

WHO SHOULD PAY FOR PROGRESS?

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The project I'm going to talk about today is a large and complex one, still very much in development (particularly part III), so I'll be very grateful for your reactions. Like any good academic, I'm going to try to make three points in my talk, and I'll set them up as claims. The first is that IP law embodies an intelligible conception of distributive justice. The second is that this conception is legitimate but contestable, meaning that criticism of IP on distributive justice grounds is best understood as a matter of competing conceptions of distributive justice rather than a matter of trading justice against some other value, such as efficiency. The third is that implementing IP's conception of distributive justice is difficult as a practical matter, and this difficulty is responsible for many familiar doctrinal tensions.

- I -

To get to the first point, we need to understand what we mean by distributive justice. This is a question we can only effectively ask thanks to the increasing theoretical diversity of our discipline. The framework of law and economics—and its overarching concern for welfare-maximization—is lately returning to a state of healthy competition with other theory-based normative commitments.¹ This theoretical diversity is especially noticeable when we talk about the appropriate distribution of the burdens and benefits of innovative and creative activity—what philosophers call distributive justice.² In our field, this issue most often arises in the context of concerns

¹ Rob Merges's recent book is a good example of this phenomenon. ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011).

² See, e.g., Julian Lamont & Christi Favor, *Distributive Justice*, in *THE STANFORD*

² See, e.g., Julian Lamont & Christi Favor, *Distributive Justice*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Spring 2013 ed. 2013), <http://plato.stanford.edu/archives/spr2013/entries/justice-distributive/> (last visited Jun 24,

over access to knowledge,³ and is sometimes framed as a tradeoff between efficiency and access.

To the extent arguments in favor of broadening access have a theoretical foundation, they often rest not on the welfarism of law and economics, but on some other strand of liberal political theory. This could be Sen and Nussbaum's capabilities approach,⁴ or Rawls's principles of justice,⁵ or Dworkin's egalitarianism,⁶ or what-have-you. But I am interested in whether IP law can be said to reflect or implement *its own theory* of distributive justice *independent* of a concern for welfare-maximization. Because if it can, then the critiques of IP on distributive justice grounds can be seen less as an accusation of injustice, or a debate over the appropriate tradeoffs between justice and some other theoretical construct such as efficiency, and more as a conflict between what Rawls called differing "conceptions" of justice.⁷

I propose to come at this question comparatively, which brings me to another trend in IP scholarship: comparative institutional analysis of innovation-incentive regimes.⁸ This literature is most developed in the debates over the comparative *efficiency* of patents, prizes, and government procurement, by comparing the effectiveness of their solutions to a perceived market failure. But recently, a few scholars have started looking comparatively not only at efficiency, but at which of these systems may satisfy *other* normative commitments that we might hold. So a few years

2014) ("Principles of distributive justice are therefore best thought of as providing moral guidance for the political processes and structures that affect the distribution of economic benefits and burdens in societies.").

³ See generally, e.g., William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World*, 40 UC DAVIS L. REV 581 (2006); Margaret Chon, *Intellectual Property From Below: Copyright and Capability for Education*, 40 UC DAVIS L. REV (2006); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE LAW J. 804 (2008).

⁴ See generally THE QUALITY OF LIFE, (Martha Nussbaum & Amartya Sen eds., 1993); Amartya Sen, *Equality of What?*, in 1 THE TANNER LECTURES ON HUMAN VALUES 198 (1980).

⁵ See generally JOHN RAWLS, A THEORY OF JUSTICE (1999).

⁶ See generally RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).

⁷ RAWLS, *supra* note 5, at 9 ("I have distinguished the *concept* of justice as meaning a proper balance between competing claims from a *conception* of justice as a set of related principles for identifying the relevant considerations which determine this balance." (emphasis added)).

⁸ See, e.g., Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When Is It The Best Incentive System?*, in 2 INNOVATION POLICY AND THE ECONOMY, 51 (2002); GOVERNING KNOWLEDGE COMMONS (Brett M. Frischmann, Michael J. Madison, & Katherine J. Strandburg, eds. 2014).

ago in the *UCLA Law Review*, Amy Kapczynski argued that IP might not satisfy the demands of distributive justice if the underlying distribution of wealth in society were unjust, and that this might be a reason to favor alternative regimes.⁹ And even more recently, Daniel Hemel and Lisa Larrimore Ouellette observed that in comparing legal regimes designed to promote innovation, one criterion that we might look to (other than efficiency) is the answer to a very basic question: who pays?¹⁰

For my project, I propose to use a variant of this “who pays” question as a lens through which we might inductively construct the *conceptions* of distributive justice embodied in various legal regimes. The main payoff from that approach, I think, is that it allows us to compare regimes in terms not only of rights, but also of correlative duties.¹¹ It allows us to ask not only whether the creative professional has a *right* to a livelihood, as Rob Merges argued in his book,¹² but to ask *who* has the necessarily implied *obligation* to provide that livelihood.

To see how this might work, I want to pose a thought experiment: let’s assume we could be certain that any particular invention or work of authorship or unit of new knowledge that we might wish to produce would reliably emerge from any incentive regime we might adopt. How would each regime allocate the *burdens*—broadly speaking—of producing that knowledge?¹³ If we assume that the answer to this question emerges from—or is at least consistent with—the regimes’ internal conceptions of distributive justice, we should be able to formulate some of the principles on which those conceptions rest.

It may be easiest to start this comparison not with IP, but with its theoretical antithesis: open-source peer production. Under the most basic model of an open-source regime—say for software—the benefits of new knowledge are freely available to all, while the burdens of creating that knowledge are borne by the creators themselves, who are not necessarily compensated by anyone else.¹⁴ Of course, developers *could* be compensated

⁹ Amy Kapczynski, *The Cost of Price: Why and How to Get beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970 (2011).

¹⁰ Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents-Prizes Debate*, 92 TEX. L. REV. 303 (2013).

¹¹ Cf. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 30–32 (1913).

¹² MERGES, *supra* note 1, at 81.

¹³ I will bracket for the present the aggregate magnitude of those burdens—which would almost certainly differ from one regime to the next under the assumptions of the thought exercise. I am also bracketing the dynamic complications of cumulative innovation or creative production for the present. Both considerations are obviously relevant, and I intend to bring them back into the analysis as this project develops.

¹⁴ See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS* at 66–67 (2006).

by voluntary contributions of funds, by the intangible benefits of their social relationships, or by peers sharing the burden by participating in the iterated process of production itself. But such contributions are not legally required under an open-source regime.

If we wanted to formulate a normative principle that would justify (or perhaps require) such an allocation of burdens, it might be this:

Nobody *ought to be compelled to share the producer's burden of generating new knowledge, but voluntarily sharing that burden is at least permissible, and perhaps even praiseworthy.*

This distinction—where the performance of an act is not compulsory but attracts our moral praise—is recognizable to the Kantian theorist as a distinction between duties of Right and duties of Virtue,¹⁵ and to the philosopher or jurist more generally as the distinction between legal duties and ethical or moral duties.¹⁶ The key to that distinction is that compliance with legal duties may permissibly be coerced, preferably by the state, while compliance with ethical duties may not. The failure to perform an ethical duty at worst attracts our moral censure (with its attendant social consequences), just as the performance of an ethical duty attracts moral praise. So the hypothetical open-source regime I'm describing treats the distribution of the burdens of creating new knowledge as purely a matter of ethics.¹⁷ As a practical matter, then, this is a distributive agenda that is fairly easy to implement in law: legal compulsion—and therefore the state—has no role to play.

We can now briefly consider the other common foils for IP in comparative analysis: prizes and government procurement—and here again I'll assume that once generated the knowledge in question is freely available to all. In the most basic of these models, where there are no dedicated taxes or other specialized revenue streams, knowledge-creators are compensated by the state directly out of general funds. This is indeed the model for

¹⁵ See generally IMMANUEL KANT, THE METAPHYSICS OF MORALS (1991).

¹⁶ See H. L. A. HART, THE CONCEPT OF LAW 167-180 (2d ed. 1994).

¹⁷ Specifically, if we continue down the Kantian line of thinking where this distinction is sharpest, we can plausibly identify a beneficiary's voluntary choice to share in the burdens of knowledge-creators in an open-source regime with the duties of beneficence and gratitude. KANT, *supra* note 15, at 246-47 ("[B]eneficence is the maxim of making another's happiness one's end.... To be beneficent, that is, to promote according to one's means the happiness of others in need, without hoping for something in return, is every man's duty."); *id.* at 248 ("Gratitude consists in *honoring* a person because of a benefit he has rendered us.").

funding many public goods—the prototypical case being national defense. In this framework, the burdens of generating new knowledge are apportioned as part of the burdens of funding government generally. And in most advanced economies, which produce most new knowledge and also rely on more or less progressive taxation, this approximates to distributing the burdens of creating new knowledge according to income.

If we were to formulate a normative commitment that might justify such regimes, it would likely be this:

The burdens of generating new knowledge *ought to be borne by all members of society in (rough) proportion to their economic means.*

This principle seems to be enforceable as a legal duty, insofar as the state has the power to enforce its system of revenue collection through compulsory means. This principle also has an important corollary: that the distribution of the burdens of creating any particular unit of new knowledge should be—or perhaps may permissibly be—*independent* of the distribution of the *benefits* of that knowledge. Note also, in an inversion of the open-source model, that ethical duties seem to play no role at all.¹⁸ Finally, while the practical difficulty of apportioning burdens under this principle is equivalent to the practical difficulty of running a generally applicable tax regime, the overall practical difficulty of running a prize- or procurement-based system will depend heavily on whatever independent principle of *benefit distribution* is selected.

Which brings us to IP. Now, when Hemel and Larrimore Ouellette addressed the “who pays” question, they contrasted the rule of IP—which they characterized as “user pays”—with a general notion of “cross-subsidy.”¹⁹ And this is a helpful start, but it begs some important questions. First: what does it mean to “pay”? The answer to this question obviously depends on your choice of baselines. And if we maintain the comparative perspective of our thought exercise and its assumptions, we could conceptualize “payment” in terms of the burdens that individuals must bear under one regime that they would not have to bear under one or more of the alternatives. Monopoly pricing is only one such burden under an IP regime. The legal compulsion to forego consumption in the absence of permission

¹⁸ Though if we follow the Kantian line of thinking, beneficiaries might owe knowledge creators a duty of gratitude that can be discharged through acknowledgment. See generally Jeremy M. Schwartz, *A Kantian Account of Gratitude*, <http://www.myweb.ttu.edu/jereschw/A%20Kantian%20Account%20of%20Gratitude.pdf> (last visited Aug 3, 2014) (unpublished manuscript).

¹⁹ Hemel and Ouellette, *supra* note 10, at 345-52.

(and, typically, pecuniary remuneration) of a rightsholder is another—in the comparative perspective it’s analogous to an opportunity cost. Thus, under an IP regime, actual *and* potential beneficiaries of any given unit of new knowledge will suffer a burden: some out of their pockets, and others through the comparative disutility of going without.²⁰

Importantly, this latter burden is only felt by those who would benefit from the knowledge under a regime of open access. If you wouldn’t take the medicine, or read the novel, or watch the movie—even if *they were free*—you probably won’t feel their absence as a burden when the market denies them to you. This, it seems, is the key normative difference between IP and alternative regimes with regard to the allocation of the burdens of creating new knowledge, and we might encapsulate it as the distributive principle of IP regimes. I would state it in the following way:

The burdens of creating *any given unit of new knowledge ought to be correlated to the benefits of that same unit of new knowledge at the level of the individual.*

So there is the first point I promised you: this is a principle of distributive justice that I claim we can infer from a comparative analysis of a theoretical IP regime’s distribution of the burdens of producing new knowledge.

- II -

My second point is that this is not an inevitable normative principle of distribution, but it is a legitimate one. There are strong moral intuitions both for and against it. It is simply a contestable *conception* of distributive justice. As already noted, the other institutions we’ve examined appear

²⁰ This observation works in reverse as well: to the extent that a regime funded by the state under a principle of progressive taxation would prioritize different knowledge-production goals than the IP system, leading to a different distribution of *benefits*, the absence of benefits under one regime that would be available under another could be considered a “burden” under the terms of this thought experiment. Thus, unless benefits under the state-funded regimes are allocated by a social choice mechanism that proportionally favors those with greater economic means, we could expect the *relative* burdens of a state-funded regime (in the form of the comparative disutility of deprivation against the baseline of the distribution of benefits under an IP regime) to fall on those with greater economic means. For the present, however, I have left the social choice mechanism by which such state-funded regimes might allocate the benefits of new knowledge (e.g., by setting research priorities) unspecified, as it has no necessary relation to the distribution of burdens under those regimes.

largely indifferent to any correlation between burdens and benefits. In this light, critiques of IP regimes that seek to broaden access to knowledge can be seen as a special case of a more general objection IP's *conception* of distributive justice, and in favor of an alternative conception. Whether you find IP's conception of distributive justice normatively attractive likely depends on your views on a number of highly contested philosophical questions that I'll be addressing at length in the full paper. These include the causal and moral relevance of luck,²¹ the degree to which individuals deserve their own natural or inherited endowments (and indeed what it might mean to deserve them),²² the moral responsibility of present individuals with respect to past injustices that they benefit from but did not cause,²³ the moral responsibility of the present generation for the well-being of future generations,²⁴ the duties of one moral agent to another as a matter of autonomy or freedom,²⁵ and perhaps most importantly, whether and how aggregation of individual needs, values, and preferences ought to be carried out.²⁶

When we argue about whether IP or some alternative system is the more desirable institutional framework for encouraging innovation or creativity, I submit that these philosophical questions are what we are really arguing about. Even when we claim to be arguing about welfare-maximization and disclaiming any concern over distribution, these types of normative commitments about distribution are always present and often assumed, in

²¹ See generally, e.g., Thomas Nagel, *Moral Luck*, in MORTAL QUESTIONS 24 (1979).

²² Compare RAWLS, *supra* note 5, at 89 ("We do not deserve our place in the distribution of native endowments, any more than we deserve our initial starting place in society. That we deserve the superior character that enables us to make the effort to cultivate our abilities is also problematic; for such character depends in good part upon fortunate family and social circumstances in early life for which we can claim no credit."); with ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 226 (1974) ("Whether or not people's natural assets are arbitrary from a moral point of view, they are entitled to them, and to what flows from them").

²³ See generally, e.g., George Sher, *Ancient Wrongs and Modern Rights*, 10 PHILOS. PUBLIC AFF. 3–17 (1981).

²⁴ See, e.g., RAWLS, *supra* note 5, at 259–62; see generally AVNER DE-SHALIT, WHY POSTERITY MATTERS: ENVIRONMENTAL POLICIES AND FUTURE GENERATIONS (1995). This is a particularly salient concern in IP given the historical practice of granting temporally limited IP rights.

²⁵ Compare generally, e.g., NOZICK, *supra* note 22; with IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS (3d ed. 1993); with THOMAS SCANLON, WHAT WE OWE TO EACH OTHER (1998).

²⁶ DEREK PARFIT, REASONS AND PERSONS 381–441 (1984) (critiquing various theoretical approaches to aggregation); Joseph Raz, *Numbers, With and Without Contractualism*, 16 RATIO 346, 360–66 (2003) (critiquing the contractualist approach—or resistance—to aggregation); NOZICK, *supra* note 25, at 35–42 (using the hypothetical of the "utility monster" to critique the utilitarian approach to aggregation).

ways that again I'll be discussing at greater length in the paper. These assumed distributive principles may be buried in a causal model of human behavior, or in the specification of a utility function, or in the definition or measurement of utility or social value itself.²⁷ Once there, they end up doing much if not most of the work in our analysis. So we might claim to be arguing, for example, about maximizing efficiency, or tradeoffs between efficiency and equity, when in fact what we're really arguing over is differing definitions of what is equitable.²⁸ Again, I submit that IP offers such a definition, whether or not we agree with it.

- III -

This brings me to my third and final point: we can understand many doctrinal problems in IP as emerging from the effort to implement this particular conception of distributive justice. Regardless of whether we think correlating burdens and benefits at the individual level is *just*, I think we can agree that it is *difficult*. Referring back to Hemel and Ouellette's "user pays" formulation:²⁹ it is incumbent on us to define who counts as a "user"—*i.e.*, who benefits sufficiently from the new knowledge to come under a legal obligation to incur a correlative burden. This is a particular problem in copyright, where questions of "substantial similarity" (in the sense of "improper appropriation") are so vexing.³⁰ But it is also lurking under the surface in patent law, where we seem to want to deal with it at the patentability stage—particularly in novelty³¹ and non-obviousness³² doctrines, but also to some extent in enablement and written description doctrines.³³ In the case of copyright, we are trying to determine whether the defendant is drawing enough benefit from the knowledge created by the plaintiff to come under some correlative burden; in the case of patent, we are trying to determine whether the patentee has created knowledge of sufficient benefit to impose a correlative burden on *anyone*.

IP's distributive principle also requires us to define the proper *magnitude* of payment by reference to the magnitude of *benefit*, again on an

²⁷ Cf. generally Jeremy N. Sheff, *Disclosure as Distribution*, 88 WASH. L. REV. 475 (2013).

²⁸ There are, of course, exceptions. For example, Talha Syed's recent work with Terry Fisher is very good about laying out and critically assessing the normative commitments underlying their analysis right up front. See generally Fisher and Syed, *supra* note 3.

²⁹ See *supra* note 10 & 19 and accompanying text.

³⁰ Indeed, the leading treatise calls this "one of the most difficult questions in copyright law." 4-13 NIMMER ON COPYRIGHT § 13.03.

³¹ 35 U.S.C. § 102.

³² 35 U.S.C. § 103.

³³ 35 U.S.C. § 112.

individualized basis. And remember from our comparative exercise that payment can come in many different forms, not all of them pecuniary. Of course, pecuniary payments are the most visible, and we're familiar enough with the practical difficulties that arise when we try to correlate them to benefits. Whether we look to some neutral arbiter to evaluate that correlation—as under a liability rule—or look to individuals themselves to do so—as under a property rule—the correlation will often be inaccurate or simply mistaken. Some of these difficulties result from the types of distortions that result when we substitute economic means for utility by channeling decisionmaking into a real-world market where actors face heterogeneous budget constraints. Others are what we're used to bracketing as “transaction costs”: under a liability rule they could be administrative and error costs, under a property rule they could be search costs and bargaining costs (including the costs of strategic behavior).

To some extent we can tailor our legal rules to try to check the social forces that threaten the individual-level correlation between burdens and benefits under an IP regime. This is particularly evident for strategic behavior: consider the remedial shakeup that began with *eBay v. MercExchange*,³⁴ and the emerging framework for dealing with standards-essential patents.³⁵ But to a significant extent our IP system relies on a bevy of supplemental *norms* to mitigate these difficulties—the types of ethical duties I mentioned earlier.³⁶ We can see this in the moralized rhetoric denouncing IP owners who seek to impose burdens that are supposedly unjustified by the benefits of the IP they claim to own—“bullies,” “trolls” and so forth—or praising those who decline to extract the maximum amount from others that their legal powers might allow—think of Elon Musk,³⁷ or

³⁴ 547 U.S. 388 (2006).

³⁵ See generally, e.g., *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823, slip op. (W.D. Wash. 25 Apr. 2013); *In re Innovatio IP Ventures L.L.C. Patent Litigation*, MDL 2303, No. 11-C-9308 (N.D. Ill. July, Sept. 2013); Letter of Aug. 3, 2013 from Amb. Michael B. G. Froman, U.S. Trade Rep., to Hon. Irving A. Williamson, Chairman, U.S. Int'l Trade Comm'n, available at http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF [hereinafter “USTR Veto Letter”]; but see *In the Matter of Certain Electronic Devices*, Inv. No. 337-TA-794, slip op. at 41-66 (U.S. Int'l Trade Comm'n July 5, 2013) (vetoed by USTR Veto Letter).

³⁶ LAWRENCE LESSIG, *FREE CULTURE* 122 (2004); Mark F. Schultz, *Copynorms: Copyright and Social Norms*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH* (Peter Yu ed. 2007).

³⁷ Elon Musk, *All Our Patent Are Belong To You* (2014), <http://www.teslamotors.com/blog/all-our-patent-are-belong-you> (last visited Aug 4, 2014); Julie Meyer, *A Winning Strategy For Growth Companies, A Fight-Back Plan For Established Goliaths*, *FORBES*, <http://www.forbes.com/sites/juliemeyer/2014/07/24/a-winning-strategy-for-growth-companies-a-fight-back-strategy-for-established-goliaths/> (last visited Aug 4, 2014).

Radiohead,³⁸ or Creative Commons licensors.³⁹ We also see it in efforts to persuade would-be file sharers that they have a moral obligation to contribute economically to the artists whose works they enjoy.⁴⁰ In either case, we find ethical duties trying—often unsuccessfully—to do the work of maintaining an individual-level correlation of burdens and benefits against a backdrop of legal rules that do an imperfect job of it.

Finally, the assumption of nonpecuniary burdens might be thought to discharge an individual's distributive obligations with respect to the creation of the beneficial knowledge—similar to the way the in-kind contribution of peers satisfies an ethical duty in the case of open-source development.⁴¹ But such burdens are especially difficult to account for through legal (as opposed to ethical) duties, and we don't seem to have a tidy doctrinal answer for how to do so. We see this tension in the interface between the derivative works right⁴² and fair use⁴³ in copyright,⁴⁴ and in debates over the appropriate scope of the experimental use defense to patent infringement.⁴⁵ In general, these are the types of tensions that predictably arise when correlating burdens and benefits of knowledge creation for one individual (e.g., the satirist, the improver) threatens the correlation for another (e.g., the creator of an underlying invention or work). In short, the distributive principle of IP necessarily imposes significant challenges of practical reasoning on the legal system and on society at large via a complex body of overlapping legal and normative duties.

That is not to say that alternative regimes do not pose their own challenges of practical reasoning, nor even that the challenges under alternative regimes would be less demanding than those under an IP regime. Again, I am skeptical of any effort to argue that the aggregate social

³⁸ Paul Thompson, *Radiohead's In Rainbows Successes Revealed*, PITCHFORK (Oct. 15, 2008), <http://pitchfork.com/news/33749-radioheads-in-rainbows-successes-revealed/> (last visited Aug 4, 2014).

³⁹ To the extent this moral judgment corresponds to an ethical duty of knowledge-creators, we might again identify that duty with Kantian beneficence. *See supra* note 17.

⁴⁰ Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y USA 235 (2014).

⁴¹ *See supra* notes 14-18 and accompanying text.

⁴² 17 U.S.C. § 106(2).

⁴³ 17 U.S.C. § 107.

⁴⁴ *See generally, e.g.*, R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2007); Alex Kozinski & Christopher Newman, *What's So Fair about Fair Use?*, 46 J. COPYRIGHT SOC'Y USA 513 (1998); Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEG. STUD. 67-78 (1992).

⁴⁵ *Madey v. Duke University*, 307 F.3d 1351 (2002); Elizabeth A. Rowe, *The Experimental Use Exception to Patent Infringement: Do Universities Deserve Special Treatment*, 57 HASTINGS L.J. 921 (2005); Katherine J. Strandburg, *What Does the Public Get - Experimental Use and the Patent Bargain*, 2004 WISC. LAW REV. 81 (2004).

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benefits or burdens of one regime are greater or less than those of any other in some objective or absolute sense. My goal is only to show that these are the difficulties that necessarily attend the normative commitments of our IP regime, that we have a choice in our normative commitments (and thus in the practical difficulties we face), and that this choice is fundamentally a distributive one—a political choice, in a non-pejorative sense—and should be evaluated and defended as such.