Independent Owners: A Comment on Peter Lee, Autonomy, Copyright, and Structures of Creative Production

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I. INTRODUCTION

Peter Lee has contributed an impressive addition to a new, fast-rising wing of IP theory. Like others working alongside him, Professor Lee's contribution features the transactional and organizational functions of intellectual property rights (IPRs).[1] In particular, copyrights. His attention is trained on the entertainment industry, and his main goal, as he puts it, is to bring attention to the:

> [U]nderappreciated *organizational* mechanism by which copyright contributes to creative expression. [Lee's Article] argues that copyright indirectly promotes creativity by facilitating industry structures that are particularly conducive to creative expression, namely those where creators can work independently of large bureaucracies.[2]

And with that, we are off on an impressive tour of the way copyright law supports author autonomy and the added creativity known to flow from it.

The new twist in this Article is the emphasis on a different aspect of author incentives than those examined in traditional models. The economics of

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[1] Descriptions of this trend in IP scholarship can be found in ROBERT P. MERGES, ECONOMICS OF INTELLECTUAL PROPERTY LAW, IN THE OXFORD 2 HANDBOOK OF LAW AND ECONOMICS: PRIVATE AND COMMERCIAL LAW (Francesco Parisi, ed., 2017), avail. at DOI: 10.1093/oxfordhb/9780199684205.013.017; and JONATHAN M. BARNETT, INNOVATORS, FIRMS, AND MARKETS: THE ORGANIZATIONAL LOGIC OF INTELLECTUAL PROPERTY 56–57 (2021).

[2] Peter Lee, *Autonomy, Copyright and Structures of Creative Production*, 83 OHIO ST. L.J 286–87 (2022).

copyright are conventionally described in terms of an incentive/access tradeoff.[3] At the aggregate level, copyright in these models increases the money earned by authors, but makes authors' works more expensive to consumers.[4] The simple-to-model-but-probably-impossible-to-implement solution is, as any veteran of microeconomics might guess, to balance things at the margin: to strengthen copyright along various dimensions just to the point where the authors' marginal gain is equal to the (society-wide) loss in consumer value attributable to stronger copyright. Restated: How many would-be consumers of a creative work will be priced out of the market due to the higher price tag that follows from copyrighting the work, and at what point does the loss suffered by these excluded purchasers become higher than the marginal incentive gain to the work's creator?

Professor Lee offers an intervention here that penetrates beyond these aggregate models. He is at pains to show—and he does show, I think—that the aggregated models miss a key point. They address how many copyrighted works society will produce, and at what social cost; but they say nothing about the organizational setting in which these works will be incubated and created.[5] The traditional approach addresses *how much* creative work copyright may call forth, but not *where* this creative work will get done.[6] Professor Lee aims right for this hole in existing theory.

He shows that copyright encourages a vertically disaggregated, contract-intensive organizational structure with one key, shining attribute: it allows authors to be independent of direct control by large corporate entities.[7] Copyright law grants a multi-faceted property right to an original author.[8] That right is then capable of becoming an organizational kernel: the substructure on

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[3] *See, e.g.*, Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 485 (1996).

[4] *Id.* ("Broadening copyright's scope, however, also limits access to such works both generally, by increasing their price, and specifically, by limiting the material that others can use to create additional works.").

[5] *See* Lee, *supra* note 2, at 283.

[6] *See, e.g.*, PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 1.14 (last update June 2022) (ebook) (footnote omitted):

> To give greater property rights than are needed to obtain the desired quantity and quality of works would impose costs on users without any countervailing benefits to society. To give fewer property rights than are needed to support this investment would give users freer access, but to a less than socially desirable number and quality of works. The premise of social benefit imports a value judgment and an empirical judgment. Every time Congress amends the Copyright Act, it makes a value judgment about the quantity and quality of literary, musical and artistic works that are socially desirable and an empirical judgment about the amendment's efficacy in achieving that end.

[7] *See* Lee, *supra* note 2, at 283.

[8] *See generally* Lee, *supra* note 2.

which an elaborate scaffolding of distribution, diversification, and follow-on creation can be built. Through a complex series of contracts with investors, movie theatre owners, streaming service platforms, toy and clothing companies, etc., an author (or an alter ego corporate entity) can exploit a copyrighted work in all sorts of sub-markets while remaining independent: free to write, draw, direct, or compose the next work, which is then capable of being blended into this emergent structure, or used as the foundation of a parallel structure.[9] As Professor Lee shows so well, sociological and psychological research amply and consistently supports the conclusion that creative people crave autonomy and value it highly.[10] The emphasis on not just aggregate levels of creative work, but the *locus* of that work, incorporates these insights.[11] Put perhaps provocatively, the gist of copyright might be simply this: ownership, via copyright, gives at least some authors a chance to *avoid being an employee*. The grant of a copyright gives an author an asset around which a profit-making structure may be built—but without trapping the author inside a large bureaucracy whose effect, if not intention, is to strangle whimsy and constrain creativity.

II. AUTONOMY: A DEEP DIVE

Professor Lee in this Article does an excellent job summarizing the psychological and sociological literature on autonomy: what it is, how to measure it, and why it matters. He skillfully summarizes a large body of research and—most importantly—makes it intelligible and relevant to students of IP law. The idea of psychological ownership,[12] for example, adds a perceptual and motivational layer to conventional thinking about property rights: an invaluable extra dimension. It has been understood for some time that many creative people respond better to intrinsic (self-generated) motivation than extrinsic (material) rewards.[13] Seen in a purely economic frame, ownership is closely associated with pecuniary reward—implying that ownership might hold no interest for a creative person.[14] But if instead (or in addition) ownership has a symbolic component, if it stands as the legal embodiment of a deeper, more personal connection to one's work, then it might matter even to one motivated primarily

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[9] *See id.* at 289–90.

[10] *Id.* at 337–41.

[11] *See id.*

[12] *Id.* at 338–39.

[13] *See, e.g.*, Christopher Buccafusco, Zachary C. Burns, Jeanne C. Fromer & Christopher Jon Sprigman, *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 92 TEX. L. REV. 1921, 1936–37 (2014) (reviewing psychological literature and concluding that "[some] studies find that intrinsic motivation is more conducive to creativity than extrinsic motivation").

[14] *See* Lee*, supra* note 2, at 338.

by non-monetary values.[15] Ownership can be seen as recognizing the *personal* nature of a work, which might fit well with an *intrinsic* motivation to create that work in the first place.

One element of control often overlooked is the ability to choose your teammates. Professor Lee has fully digested this important fact. He writes: "[C]reative individuals seek autonomy but also derive great value from engagement and collaboration with others. Collaborations can facilitate synergies that enhance individual creative capacity."[16] Because collaboration is so vital to so many creative projects, it is necessary to incorporate teamwork into any discussion of job satisfaction for creative professionals. Autonomy, it might be said, can exist as a shared value among the members of a team. Devolving ownership down to the team level—the vertical dis-integration Professor Lee describes—promotes this value.[17]

A great virtue of Professor Lee's Article is that it skillfully combines theory with concrete examples and details. His case study on the film adaptation of the best-selling novel "Crazy Rich Asians" (CRA) is a case in point. After citing psychology and sociology sources on the value of autonomy, Professor Lee punches the point home with details drawn from the CRA story.[18] Although the author of CRA, Kevin Kwan, never mentions the word autonomy in his public statements, what he does say is a perfect instance of the value of retaining control of a creative work. Kwan is quoted in a New York Times story:

> [Interviewer] While other authors option their books for thousands of dollars, you optioned the book to the production companies Color Force [the Kwan-assembled production company] and Ivanhoe for $1. What did you do with that dollar?
> [Kwan:] I don't think I actually got that dollar, quite frankly. Basically, I was trying to make myself as amenable to the deal as possible. I didn't want things

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[15] *See* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY, at xi (2011) [hereinafter MERGES, JUSTIFYING] ("IP allows more creative people to own what they make. The language surrounding IP rights rings with the message that ownership confers control and dignity. Workers receive wages, but IP owners are paid in *royalties*. This linguistic signal carries an important social message about the status of creative effort."); *see also* Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 53 ARIZ. L. REV. 145, 150 (2011) [hereinafter Merges, *Autonomy*].

[16] *See* Lee, *supra* note 2, at 59; *see also* MERGES, JUSTIFYING, *supra* note 15, at 22 ("[I]ndividual creators continue to make important contributions to culture and commerce. More importantly, if we widen the angle of vision just a bit, we can see that individual creators working in *small teams*—often in small start-up companies—play a very important part in contemporary IP-driven creativity.").

[17] On rules that concentrate ownership of jointly produced works into a single entity, which rules counteract the deleterious effects of individual ownership claims on a joint work product, see Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 HARV. J. L. & TECH. 1, 20–26 (1999).

[18] Lee, *supra* note 2, at 285–86.

> to be held up by money. I wanted the money to be spent hiring a great screenwriter—to really adapt my book rather than to pay me some stupid option fee. And it gave me a partnership stake in the whole process. So it was worth every dollar—it was worth that dollar. [laughs][19]

What we see at work here is the importance of *control* as an adjunct to and partial substitute for monetary compensation.[20] Control is an oft-overlooked *dimension* of the compensation the legal system provides to creators in the form of copyright.[21] Aside from moral rights, which are explicitly centered on an author's continuing dignity interest in her creative works (and which are not much recognized in US law), the best example of copyright's concern with control might be in the rules surrounding derivative works.[22] These rules can be harsh for unauthorized adapters or improvers who build on a pre-existing copyrighted work. That's because creative add-ons made without prior permission of a copyright owner cannot be copyrighted at all.[23] Anything that

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[19] Andrew R. Chow, *'This Story Transcends Race': Kevin Kwan on the Appeal of 'Crazy Rich Asians'*, N.Y. TIMES, (Aug. 19, 2018), https://www.nytimes.com/2018/08/19/movies/kevin-kwan-crazy-rich-asians.html?searchResultPosition=3 [https://perma.cc/AT84-VMXU].

[20] *See* JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 7, 14 (2014) (findings based on extensive interviews with creative professionals, including artists, musicians, etc.):

> Many [musicians] want regularity in their revenue stream so they can compose and play without worry. Some of these same musicians, however, wish for control that would prevent other people from misusing their work. In copyright parlance, these musicians value the derivative work right (protected through copyright law) and also moral rights (which are largely unprotected under US copyright law). . . .
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> [I]t is perhaps surprising that both individuals and corporate agents identify motives other than money for pursuing creative and innovative work and for protecting it through intellectual property. . . . Interviewees in this study, through their accounts of their involvement in creative and innovative professions, illustrate a diversity and balance of values to achieve professional well-being, including professional autonomy, control over time and space, relationships with others (community building and sustaining personal ties), challenging oneself and others, and earning a living.

[21] The point is that personal valuation, as reflected for example in an individual's utility level, may include both monetary and non-monetary components. *See* Robert P. Merges, *Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 310 n.24 (1993) (describing non-monetary aspects of legal rights; many economists "would contend that *any* subjective preference an individual uses to construct her own private 'utility function' is an 'economic' [though not monetary] value").

[22] *See generally* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209 (1983).

[23] *See, e.g.*, Sobhani v. @Radical.Media Inc., 257 F. Supp. 2d 1234, 1235–1236 (C.D. Cal. 2003) (free-lance creator of ad campaigns prepared unsolicited ad campaign for hamburger restaurants, which campaign built on copyrighted images owned by the restaurant chain; held, no copyright in the free lancer's newly created material because it is an unauthorized derivative work under 17 U.S.C. § 101 (definition of "derivative work")); *see also* Pickett v. Prince, 207 F.3d 402, 404, 406 (7th Cir. 2000) (Posner, J., holding the same).

derives from a pre-existing copyrighted work, must have the blessing of the owner of the pre-existing work.[24] Unsolicited adaptations, improvements, and the like, get no legal protection at all.[25]

The contrast with patent law—which explicitly welcomes and recognizes "improvement" inventions based on pre-existing technology—is instructive. In a fair number of cases, patent law permits the grant of separate patents to both a pioneer in a given field and improvers in that field.[26] Sometimes, an improver adds enough value to merit a separate patent. In such a case, anyone who wants to use the improved version of the pioneering invention must get a license from both patent owners, pioneer and improver.[27] They even have to cross-license each other if they both went to deploy the pioneer + improver version. This is referred to as "blocking patents"[28] Awarding separate patents forces the parties into a post-patent-issuance (ex post) bargain with each other, which some at least see as a clever way to split the legal entitlements in this situation.[29] But copyright is different:

> In the great run of cases, the ingenious institution of blocking patents balances the rights of original creators and subsequent improvers rather nicely. Interestingly, no such institution exists in the law of copyrights under which a follow-on creator would be prohibited from appropriating and adding to the copyrighted material of an original creator. It has been argued that to deny the derivative artist a copyright in his additional creative efforts, to the extent they are pervaded by the original work, diminishes his incentives to create new works based upon copyrighted material . . . Perhaps the best explanation for the lack of a doctrine of "blocking copyrights" is copyright law's policy favoring the reputational interest of authors: by requiring *ex ante* licensing of anyone who wishes to incorporate a copyrighted work into another work, the law ensures that the owner of the copyrighted work will completely control all manifestations of it.[30]

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[24] *See* 17 U.S.C. § 106(2) (right "to prepare derivative works based upon the copyrighted work").

[25] *See id.*

[26] *See generally* Robert Merges, *Intellectual Property Rights and Bargaining Breakdown: The Case of Blocking Patents*, 62 TENN. L. REV. 75 (1994).

[27] *See generally id.*

[28] *See, e.g.*, Standard Oil v. United States, 283 U.S. 163, 171 n.5 (1931).

[29] *See* ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY 1166 (8th ed. 2021) ("[T]he institution of blocking patents . . . represents a rather clever parsing of property rights over a family of inventions in an effort to calibrate incentives to encourage both original, breakthrough research and follow-on developments, improvements, and applications.").

[30] Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2659 n.15 (1994). *But see* Goldstein, *supra* note 22, at 244 (1983):

> The rule [denying copyrightability for unauthorized derivative works] is, however, hard to justify when applied to derivative works such as the motion picture in *Sheldon v.*

The key word being, again, control. The copyright rule requires the creator of the original work to pre-approve any adaptation or modification.[31] It forces the parties to bargain *before* the derivative work is created. (The penalty for failing to bargain is loss of any copyright in the derivative work.) No modification or adaptation that does not fit with the original creator's vision of her story, picture, play, musical composition, etc. will ever be introduced to the public.[32]

III. COPYRIGHT AS PLATFORM OR SCAFFOLD: IP-BASED PRIVATE ORDERING

"Property is a platform for the rest of private law."[33] Henry Smith writes this as a general description of property as one of the baseline entitlements that are the core of private law and private ordering. The example of character licensing serves as a concrete example of this highly abstract observation. The copyright for CRA served as the foundation of Kwon's production company Color Force, which produced the film based on the book.[34] If the first film were followed by a sequel or prequel, or if the book/film were ever adapted as a Broadway play or television show, presumably Kwan and Color Force would be involved in production.[35]

Likewise, either Color Force or some related entity, or perhaps Kwan himself, might also be the source of rights for character and merchandise licensing—the business of making t-shirts, coffee mugs, hats, sweatshirts, yoga mats, toys, posters, etc., etc. Crazy Rich Asians, like almost all popular movies, television and streaming shows, plays, etc., taps into this business to milk extra profits from the basic copyrighted book and film. Technically, the CRA film is itself a derivative work.[36] But "film rights" (a specific type of derivative work) are handled by a specialized set of industry players with their own practices, norms, habits, contractual forms, and organizational structure.[37]

> *MGM* in which the underlying work represents only a small part of the value of the derivative work but, because it underlies the whole, will defeat copyright protection for the entire derivative work. Just as an injunction against the motion picture gave plaintiff there a greater return than was needed to induce his investment in the underlying work, so depriving the motion picture owner of all protection against others will give it far less return than is needed to justify investment in the derivative work.

[31] *See* Sobhani v. @Radical.Media Inc., 257 F. Supp. 2d 1234, 1240 (C.D. Cal. 2003).

[32] *See id.*

[33] Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012). A similar metaphor is the idea of private law "scaffolding." *See generally, e.g.*, Gillian K. Hadfield & Iva Bozovic, *Scaffolding: Using Formal Contracts to Support Informal Relations in Support of Innovation*, 5 WIS. L. REV. 981 (2016).

[34] *See* Lee, *supra* note 2, at 285–86.

[35] *See id.*

[36] *See id.*; *see also* 17 U.S.C. § 106(2).

[37] *See* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 97–98 (10th ed. 2020).

Though based on the same copyrights, a different set of contracts and arrangements support character and merchandise licensing.[38] Because licenses can be parceled out to all sorts of niche products, the usual practice is to either establish an in-house licensing group or deal with a specialist agency.[39] For a "property" such as CRA, the latter course of action might make sense, given that Kwon and the other principals seem to prefer a simple organizational structure and small firm ambiance. A licensing agency serves as a go-between, linking the copyright owner with manufacturers of backpacks, pencils, coffee mugs, and so on.[40] Most licensing agreements require affirmative approval from the property owner before a character or merchandise license is granted, which permits the owner to supervise the types and quality of merchandise that incorporates the licensed property.[41] Usually the owner of the underlying copyright will retain the right to supervise quality and assure that no merchandise licensing will cause harm to the reputation of the author or value of the underlying work.[42]

The basic entitlement at the heart of all these arrangements is the copyright in CRA. It is the kernel around which an elaborate set of contracts is made. These contracts in turn serve as the backbone around which an elaborate set of business arrangements is constructed. So, starting with a simple property right in the CRA book, contracts and business structures have been built. This

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[38] *See generally* TIM HOLLIS, TOONS IN TOYLAND: THE STORY OF CARTOON CHARACTER MERCHANDISE (2015).

[39] *See* GREGORY J. BATTERSBY & CHARLES W. GRIMES, LAW OF MERCHANDISE AND CHARACTER LICENSING (2011 & Supp. 2021) ch. 5A, § 5A:2 ("The [in-house] Licensing Team"), § 6.12 ("Agreements With Licensing Agencies or Representatives"). For an example of an IP licensing agent business, see *Licensing*, CONSOR, https://consor.com/service/licensing (last accessed Sept. 5, 2022) ("[O]ur core specialty [is] the licensing, leveraging, and valuation of trademarks, brands, patents, copyrights, and other IP. We use intellectual property licensing as the ability to maximize the value of IP and intangible assets, using our proprietary licensing techniques and skills.").

[40] *See* BATTERSBY & GRIMES, *supra* note 39, at § 6:12:

> In many instances, property owners are not in a position to conduct their own merchandising program. Rather than creating a licensing department, the property owner may choose instead to utilize the services of an independent licensing agent or representative. The relationship between the property owner and the outside licensing agent is defined by an agent agreement. It should be appreciated that although these individuals are called "licensing agents," they are not "agents" in the true sense of the word in that while they do represent the property owner in negotiations, etc., they typically lack the power to bind the licensor.1 As a result, many current agreements refer to these parties as "licensing representatives" which is a more accurate description of their function, i.e., to seek out and find possible licensees for a licensor with the final agreement to be entered into between the property owner directly and the licensee.

[41] *See id.* § 5A:7 ("Product approval").

[42] The merchandise review process protects these interests. See *id.*

elaborate "network organization" duplicates many of the functions that might otherwise be performed in-house in a large company.[43] But they do so without a large company. Kwan's preference for a small autonomous operation is served, while at the same time the CRA property lies at the center of a sprawling web of contracts and business arrangements. CRA is widely and profitably exploited, with little loss of autonomy for Kwan and Color Force.

To return to the private law kernel, the copyright, it is important to understand that placing a property right—especially a federally-granted and -enforced property right—at the center of a contract makes for a more powerful contract. This in turn supports and furthers the autonomy-preserving nature of copyright. "In an economy where contracting is becoming more pervasive," one Article says, "property rights invest contractual exchange with an important dimension.[44] At the initial stage, they facilitate precontractual negotiations. "After parties sign a contract, property rights give contracting parties numerous additional enforcement options [in particular, in IP cases, the chance for a federal court injunction] which, in the aggregate, confer considerable flexibility."[45] The "exceedingly favorable remedial scheme" of IP law thus adds real clout to the power of an IP-based contract.[46] Contracts rooted in IP rights are more powerful than run-of-the-mill contracts. In this way IP law supports private ordering. It indirectly improves the value of contract as a substitute for integration, and in this way further contributes to creator autonomy.

IV. CONCLUSION: METHODOLOGICAL CONVERGENCE

Professor Lee adds social science sophistication to the case for creator autonomy. The psychology and sociology of creative workers points in the same direction as research driven by other methodologies—in particular

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[43] See Matthew Jennejohn, *Do Networks Govern Contracts?*, 47 J. CORP. L. 333, 333 (2022):

> This Article provides new empirical evidence that parties in highly innovative markets actually rely heavily on the formal legal system to address the risks that networks create. It shows that parties increasingly use formal contracts as they become more connected in a market, just the opposite of what private ordering theory predicts [which is a declining role for contract, and greater reliance on informal norms, as economic interaction increases].

[44] Robert P. Merges, *A Transactional View of Property Rights*, 20 BERKELEY TECH. L.J. 1477, 1519 (2005).

[45] *Id.*

[46] *Cf.* Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 935 (2015) (describing "areas of law with exceedingly favorable remedial schemes, such as antitrust and patent claims").

philosophical inquiries[47] and "pure" law and economics studies.[48] When multiple theoretical approaches all point to the same conclusion, that conclusion carries extra weight. Multiple methods in IP scholarship all produce valuable scholarship. Yet:

> [A] more significant payoff comes when multiple methodologies reach the same conclusion. Convergence of this sort sends a powerful message. We can more confidently argue for policy prescriptions when multiple scholars, using different tools, arrive at the same conclusion.[49]

By calling attention to the organizational structure enabled by copyright, and the autonomy-enhancing benefits that flow from this structure, Professor Lee has added appreciably to the emerging branch of IP scholarship that emphasizes the importance of where creative work is situated, and how that situation affects the work of creative professionals. Working independently, on his own, he has demonstrated that a single creative person can generate a good idea. In this way his scholarship not only considers author autonomy as a phenomenon of study, but it also embodies the very benefits that autonomy supplies.

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[47] *See, e.g.*, MERGES, JUSTIFYING, *supra* note 15, at 15–16 ("The basic foundations of IP law are individual autonomy and freedom. These are formative ideas from Immanuel Kant, so it might just as well be said that Kantian philosophy belongs, along with [John] Locke, at the bottom of the [conceptual] foundation [of IP law].").

[48] *See, e.g.,* BARNETT, *supra* note 1, at 56 ("[Historical studies] track both theoretical [economic] expectations and empirical observations in other contexts that patents facilitate trade in informational assets, which in turn promote entry by smaller R&D-intensive entities and facilitates the specialization of labor among innovation and commercialization entities along the technology supply chain.").

[49] MERGES, *supra* note 1, at 13.