adopt a neoliberal image of the state. For example, the introduction to a recently edited volume that gathers writings on the commons from seventy-three authors in thirty countries (entitled, tellingly, *The Wealth of the Commons: A World Beyond Market and State*) has this to say:

The presumption that the state can and will intervene to represent the interests of citizens is no longer credible. Unable to govern for the long term, captured by commercial interests and hobbled by stodgy bureaucratic structures in an age of nimble electronic networks, the state is arguably incapable of meeting the needs of citizens as a whole.³¹

The commons, they suggest, is a concept that seeks not only to liberate us from predatory and dysfunctional markets, but also from predatory and dysfunctional states. Something immediately seems incongruous here. If people are inherently cooperative reciprocators, why are states irredeemably corrupt? After all, as Harold Demsetz famously wrote in his 1967 attack on Arrow’s optimism about state production of information, “[g]overnment is a group of people.”³²

Lessig, one of the progenitors of the language of the commons in the informational domain, often leads with a similar view of the state:

27. See, e.g., PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO* (2008).

28. See YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* (2011); SAMUEL BOWLES & HERBERT GINTIS, *A COOPERATIVE SPECIES: HUMAN RECIPROCITY AND ITS EVOLUTION* (2011).

29. Bollier & Helfrich, *supra* note 25, at xv.

30. WENDY BROWN, *Neoliberalism and the End of Liberal Democracy*, in *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 37, 42 (2005).

31. Bollier & Helfrich, *supra* note 25, at xiv.

32. Demsetz, *supra* note 10, at 9.

[I]f the twentieth century taught us one lesson, it is the dominance of private over state ordering. Markets work better than Tammany Hall in deciding who should get what, when. Or as Nobel Prize-winning economist Ronald Coase put it, whatever problems there are with the market, the problems with government are more profound.³³

Lessig reveals his own sense of the power of this conception of the state when he seeks to tar IP law with the same brush; we should rebel against current IP law, he suggests, because we should “limit the government’s role in choosing the future of creativity.”³⁴

Benkler is more measured but admits as well to viewing the state as “a relatively suspect actor.”³⁵ We should worry, he suggests, that direct governmental intervention “leads to centralization in the hands of government agencies and powerful political lobbies,”³⁶ a view that echoes the neoliberal account described above.

It should perhaps not surprise us that leading critics of neoliberal information policy embrace a neoliberal conception of the state. After all, neoliberalism is not merely an ideology, but also a set of policy prescriptions that may have helped to call forth the state that it has described. As David Harvey puts it, “[t]he neoliberal fear that special-interest groups would pervert and subvert the state is nowhere better realized than in Washington, where armies of corporate lobbyists . . . effectively dictate legislation to match their special interests.”³⁷

There are, it must be said, few areas of law that better exemplify this problem than IP law. For example, Jessica Litman has documented the astonishing process through which the 1976 Copyright Act was drafted, in which Congress delegated most of the drafting to interest groups that were forced to negotiate with one another.³⁸ Other scholars have offered similarly startling accounts of the genesis of the most important IP treaty today, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. TRIPS

33. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 12 (2001).

34. Bollier & Helfrich, *supra* note 25, at xvi.

35. BENKLER, *supra* note 14, at 21.

36. Yochai Benkler, *The Commons as a Neglected Factor of Information Policy* (Oct. 3, 1998) (unpublished manuscript), available at <http://www.benkler.org/commons.pdf>.

37. HARVEY, *supra* note 1, at 77. This may be so, though I am not committed to that view because it depends upon a historical claim about the virtues of the pre-1970s state that is, at the very least, contestable. For a recent historical account of the intertwining of the early administrative state in the United States with profit motivations, see NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).

38. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 *CORNELL L. REV.* 857, 860–62 (1987). As she describes:

Members of Congress . . . encouraged, cajoled, bullied, and threatened the parties through continuing negotiations. They mediated disputes and demanded that combative interests seek common ground. Viable compromises emerged from the interminable negotiations largely because of congressional midwifery. The incessant pressure to achieve agreement among industry representatives was deliberate and planned in advance.

Id. at 871–72.

came into force in 1996, revolutionizing international IP law by both imposing new standards and by rendering them enforceable through the WTO's dispute-resolution system, which authorizes trade retaliation to enforce its judgments. Most countries in the world are members of TRIPS, and the Agreement introduced, for developing countries in particular, substantial new obligations, such as the obligation to grant patents on medicines and food-related inventions. Several excellent histories of the treaty have been written, documenting its beginnings as a brash idea proposed by "twelve chief executive officers (representing pharmaceutical, entertainment, and software industries)."³⁹ As Susan Sell has described, the TRIPS Agreement was a triumph of industry organizing. Through TRIPS,

Industry revealed its power to identify and define a trade problem, devise a solution, and reduce it to a concrete proposal that could be sold to governments. These private sector actors succeeded in getting most of what they wanted⁴⁰ from a global IP agreement, which now has the status of public international law.

These histories have made the neoliberal discourse of state "capture" irresistible in this field of law, perhaps moreso even than in other fields.⁴¹

Yet it is also the case that, as regards intellectual property law and information policy, the modern state has not revealed itself *only* to be captured by interest groups. The most striking recent example came in the 2012 campaign against a proposed new law called the "Protect-IP Act." That campaign emerged swiftly, instigated by nonprofit groups and netizens, and managed in a few short weeks to derail a bill that had already passed through Committee and that was seen as a *fait accompli* because it was strongly backed by Hollywood and other powerful industry groups.⁴² Another recent example comes from the transnational campaign against the Anti-Counterfeiting Trade Agreement, a campaign that very significantly shaped the Agreement's provisions and ultimately led the treaty to be rejected by one of its main proponents, the European Union.⁴³ Activists have also moved beyond a defensive agenda,

39. SUSAN SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 1* (2003). For another important account of the formation of TRIPS, see PETER DRAHOS WITH JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2002).

40. SELL, *supra* note 39, at 2.

41. See, e.g., Kaminski, *supra* note 2, at 8–25; LANDES & POSNER, *supra* note 8, at 14; Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 291–92 (2004).

42. See generally, EDWARD LEE, *THE FIGHT FOR THE FUTURE: HOW PEOPLE DEFEATED HOLLYWOOD AND SAVED THE INTERNET—FOR NOW* (2013); Yochai Benkler et al., *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate*, BERKMAN CTR. FOR INTERNET & SOC'Y (July 25, 2013), http://cyber.law.harvard.edu/publications/2013/social_mobilization_and_the_networked_public_sphere (mapping the online media discourse surrounding the proposed legislation); Susan K. Sell, *Revenge of the "Nerds": Collective Action Against Intellectual Property Maximalism in the Global Information Age*, 15 INT'L STUD. REV. 67 (2013).

43. See *EU Officially Pronounces ACTA Dead As Commission Withdraws Court Of Justice Assessment*, TECHDIRT (Dec. 12, 2012, 12:02 AM), <http://www.techdirt.com/articles/20121219/15502521443/eu-officially-pronounces-acta-dead-as-commission-withdraws-court-justice-assessment.shtml>. For an earlier example of successful mobilization against expansionist IP treaties, see Samuelson, *supra* note 2, at 374.

successfully pushing the World Intellectual Property Organization to pass the Marrakesh Treaty, the first-ever treaty dedicated to defining mandatory exceptions and limitations to IP law, thereby promoting access to copyrighted works for the visually impaired.⁴⁴

The point is not to recommend optimism about the power of democratic engagement on questions of information policy or to suggest that the extensive evidence of industry influence in this domain has been wrongly construed. Rather, it is to suggest that we miss something if we characterize the modern state as *only* corrupt and vulnerable to capture. If we can see people as having both “unattractive human traits fueled by individual fears and ego,” *and* as “capable of self-organization and cooperation” as well as capable of “a concern for fairness and social justice,”⁴⁵ what prevents us from seeing the state in the same way?

Indeed, for both proponents and critics of restrictive private IP law, the capable state is an indispensable concept. Both groups implicitly demand—and imagine—states that are not corrupt, ponderous, and ill-informed, but rather that are responsive, dynamic, and knowledgeable. Under the dominant justification for IP law, as described above, the state must be capable of generating well-crafted private-property law. That account tends to figure such law as simple to craft and as relatively immune to the dynamics of capture because of its generally applicable nature. But it is far from clear that IP law today resembles this image. Statutory exclusion-rights regimes can be enormously complex and include myriad provisions that are designed to affect only particular industries, as the U.S. Copyright Act well displays. That Act has been revised dozens of times and runs upwards of 100,000 words. The copyright that it defines is not one right, but an amalgam of many rights—for example rights of reproduction, adaptation, distribution, and (for certain categories of works) display and public performance.⁴⁶ New categories of works have been added over time, extending copyright protections to entirely new domains such as architectural works and sound recordings.⁴⁷ Extraordinarily specialized exceptions also have been codified, which often bear the obvious imprint of particular corporate interests.⁴⁸ There is nothing simple or prepackaged about the shape of copyright protection.

Even patent law, which better fits the model of abstract and generally-

44. See *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, (July 31, 2013), http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf.

45. Bollier & Helfrich, *supra* note 25, at xv.

46. 17 U.S.C. § 106 (2012).

47. 17 U.S.C. § 102. Sound recordings were added to the Act in 1971, see Pub. L. No. 92-140, 85 Stat. 391 (Oct. 15, 1971). Architectural works were added in the 1990 Act. See Pub. L. No. 101-650, 104 Stat. 5089, 5133.

48. See, e.g., 17 U.S.C. § 111 (“Limitations on exclusive rights: Secondary transmissions of broadcast programming by cable”); 17 U.S.C. § 122 (“Limitations on exclusive rights: Secondary transmissions of local television programming by satellite”).

applicable law, must be interpreted and applied to particular industries and applicants.⁴⁹ In the first instance, this is done by patent offices, which are frequently described as dangerously susceptible to industry influence.⁵⁰ Companies can—and sometimes successfully do—also lobby for very discrete benefits, such as the extension of individual patent terms.⁵¹ The crafting of IP law is an irredeemably complex enterprise. Legislatures must prescribe the scope of available subject matter, standards of novelty or originality, the duration of terms, the nature of exceptions and limitations, and so forth. Although competing interest groups may be balanced by legislative processes that pit them against one another, the history of IP law also shows that legislatures have innumerable ways to carve out concessions to particular groups.

In fact, there is no cause for a rigid distinction between “property” and “regulation” in this domain. Some might see in this evidence that IP law should be cleansed of any particularized elements in order to diminish the opportunity for capture. But if IP law is to have any claim to efficiency, to the contrary, it *must* be tailored to particular contexts. After all, the costs of innovation, as well as of transactions around exclusion rights, may vary enormously across industries.⁵² Even the most ardent proponents of restrictive private property rights in information concede that such rights must, to meet any plausible definition of efficiency, also be limited in certain ways and must be supplemented by government-funded research. Consider, for example, this statement by Richard Epstein:

[N]o defender of intellectual property thinks that private ownership of all valuable ideas is a smart social move. Rather, just as the air and waters are often held in common, the initial premise of intellectual property is that basic ideas (including various scientific laws) are property in the public domain for the best of functional reasons. The creation of private rights in these intellectual objects will blockade all sorts of useful works without creating much of an incentive for their creation.⁵³

Epstein has also criticized recent copyright-term extensions,⁵⁴ thereby calling

49. See Dan K. Burk & Mark A. Lemley, *Is Patent Law Technology Specific?*, 17 BERKELEY TECH. L.J. 1155, 1156 (2002) (“As a practical matter, it appears that while patent law is technology-neutral in theory, it is technology-specific in application.”).

50. See F. Scott Kieff, *The Case for Preferring Patent-Validity Litigation over Second-Window Review and Gold-Plated Patents: When One Size Doesn't Fit All, How Could Two Do the Trick?*, 157 U. PA. L. REV. 1937, 1949–50 (2009); Mike Masnick, *Revolving Door Between Gov't And Industry Continues: Pharma Lawyer Goes To USPTO As Gov't Financial Regulator Goes To Wall St.*, TECHDIRT (Feb. 22, 2011, 10:12 PM), <http://www.techdirt.com/articles/20110221/23203913198/revolving-door-between-govt-industry-continues-pharma-lawyer-goes-to-uspto-as-govt-financial-regulator-goes-to-wall-st.shtml>.

51. See Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 53 (2000).

52. See Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1581–95 (2003).

53. Richard A. Epstein, *Why Libertarians Shouldn't Be (Too) Skeptical About Intellectual Property*, 13.4 PROGRESS & FREEDOM FOUND., PROGRESS ON POINT 1, 7 (Feb. 13, 2006), <http://www.pff.org/issues-pubs/pops/pop13.4epsteinip.pdf>.

54. *Id.* at 11.

attention to another issue: excessive IP law is clearly expected to generate inefficiency, and incumbent industries are likely to have a strong interest in advocating for more restrictive IP law.

As Landes and Posner recognize, conventional understandings of information economics demand not only that the state fund so-called “basic research,” because such research “has no near-term commercial application and so could not be financed by patenting.”⁵⁵ In fact, the role of the state in the efficient production of information is logically still far larger. As Talha Syed and I have shown, patent rights do not offer symmetrical powers of exclusion over different kinds of information goods. In the presence of patents, drugs are easier to exclude than are new exercise regimes, for example.⁵⁶ A patent system operating alone would misallocate resources toward more excludable forms of research. An efficient system requires government not just to fund basic research, but also to fund research that is highly nonexcludable, whether it is basic or applied.

Consequently, those who defend a robust private-property approach to information production typically also imagine a state that plays an active and interventionist role in the information economy. Such a state must carefully configure IP law in all of its profuse contingencies, lest it create legions of individuals and firms capable of projecting power in ways that stifle rather than promote innovation. It must respond quickly and deftly to the emergence of new technologies; it must grant and enforce IP rights reliably and without prejudice; it must override exclusion rights when market failures appear; and it must supplement private intellectual property with government procurement strategies when needed. To do all of this, the state must of course also be able to determine the impact of changes to IP law and ascertain where market failure is likely, both enormously information-intensive activities.

Critics of robust exclusion rights in information also envision a muscular role for the state. This is sometimes not obvious because of the capacious way that such scholars employ the concept of the commons. For example, Lessig and Benkler have both described public roads as critical aspects of contemporary infrastructure and also as exemplars of the commons.⁵⁷ There is something odd about grouping public roads with Wikipedia and open-source software. Unlike these archetypal examples of the information commons, roads are funded by the state, governed by the state, and policed by the state. They are not created or maintained in any significant way through voluntary networks or decentralized social motivation.⁵⁸ Benkler also analogizes basic science to

55. LANDES & POSNER, *supra* note 8, at 307.

56. Amy Kapczynski & Talha Syed, *The Continuum of Excludability and the Limits of Patents*, 122 YALE L.J. 1900, 1936–37 (2013).

57. LESSIG, *supra* note 33, at 20; Yochai Benkler, *Commons and Growth: The Essential Role of Open Commons in Market Economies*, 80 U. CHI. L. REV. 1499, 1499–50 (2013).

58. Benkler recognizes this, but still concludes that we should consider public roads to be a commons. Benkler, *supra* note 57, at 1549. This flows from his definition of the commons as resources “over which no one exerts exclusionary proprietary claims and that are available for all to use on

commons-based peer production.⁵⁹ The analogy between science and Wikipedia is a more comfortable one because, as Benkler notes, “[s]cience is built by many people contributing incrementally—not operating on market signals, not being handed their research marching orders by their dean—but independently deciding what to research, [and] bringing their collaboration together”⁶⁰ But modern science is also a massive state-funded enterprise. The National Institutes of Health, for example, allocate thirty billion dollars each year for health research.⁶¹ Although that research is largely allocated by scientific decisionmaking, channeled through grant proposals and peer review,⁶² this process does not negate the role of the state in providing funds and establishing the institutions that facilitate peer review. The expansive deployment of the concept of the commons itself may be a symptom of the power of the neoliberal image of the state in our contemporary imaginary. Pessimism about the state may be so profound that we become inclined to submerge its role, even when it clearly stands behind programs and functions that we demand and need.

Like proponents of exclusion rights in information, advocates of the commons also at times expressly make demands upon the state in ways that seem incompatible with the radical pessimism about the state that they often lead with. For example, commons theorists call upon the state to “begin to provide formal charters and legal doctrines to recognize the collective interests and rights of commoners.”⁶³ This is the commons-based equivalent of asking the state to involve itself only in the production of private property regimes. Although it is less clear what kinds of moves these commons advocates might be asking of the state, it seems likely that they will require the same informational sophistication and openness to democratic claims-making that would be required for sound lawmaking in the domain of private intellectual property.

Lessig also calls for a series of ambitious reforms that states ought to undertake, including not just major scaling back of copyright law, but also the affirmative “building out [of] the information superhighway.”⁶⁴ Benkler also suggests that his *Wealth of Networks* offers “no reason to think that, for example, education should stop being primarily a state-funded, public activity and a core responsibility of the liberal state, or that public health should not be so.”⁶⁵ If the state is to play this role and play it well, however, it will require

symmetric terms.” *Id.* at 1499.

59. Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1256 (2003).

60. *Id.*

61. See *About NIH: NIH Budget*, NATIONAL INSTITUTES OF HEALTH, <http://www.nih.gov/about/budget.htm> (last visited Nov. 11, 2014) (reporting a budget of \$30.1 billion in financial year 2014).

62. See generally Bhaven N. Sampat, *Mission-Oriented Biomedical Research at the NIH*, 41 RES. POL'Y 1729 (2012).

63. Bollier & Helfrich, *supra* note 25, at xviii.

64. See LESSIG, *supra* note 33, at 244. Benkler does the same. See Benkler, *supra* note 36, at 7.

65. BENKLER, *supra* note 14, at 22. Benkler also affirms the role of “state funding for basic science and research.” *Id.*

substantial support—particularly because of the overtly distributional component of these public functions. It will also require efforts to critically reimagine the role of the state in an age of both neoliberalism and of commons-based peer production.

IV

The capable state is a concept that we seem to be unable to live without, though this is admittedly not the same thing as showing that such a state does or could exist. There are, however, empirical reasons to resist the notion that the state is incapable of playing a major and positive role in information policy, and not just because the state must be involved in any such scheme, including that of creating exclusion rights. Might it be that the modern state is in fact *better* at directly promoting innovation than it is at creating private property rights that are well-configured do the same? After all, the same state that gave us the “Mickey Mouse” Copyright Term Extension Act, which lengthened copyright protection by two decades, not only prospectively but also retroactively (to better incentivize Walt Disney, God rest his soul?), has also funded agencies like the National Institutes of Health, the National Science Foundation, and (more ominously), Defense Advanced Research Projects Agency, which are widely credited with the foundational advances that made the networked information age and the biotech age possible.⁶⁶ Governments today fund not only blue sky research, but also “mission-oriented research,” with particular goals in fields like health and energy, where their role is critical not because possible applications are distant in time, but because their social value is hard to internalize even in the presence of private intellectual property rights, or because the private sector is more risk-averse than is government.⁶⁷

It is in some sense no surprise that all of this is not well-profiled in recent debates about information policy and private IP law, particularly in the United States. After all, as Erik Reinart has recently put it:

[S]ince its founding fathers, the United States has always been torn between two traditions, the activist policies of Alexander Hamilton (1755-1804), and Thomas Jefferson’s (1743-1826) maxim that ‘the government that governs least, governs best.’ . . . With time and usual American pragmatism, this rivalry has been resolved by putting the Jeffersonians in charge of the rhetoric and the Hamiltonians in charge of policy.⁶⁸

This pragmatic accommodation may have a dangerous aspect, if it intersects with neoliberal trends in a way that brings about a state that is less empowered and less worthy of our respect. It would not be surprising if there were a self-fulfilling dimension to the neoliberal image of the state. If common wisdom suggests that the state is an inertial Leviathan, will the best young minds want to

66. See MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* (2013).

67. MAZZUCATO, *supra* note 66, at 108.

68. ERIC REINERT, *HOW RICH COUNTRIES GOT RICH AND WHY POOR COUNTRIES STAY POOR* 23 (2007).

labor in its service?⁶⁹ And if skepticism about the abilities of the state leads us to relegate it largely to facilitating the functions of the market, would it be a surprise if this new state were more susceptible to capture?

In these few pages I can do no more than generate some doubt about the neoliberal image of the state that enjoys such currency in contemporary IP literature and beyond. But I hope I have done that. What is needed in IP scholarship—as elsewhere in legal studies—is a postneoliberal conception of the state, but one that is attuned to the fact that some aspects of the contemporary state in fact resemble the nightmarish neoliberal image. A call to bring the state back in is not a call to dislodge the generative new work being done on the commons, but rather to suggest that there is today no viable form of a prepolitical commons, and that theorists of the commons need to make space in both their accounts of the commons, and in their articulations of the political domain that they wish to bring into being, for a postneoliberal image of the state. Can we conceive of—even if we cannot easily achieve—a state that is capable of constraining the proliferation of exclusion rights in information and that can support social ordering beyond markets? Is it possible to imagine a state that could temper the tendencies of certain market formations to promote ghastly inequality, environmental collapse, and political corruption of the first rank?⁷⁰ If the answer is no, then we should fear grievously for our collective future. In that case, the market and the commons will not be able to save us from the neoliberal Leviathan, and the future of ideas will be bleak indeed.

69. MAZZUCATO, *supra* note 66, at 4.

70. For a call along similar lines, see Michael Bauwens & Franco Iacomella, *Peer-to-Peer Economy and New Civilization Centered Around the Sustenance of the Commons*, in *THE WEALTH OF THE COMMONS*, *supra* note 25, at 326.