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Decentralizing the Lawmaking Function:
Should There Be Intellectual Property Rights in Law?

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1. Introduction

In a series of articles and a book published shortly before he died, Professor Larry Ribstein argued powerfully for decentralizing the lawmaking function, enabling private parties to make law, and harnessing the market as a force for legal innovation. (Butler & Ribstein 2011; Kobayashi & Ribstein 2011a, 2011b, 2004; Ribstein 2010, 2004; *see also* O'Hara & Ribstein 2009) He described technological and economic developments that he claimed were pushing the law toward decentralization, and he predicted the eventual demise of the huge law firm, the breakdown of professional rules that restrict the practice of law, and the proliferation of private suppliers of law and legal services competing in a global market. (Ribstein 2010) On the normative side, he insisted that the market could be a valuable device for spurring legal innovation and making legal services more generally available.

As part of this larger project, Professor Ribstein described optimal conditions for the private production of law. Together with Professor Bruce Kobayashi, he argued, among other things, that a private market in law requires intellectual property rights in legal creations. (Kobayashi & Ribstein 2012, 2011a, 2011b, 2004) The argument relies principally on the conventional *quasi*-public goods rationale for IP rights. Innovators have suboptimal incentives

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to create new law in the absence of property rights because competitors can free ride and sell at prices below what an innovator must charge to recoup its fixed creation costs. As a result, most privately-made law will be created as a byproduct of other activities such as litigation or political rent-seeking, and byproduct lawmaking is likely to produce suboptimal law. Broader IP rights solve the free rider problem and thus make possible a private lawmaking market that can produce better law through competition.

In this Article, I critically examine the proposal to grant IP rights in privately produced law. While I comment on work by Professors Kobayashi and Ribstein, I do not mean to single them out in particular. I understand that Professor Ribstein's views were in flux just before he died, and Professor Kobayashi's ideas have evolved while carrying their joint work forward. In the later stages of their work together, Ribstein and Kobayashi were somewhat more cautious about private lawmaking and IP rights in law, and in his recent work, Kobayashi eschews broad claims choosing instead to focus on particular applications such as the private production of business organization law. Thus, I intend this essay as a contribution to an ongoing discussion about the proper scope of IP rights and private markets in law, a discussion that has been shaped in major ways by the work of Professor Ribstein.

My analysis begins by briefly examining the general idea of harnessing the private market to produce better law. The work in this area by Professors Ribstein and Kobayashi, Professor Gillian Hadfield, and others does a wonderful job of loosening the strong grip of the conventional, lawyer-centered paradigm and freeing the imagination to envision a very different world of multifarious suppliers of legal products and competitively produced law. I highlight some costs of private lawmaking and sound a note of caution. But in doing so, I mean to guide, not halt, this re-imagining process.

With this background in place, I then examine the case for IP rights. I first survey the availability of IP protection under current law and then discuss the benefits and costs of expanding IP rights. The reasons why current law confers only limited rights are also reasons for concern about expanding those rights. In particular, the benefits of extending IP protection depend to a considerable extent on the availability of alternative mechanisms to solve the free rider problem, and the costs of broader IP rights depend primarily on impediments to information diffusion that IP rights create.

I close the discussion of IP rights and law by focusing on some special problems with granting property rights in aspects of common law adjudication, such as litigation documents and judicial decisions. I then conclude.

A word of clarification is in order at the outset. This Article opts for breadth over depth. I make a number of empirical assertions without offering empirical support. These assertions are quite plausible, I believe, but they are still speculative. Moreover, the essay is more “think piece” than systematically developed analysis. I raise a number of points but leave it to others to develop them with greater care.

2. A Private Market in Law

This Part first describes the private lawmaking model in somewhat greater detail and places it in context. It then examines some of the potential problems.

2.1 The Proposal and Its Benefits

Private lawmaking envisions private actors creating new laws and legal regimes or customizing existing laws to fit the needs of particular firms and individuals. These laws include rules governing the creation and operation of corporations; rules governing stock and commodity exchanges; rules of contract law, procedural rules, and so on. They also include the more

specific terms of a contract, especially though not exclusively when those terms modify otherwise applicable mandatory law. Lawyers also furnish advice about the likely effects of different courses of action under existing law and a private market could supply this advice if nonlawyers were allowed to participate. However, this is not lawmaking in the sense I use that term here. The lawmaking process that I discuss here involves creating rules, principles, or other norms to structure and regulate institutions and relationships.

In a world of private lawmaking, individuals and firms compete with one another to sell legal products to consumers. Consumers might include corporations, associations, individuals, or even governments. For example, the founders of a new corporation might purchase from the lawmaking market a corporate charter that fits the specific needs of their corporation, and this charter might even include provisions governing limited liability, board management, and fiduciary duties that are currently controlled by mandatory state law. Or two corporations engaged in a commercial transaction might be interested in purchasing a contract that structures their relationship in a novel and attractive way. So too, individuals might be interested in purchasing a will or a lease.

To assure a robustly competitive market, the power of the state and legal profession over the production of law and the provision of legal services would have to be dismantled. This means loosening restrictions on the practice of law and allowing non-lawyers to furnish legal services. It also means ending the hegemony of the large law firm and allowing greater differentiation so law is sold in smaller units. And it means letting the market set the price.

Professor Gillian Hadfield, in a contribution to a volume on innovation and growth compiled by the Kaufmann Task Force on Law, Innovation, and Growth, offers a speculative, provocative, and rather expansive account of what might be possible for private lawmaking.

(Hadfield 2011) She imagines a world free of the legal profession's monopoly, a world in which nonlawyers compete to supply legal services efficiently. Firms compete to sell corporate law tailored to the needs of different customers, customized contracts that might include novel rules of contract law, and even regulatory regimes that "substitute for or complement existing publicly provided securities, product safety, intellectual property, and other regulation." (Hadfield 2011: 41-42) In the latter case, legislatures, administrative agencies, or other public bodies would oversee the competing regulatory service providers, but only at "a relatively macro level" that focuses on meeting broad "performance and outcome targets." (Hadfield 2011: 44; see also Hadfield 2001: 41; Hadfield & Talley 2006)

Supporters cite three main benefits of a private market in law. First, private lawmaking is likely to be more responsive to changing economic, social, and technological conditions than legislation or adjudication. (Butler & Ribstein 2011: 3-4; Hadfield 2011: 26; Kobayashi & Ribstein 2012, 2011b) Legislators lack strong incentives to engage in socially desirable innovation themselves. For one thing, they cannot internalize all the social benefit that their laws create. Moreover, their interest in reelection biases them in favor of legislation that caters to supporters, and also induces risk-aversion and a conservative attitude toward legal change. (Abramowicz 2003: 154) As for common law adjudication, its incremental and slow pace makes it a poor instrument for responding to conditions of rapid change. By contrast, decentralized lawmaking places the creation of new law in the hands of many potential innovators, and structuring it as a market creates strong incentives to innovate rapidly and design well-functioning legal regimes—or so supporters claim.

Second, a private lawmaking market is likely to produce better law, at least for the economic sector, regardless of the optimal pace of legal change. (Kobayashi & Ribstein 2012,

2011b) Official lawmaking today is plagued by public choice problems and private lawmaking takes place mostly as a byproduct of litigation or political rent-seeking by private groups. A robust private lawmaking market with firms competing to sell law for profit is likely to generate better laws, according to proponents. For example, a private lawmaking market might produce better corporate law than the current system of interstate regulatory competition.² While there are different views about whether regulatory competition moves in the direction of more efficient or less efficient rules—a race to the top or a race to the bottom—there are good reasons to believe, based on public choice and public goods constraints, that regulatory competition is unlikely to produce optimally efficient corporate rules, especially if demand is highly heterogeneous. (Hadfield & Talley 2006; Kobayashi & Ribstein 2012)

Third, supporters argue that private lawmaking will improve access to law, reduce the price of legal services, and direct more social resources to servicing a wider range of legal needs. (Hadfield 2008: 1728-29; Hadfield 2000; Kobayashi & Ribstein 2011a) For example, if firms can sell simple contracts or wills without running afoul of prohibitions on the practice of law by non-lawyers, even people with moderate or low incomes will be able to afford these legal documents. Product quality would be assured in the same way that product quality for ordinary goods and services is assured, through reputation, warranties, agency oversight, and the like. (Kobayashi & Ribstein 2011a: 1172, 1185)

The idea of privately-created law might seem a bit odd at first glance. We are accustomed to thinking of lawmaking as a quintessentially public function, one that a democracy

² It is worth mentioning that Professor Ribstein's work on regulatory competition, like most of his work, is complex and nuanced. He had some confidence in regulatory competition producing more efficient laws. One particularly interesting aspect of his theory focuses on the beneficial effects of lawyer licensing. (Ribstein 2004) Because of professional licensing, in-state lawyers have an advantage over out-of-state lawyers in servicing in-state business. This advantage, in turn, creates incentives for in-state lawyers to lobby the legislature to adopt more efficient laws that attract more business to the state. If lawyers have substantial influence in the legislature, this dynamic can drive statutory law in the direction of greater efficiency.

assigns to government agents exclusively. However, the truth is that there is quite a lot of private lawmaking taking place today. For example, it is not uncommon for close-knit groups to govern themselves by a system of informal norms enforced through community sanctions, and trade associations often use home-grown rules to regulate dealings among their members. As another example, a legislature might codify an industry custom or a court might rely on custom to give content to an open-ended legal standard.³ In addition, by using choice of law clauses, contracting parties can design the substantive law governing their relationship. (Butler & Ribstein 2011; O'Hara & Ribstein 2009) And they have some latitude to create their own procedural rules if they sue in court—and much more latitude if they choose arbitration. (Bone 2012)

There are many other examples, all of which support an obvious but important point: private parties exert varying degrees of control and influence over the law's content today. Still, there is a big difference between these situations and a full-fledged private market in law. The latter relies explicitly on the market and aims to minimize public involvement, two features that can create problems as the following section describes.

2.2 *Potential Costs and Problems*

If all parties subject to a system of privately-made law gave their informed and voluntary consent and its application generated no externalities, there would be little cause for concern. The legal regime might alter background circumstances in ways impossible to predict at the time parties gave their initial consent, but this should not be troubling as long as parties can easily exit or renegotiate.

³ Indeed, when legislatures adopt model statutes or courts draw on Restatements of the Law produced by the American Law Institute (ALI), the result is public law made by private organizations. Trade secret law is a notable example of a body of law strongly shaped early on by the Restatement and later by a model statute. (Bone 2011: 52-58)

The problem is that these conditions are not likely to exist outside of local, insular, and self-contained communities. Even in local communities, there are likely to be externalities. If privately-made law applied to resolve insider disputes with outsiders, for example, there would be reason to worry about the quality of the law for deterrence and compensation purposes. If public law applied to these disputes instead, then at least a portion of the community's activities would be governed by public law and public courts might have to be used for enforcement, which would create additional externalities.

The following discussion identifies the potential costs of private lawmaking in the more realistic scenario where consent could be questionable and externalities a serious risk. My point is not to reject markets in private lawmaking; indeed, they might well produce substantial benefits when properly designed. However, implementation must be done carefully and with attention to the full range of potential costs.

2.2.1 Enforcement Costs

Privately-made law would have to be subject to some kind of public oversight and probably some form of state enforcement whenever there is a serious risk of externalities or questionable consent. There are different ways to structure public oversight and state involvement. One possibility is to require legislative approval of every privately-made law that alters otherwise applicable and mandatory public laws—just as legislative approval is required today before model codes become enforceable. This approach, however, is far from optimal. The need to obtain prior legislative approval would increase the costs of innovation and dampen its pace, and the official laws produced would reflect the public choice dynamics of the legislative process.

Another possibility is to rely on a general enabling statute that authorizes private lawmaking subject to certain conditions. In the case of a complex private regulatory regime, the statute would also have to provide some method of public monitoring and oversight. As for enforcement, it could be handled by courts or agencies in the first instance. Alternatively, parties might be required to take their disputes first to an arbitration panel or other form of private dispute resolution, with courts or agencies getting involved only when one of the parties refuses to comply.

This approach has many advantages, but it is likely to significantly increase enforcement costs compared to the current regime. There are substantial benefits to the relatively uniform and standardized character of existing law. For example, the use of forms and terminology with conventionally accepted meanings supports clearer and more predictable laws and legal documents. Moreover, established principles, precedents and even interpretive methodologies reduce the costs of enforcement. Parties are less likely to sue when the laws that apply to them are clearer, and judges can decide disputes more expeditiously when there is general agreement on interpretive sources and methodologies.

If a private lawmaking market strongly spurs legal innovation, as some of its supporters hope, there should be a greater variety of legal products to serve a diverse array of consumer preferences. For example, the market would supply novel corporate charters more closely tailored to the needs of particular companies, more varied regimes of corporate law, greater differentiation in contracts for business and personal use, and depending on how far it extends, perhaps even heterogeneous regulatory regimes. Indeed, there is no reason why private vendors would not offer legal packages that include different contract or tort rules, different procedures, and different interpretive methods. A greater diversity of legal products formulated in creative

ways to address novel circumstances is likely to produce more disputes, and more disputes to which existing precedents, principles, and interpretive methodologies do not readily apply. The volume of cases will increase as a result. And with greater legal uncertainty, parties are likely to invest more in litigating the issues and judges will invest more in deciding those issues.

Even if the parties use arbitration or some other form of private dispute resolution, the arbitrators or other decisionmakers will have to invest in understanding the new legal rules and texts. Of course, the parties must pay for these costs so the costs are internalized. However, disputes create external costs when they spill over to court. If one party believes it might obtain a more favorable result in court, it will refuse to comply with an award and force the other side to seek judicial enforcement.⁴ Depending on the scope of review, the reviewing judge will have to interpret the new laws, thereby increasing public enforcement costs. And with novel legal issues increasing outcome uncertainty, settlement is likely to be more difficult. With fewer settlements, enforcement costs will be even higher.

There is another factor to consider. In a system governed by an enabling statute, every case would potentially require a determination that the particular law in question comports with the statute. Litigating and determining this issue is bound to multiply enforcement costs. To be sure, a body of precedent might develop over time, but there is no way to avoid at least some, and probably quite substantial, costs. This is especially true in a dynamic legal market that produces lots of new legal products, each of which must comply with the enabling statute. The legislature might try to draft a simple statute to minimize these costs, but there are limits to how simple and clear statutory language can be and still capture all socially undesirable laws. Thus,

⁴ If people tend to be risk-seeking when they choose between losses, as the psychology literature suggests (Rachlinski 1996), the loser in arbitration might be even more inclined to force recourse to court in the face of the greater uncertainty associated with a novel legal regime.

with a simple statute, either courts would have to do more work policing privately-made laws or the state would have to be willing to live with more bad laws.

Enforcement has another dimension: the costs associated with uncertainty about whether and in what way a privately-made legal arrangement will be enforced. Suppose Company A creates a novel corporate structure to handle a particular set of risks and sells a corporate charter that implements this structure. Firm X purchases the charter and organizes and operates in accordance with it. At a later time, a case arises in which a judge must decide whether to enforce the charter provisions. If the judge construes the provisions in a way that deviates from Firm X's expectations, Firm X will have to incur potentially high costs to readjust to the new legal environment. (Kobayashi & Ribstein 2012, 2011b) Moreover, the risk of facing these costs in the future will affect Firm X's incentives *ex ante*, as well as the price that Company A can charge for its innovation—and ultimately Company A's incentives to innovate.

Of course, this can be a problem for public law as well. All law must be interpreted and there is a chance that the interpretation will deviate from expectations. However, this uncertainty is likely to be greater for privately-made law, even when it is cloaked with the status of formal law. Existing public law is likely to be more certain and predictable because of established precedent, the use of standard form language with settled meanings, and the application of conventional interpretive techniques. Novel legal arrangements, even those recognized as law, are less likely to have these features, precisely because they are novel.

Although Professors Kobayashi and Ribstein do recognize enforcement costs to some extent, they do not fully appreciate the impact of these costs on their model of private lawmaking. (Kobayashi & Ribstein 2012, 2011b) The Kobayashi-Ribstein model focuses on business association law and assumes a world in which firms can organize under different

standard forms as well as a general public statute. These firms have heterogeneous preferences for organizational structure (including member participation in management, limited liability, and so on). Each firm must choose between organizing under a public law which does not fit its needs and organizing under a privately-made standard form which does (or comes closer to doing so).

In the model, a firm's choice between a public law and a privately-made standard form involves trading mismatch costs against reorganization costs in light of an exogenously specified probability of judicial enforcement. When a firm organizes under a public statute, it gains certainty of enforcement and thus avoids reorganization costs, but it incurs mismatch costs because it has to adjust to the statute or contract around it. On the other hand, when a firm organizes under a private law that fits its needs perfectly, it incurs no mismatch costs but risks reorganization costs if a court later refuses to enforce the provisions.

Kobayashi and Ribstein posit two different scenarios for privately-made law. In one, the standard form is enforced less frequently than public law; in the other it is treated just like public law and enforced with the same probability (for example, it might be created and sold under a general enabling statute). Kobayashi and Ribstein show that firms are better off with a choice of privately-made standard forms as long as those forms are enforceable to the same extent as public law. (Kobayashi & Ribstein 2012) Under the assumption of identical enforcement, a firm incurs the same expected reorganization costs as for public law because the probability of enforcement is the same, and it incurs lower expected mismatch costs because it can purchase laws that more closely fit its preferences.

This model, however, does not take adequate account of two factors. First, because of established precedent, the use of standard language with settled meanings, and the application of

conventional interpretive techniques, public law is likely to be enforced more frequently than privately-made law even when the privately-made law has the same official status and force as public law. For this reason, it is unrealistic to assume that the probability of enforcement is identical for public law and privately-made law. Kobayashi and Ribstein recognize this possibility but do not appreciate how likely it is to occur. (Kobayashi & Ribstein 2012) Second, the costs of litigating and deciding issues involving privately-made law should be greater than the costs of litigating and deciding issues involving established public law, again because of the benefits of settled precedent and interpretive techniques. Once greater uncertainty and higher costs of enforcement are added to the model, it is no longer as clear that privately-made law is superior to public law *even when the privately-made law has the same status and force as public law*.⁵

A caveat is in order. It is important not to overstate the network benefits of precedent, standardized language, and legal convention. In a 2001 article, Kobayashi and Ribstein explored the impact of network effects on firm choice of organizational form, and in particular the choice between limited liability partnerships and limited liability companies. (Kobayashi & Ribstein 2001) They found that the network externalities associated with settled precedent, standardized language, and the like did not have a major lock-in effect.⁶ Of particular relevance to my

⁵ Using the same types of symbols Kobayashi and Ribstein use, let ϕ^L be the probability of enforcement for public law, $\phi^{PP/L}$ be the probability of enforcement for privately-made law that has the same status and force as public law, and ϕ^{PP} be the probability of enforcement for privately-made law that is not treated as official law. It is likely that $\phi^L > \phi^{PP/L} > \phi^{PP}$. Also, let C^L be the expected litigation and decisions costs for public law, $C^{PP/L}$ be the same for privately-made law. Then it is very likely that $C^{PP/L} > C^L$. (Note that C is the product of the likelihood of a legal dispute and the average cost of processing a dispute should one arise, and both of these variables should be larger with privately-made law.)

⁶ More specifically, they found that most firms prefer the LLC form to the LLP form even though the latter “linked to the existing network of partnership law.” (Kobayashi & Ribstein 2001: 128) The exception—the choice of firms in states where the tax or other disadvantages of the LLC form were substantial—only added further confirmation to the hypothesis that network externalities did not create a substantial lock-in effect. (Kobayashi & Ribstein 2001: 121-22)

argument in this section, they raised serious questions about the magnitude of network benefits in the business association field, pointing out, among other things, that these benefits depend on how case-specific and factually-contingent judicial decisions are, as well as on the degree of inter-judge decisional consistency. (Kobayashi & Ribstein 2001: 112) They also made another relevant observation: the cost of lost network benefits associated with switching to a new regime can be reduced if lawyers and legal scholars provide interpretive guidance through articles and other publications.

These are certainly important considerations. Indeed, the effect of new law on enforcement costs is a complex empirical question and the answer is likely to vary with different contexts. Nevertheless, it seems reasonable to suppose that enforcement costs will increase as the degree of divergence between new and settled law increases. The divergence could be quite large for the novel legal instruments and legal regimes that a private market generates. To be sure, consumers in the private law market will internalize some of these costs, but they have no reason to take account of the marginal increase in public enforcement costs and this increase could be substantial. For example, when a customized contract specifies its own rules of interpretation or alters otherwise applicable rules of enforcement, public litigation costs and decisional costs are likely to increase, and possibly by a large amount.

2.2.2 Transaction Costs

The same uncertainties that increase enforcement costs are also likely to make it more difficult for parties to value novel legal products, especially those that are customized to fit special needs, and this can increase transaction costs. Suppose, for example, that two firms decide to enter into a joint venture and look to the private lawmaking market for a legal package to structure their arrangement. Problems with valuing that package create uncertainty, and

uncertainty increases transaction costs and might even scuttle a successful deal if valuations diverge.

However, unlike enforcement costs, transaction costs are borne by the contracting parties, so presumably they have incentives to select a private law package that is easier to value if such a package reduces their costs. Moreover, vendors have incentives to supply information to help the parties estimate value accurately. Nevertheless, transactions costs could still be a problem if the parties have trouble estimating the magnitude of those costs for different private law packages.⁷

2.2.3 *Outcome Quality Costs*

There is a risk that agency costs, externalities, and other defects in the private lawmaking market will produce bad laws. For example, a vendor will make laws that cater to the preferences of its corporate customers. If those customers are managers rather than shareholders, privately-made law could be distorted by the same agency cost problems that affect other corporate dealings. (Abramowicz 2003) And if private lawmakers are allowed to alter the rules aimed at controlling agency costs, the risks are likely to be even greater. Moreover, even without agency problems, privately-made law might fall short of achieving optimal deterrence if the private deterrence benefit for consumers is less than the full social benefit and if perfect price discrimination is impossible. One way to address these problems is to empower judges or an agency to review privately-made laws, but this solution only increases enforcement costs and perhaps transactions costs as well.

Still, for routine legal instruments, such as simple wills, trusts, contracts, and the like, the risk of bad law should be no different than the risk of other bad products, and can be addressed in

⁷ The work of Kobayashi and Ribstein on the choice between LLC and LLP forms suggests that the uncertainty of new law might not necessarily create high transaction cost barriers. (Kobayashi & Ribstein 2001)

a similar way. Moreover, the laws that legislatures create are distorted by public choice dynamics. And even if a private lawmaking market creates more bad law, it could still be desirable on balance because of the innovation and access benefits it creates.

There is, however, a deeper problem with the quality of laws produced by a private process. Assuming that a lawmaking market spurs fast-paced innovation in the way some of its supporters claim, market-based innovation might cause serious dislocation in the short run and perhaps in the long run as well. Not all types of law benefit from rapid innovation. Indeed, there are advantages to the incremental progress and slow pace of common law evolution. It is one way to cope with the radical uncertainty of altering general rules and principles of wide application. Moreover, an incremental and gradual approach has epistemological advantages. It is difficult for a lawmaker to obtain and process the information needed to regulate fundamental aspects of social and economic life. The common law method is capable of harvesting local knowledge through case-by-case adjudication, and its incremental approach allows for experimentation without risking serious and irreversible consequences.⁸

The common law process is hardly perfect, but if the case for it has merit, it gives reason to worry about allowing private lawmakers to tinker with basic features of contract, property, and tort law. The point is not that these rules and principles cannot be improved. The point is rather that vendors and consumers of law in a private market are likely to innovate, at least in the short run, without adequate information about consequences, and innovation under these conditions could have devastating and possibly irreversible effects. This risk, however, does not rule out private lawmaking altogether. At most, it counsels in favor of restricting the private market in

⁸ A well-functioning market is also capable of processing complex information and harvesting local knowledge. However, the market is a poor mechanism for adjusting general rules and principles because of the radical uncertainty associated with the task.

law to more specific applications and lower-level rules, and reserving the more general rules and principles for public lawmaking.

Finally, in a more speculative vein, private lawmaking could, over the long run, alter our understanding of the nature of law at a deep level. The private lawmaking model is most compatible with a positivist conception that envisions law as a system of relatively clear rules. For example, it is relatively easy to imagine canonical legal rules packaged as commodities and sold separately or in different combinations. It is much more difficult to imagine the same thing for an interconnected system of principles subject to balancing. Moreover, a positivist conception makes it possible to conceive of laws drafted as clear rules and capable of relatively straightforward valuation and enforcement.⁹

The problem is that law is not just a collection of rules laid down. Rather it is a set of principles, rules, and interpretive methods subject to a more general institutional commitment to coherence and consistency. (Dworkin 1986, 1978) It is not just that judges are behaviorally predisposed to interpret legal texts in light of broader principles, though they are. It is rather that judges are obligated to interpret the law in this way because law is an interpretive practice. (Dworkin 1986) I realize that this is a controversial claim about law, and to develop the point more rigorously would require far too extensive a journey into jurisprudential theory. Nevertheless, assuming some version of this more complex conception is correct, a private lawmaking market could exert pressure to reconceive the law as a system of clear rules in order to justify and support the market. Some might see little lost in such a revision, but if the more

⁹ Professors Kobayashi and Ribstein rely on Holmes's famous predictive theory of law to define a "law" in positivist terms, as "a rule that determines how a court or administrative agency will act when confronted with the provision." (Kobayashi & Ribstein 2012: 1, 2011b:7) Admittedly, they adopt this definition for the limited purpose of comparing private and public lawmaking in their formal model. Nevertheless, the definition reflects an implicit bias toward a theory of law as relatively clear rules. A theory that includes general principles subject to balancing is more difficult to square with a probability-of-enforcement conception of law.

complex view serves valuable social functions, as I believe it does, then something important would be lost.

One should not exaggerate this danger, however. A private lawmaking market limited to more specific applications and narrowly drawn rules might coexist reasonably well with a complex conception of law. The conclusion then is similar to the one above: confine the private market in law to customized applications and lower-level legal norms that apply narrowly and can be readily expressed in rule form.

2.2.4. Democratic Legitimacy

No discussion of private lawmaking would be complete without mentioning concerns about democratic legitimacy. There are two different kinds of legitimacy: perceived legitimacy and normative legitimacy. Perceived legitimacy has to do with how individuals subjectively perceive the law or legal system. Normative legitimacy has to do with whether private lawmaking is justified in a democracy regardless of how people feel about it.

First, consider perceived legitimacy. Private lawmaking can create potential risks for perceived legitimacy if public attitudes toward the law and its legitimacy change when the public becomes accustomed to thinking of law as a commodity bought and sold in a market. Whether this will happen is a complicated empirical question, but there is a social psychology literature showing that people's perceptions sometimes change when a good or activity is commodified. It seems that giving something a price or imposing a monetary sanction can crowd out motivations based on moral duty.¹⁰ (Frey 1997; Radin 1996; Sandel 2012) It is possible, therefore, that

¹⁰ In a well-known experiment, parents were late more frequently in picking up their children when a fine was imposed to encourage timely pickups. (Gneezy & Rustichini 2000) One explanation is that the fine was perceived as a price on tardiness that crowded out motivations based on moral obligation and reputation. Imposing fines is, of course, different than selling law in a market, but the effect of the fine on perceived obligation is at least relevant. Another analogy is worth mentioning. Some critics of tradable pollution permits worry that creating a market sends

people will come to view obedience to law as less an internalized moral obligation of democratic citizenship and more a prudential duty arising from contractual exchange.

Still, predicting public reaction to the commodification of law is highly speculative. It depends, in part, on the “messages” that people understand a social practice to convey. My guess is that any negative effects are likely to be minimal as long as more general laws are reserved exclusively for public lawmaking and private lawmaking is limited to customized contracts, corporate charters, and the like that involve applications and lower-level rules chosen by parties and justified on efficiency grounds.

Normative legitimacy is also difficult to assess. If everyone affected by privately-made law voluntarily consented and there were no distributive justice problems, there would be little reason to worry about democratic legitimacy. However, insofar as privately-made law produces serious externalities, democratic legitimacy becomes a key issue. This is not the place to explore this issue with care, but it is worth mentioning that we ordinarily associate the legitimacy of lawmaking that binds in the absence of individual consent with norms of participation, electoral accountability, and institutional constraint. Thus, the question is whether a private lawmaking market can be structured in a way that satisfies these principles.

I hasten to add that much of privately made law is supported by consent or enacted through a democratic process. For example, firms should be able to sell new contracts and novel corporate charters without worrying about legitimacy so long as all the parties significantly affected give their consent. Also, model codes are no problem as long as they are eventually enacted into formal law through a legitimate democratic process. However, model statutes and regulations that automatically become official law under a general enabling statute, subject to

the message that pollution is not something one should avoid on moral grounds but just another commodity with a price. (Sandel 2012: 72-79)

minimal state oversight, raise more serious legitimacy concerns, unless their effects can be limited to consenting parties.¹¹

3. IP Rights in Law

Assuming that the benefits of a private market in law exceed the costs and that the system can be implemented in a manner consistent with democratic values, the question is how to incentivize a robust environment for private lawmaking. Proponents of IP rights in law argue that IP rights are necessary to solve the free rider problem and incentivize the production of socially optimal laws through market competition. The following discussion first briefly describes current IP rights in legal innovations, and then addresses the policy arguments for expanding those rights.

3.1 Current IP Rights in Law

Creativity in law takes many different forms. Lawyers write new contracts, draft corporate charters, design model codes that may or may not be adopted as official law, write litigation documents such as complaints, motions, and briefs, develop ideas about legal strategy, and so on. IP law today protects some of this creativity but only in a very limited way. In particular, legal creations have three characteristics that account for limited IP rights: (1) the primary value of law is functional and that value often depends on the ability of others to access the same information; (2) legal innovation is strongly cumulative and the cumulative process builds on previous creations incrementally, and (3) network benefits and standardization are important for law.

¹¹ Professor Hadfield tries to address normative legitimacy by drawing a distinction between law's democratic-political function and its economic function; she restricts private lawmaking to the economic side. (Hadfield 2008: 1702-05; Hadfield & Talley 2006: 415, 440) I am not persuaded that this works. Most laws serve multiple objectives and cannot be neatly classified into one category or the other. At a minimum, it is a controversial matter what social values particular laws should serve and disagreement about social values is usually resolved through the democratic process not through markets.

3.1.1 *Copyright*

The idea-expression dichotomy assures that copyright law protects expression and not idea.¹² Legal creations are functional works, and for functional works with utilitarian value, the “idea” that copyright is not supposed to protect is the function that the work performs or to which it is linked. For example, if a private firm were to create a new and more efficient corporate structure, copyright would protect the written expression of the corporate charter and other legal documents used to implement the new structure, but not the structure as a legal idea itself. Therefore, another firm would not violate copyright if it copied the idea in all its detail but implemented it through different written documents.

These basic principles mean that copyright law does not protect the legal ideas implemented through a legal form no matter how large the investment in their creation. Legal ideas are protectable, if at all, only by patent. Accordingly, they must be evaluated by patent law’s stricter standards. Still, copyright can protect the text of a legal form as a particular mode of expressing the idea. For example, the creator of the poison pill strategy for deterring corporate takeovers cannot rely on copyright to prevent others from using the strategy but can use copyright to prevent others from copying and using the written text of a corporate charter and related documents that implement that strategy. Similarly, copyright does not protect a building code treated as a set of ideas—for example, specific distances for setbacks, specific height restrictions, and procedures for applying for variances—but at least in theory it can protect the written language of the code used to express those ideas.

Furthermore, copyright protection is limited even for the expression in legal documents. There are two special policy concerns that account for this limited protection: (1) a concern that

¹² 17 U.S.C. § 102(b); Nimmer (1998): §2.03[D].

giving exclusive rights in legal creations will impede free access to the law that is essential in a liberal democracy; and (2) a concern that extending copyright to legal expression might indirectly protect legal ideas when the expression is needed to use the idea. Although Kobayashi and Ribstein recognize the first concern (Kobayashi & Ribstein 2011a), they miss the importance of the second. The following discussion describes the scope of copyright protection for three different types of legal products: (1) officially promulgated law created by government actors, (2) privately produced law, such as model codes, eventually adopted as official law, and (3) privately produced legal products never adopted as or used as part of official law.¹³

First, consider officially promulgated law created by a legislature, agency, court, or other government actor. The Copyright Act makes clear that the federal government cannot claim copyright protection in federal statutes, regulations, or judicial opinions.¹⁴ There is, however, some controversy about whether states can do so for their own official statutes, regulations and opinions. The weight of authority is in the negative, with courts and commentators relying primarily on the free access concern.¹⁵

Second, consider privately made laws that are eventually adopted as official law. The author of a model law is entitled to federal copyright protection in the text of that law if it is original, and he can prevent others from reproducing and distributing the model law, at least if the other person copies it nearly verbatim. The more pressing question is whether this copyright

¹³ Cunningham (2005) refers to the first category as strong form adoption, the second category as semi-strong form adoption, and the third category as weak form adoption when a judge, for example, cites to the legal product without making it official law.

¹⁴ 17 U.S.C. § 105.

¹⁵ See, e.g., *Banks v. Manchester*, 128 U.S. 244, 252 (1888); *Callaghan v. Miller*, 128 U.S. 617, 647 (1888); *Wheaton v. Peters*, 33 U.S. 591 (1834); *Veeck v. Southern Bldg. Code Congress Intern.*, 293 F.3d 791, 796 (5th Cir. 2002). For a general discussion, see Nimmer (1998): §5.14; Cunningham (2005): 300-309. Even so, many states claim to own copyright in their official laws, although they do not attempt to enforce those copyrights very often and their power to do so is unclear. (Dmitrieva 2000)

is lost or limited when the model law is officially adopted by a government entity. The courts are divided on the answer to this question.¹⁶

Those courts that deny copyright protection to laws after official adoption stress the importance of public access to and use of the specific text of statutes and regulations. As the Fifth Circuit put it in a well-known decision, the precise language of an official code is the “unique, unalterable expression of the ‘idea’ that constitutes local law” and “[the defendant] could not express the enacted law in any other way.”¹⁷

Those courts and commentators that favor some protection for privately-made laws that become official law stress the social value of private lawmaking entities and the importance of copyright to support creation incentives.¹⁸ Some of these cases involve works that are only incidental to a statutory scheme, such as real estate tax maps or an arrangement and classification of medical diagnoses used by a federal agency. Supporters of copyright protection argue that free access policies are weaker for these incidental works and the need for copyright to support incentives to create is much stronger than for core legal texts.¹⁹

Third, consider legal products that are never officially adopted as law, such as contracts, corporate charters, and the like. Copyright offers some protection to expressive form in most of these cases, but the protection is extremely limited. Here the problem is the close relationship

¹⁶ See *John G. Danielson, Inc. v. Winchester Conant Props., Inc.*, 322 F.3d 26, 40 (1st Cir. 2003).

¹⁷ *Veeck v. Southern Bldg. Code Congress Intern.*, 293 F.3d 791, 801-02 (5th Cir. 2002). See also *Bldg. Off. & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734-35 (1st Cir. 1980). However, even the Fifth Circuit left open the possibility that a private author of a model code adopted as official law might use copyright to prevent another party from copying and selling the code in competition with the author. See *Veeck, supra*, at 800 n. 14.

¹⁸ See, e.g., *Practice Management Info. Corp. v. American Medical Ass’n*, 121 F.3d 516, 518-20 (9th Cir. 1997); *CCC Info. Servs. v. MacClean Hunter Mkt. Reports*, 44 F.3d 61, 74 (2d Cir. 1994); *Veeck*, 293 F.3d at 816-18 (Wiener, J., dissenting). See also Nimmer (1998), at §5.12 (suggesting that fair use might be used to tailor infringement to the competing publisher situation).

¹⁹ See, e.g., *County of Suffolk v. First American Real Estate Sol.*, 261 F.3d 179, 194 (2d Cir. 2001). Even the *Veeck* majority thought the result might be different for privately created standards that are referenced in a law, as opposed to privately created codes that are adopted as law. *Veeck*, 293 F.3d, *supra*, at 805.

between form and function. Because there is a great deal of socially desirable standardization in legal language, legal texts are strongly constrained by function. As a result, protecting a particular text through copyright can impede others from using the legal idea that the text implements. The risk then is that copyright in expression will indirectly create a monopoly in idea by protecting expression essential to its use.

Copyright law handles this problem in two different ways: the no-copyright approach implemented through the merger doctrine, and the thin-copyright approach implemented through narrow infringement standards.²⁰ One important factor in choosing between the two approaches has to do with the number of different forms of expression available to use the idea. When there is only one expressive option or a very limited set, expression cannot be protected without restricting the ability of others to use the idea and thus granting a forbidden copyright monopoly in the underlying idea. In this case, the merger doctrine applies and bars all copyright protection—hence the no-copyright approach. However, when there are more, although still limited, expressive options, protecting one does not confer as strong a monopoly if other individuals can use one of the alternatives without risking copyright infringement. This is possible, though, only when the scope of copyright protection is narrow enough so that the other options are freely available. In this case, copyright law protects the expression but provides only a very thin copyright that limits protection to nearly verbatim copying.²¹

There are other important factors as well. For example, thin-copyright, by barring verbatim copying, forces a competitor to incur some creation costs and thus reduces the free rider

²⁰ Compare *Morrissey v. Procter & Gamble*, 379 F.2d 675 (1st Cir. 1967) (no copyright) with *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1958) (thin copyright). For a general discussion, see Nimmer (1998): §13.03[B][3]; Cunningham (2005): 300-09.

²¹ See Nimmer (1998): §13.03[A][4]. The thin-copyright approach is usually considered an aspect of infringement analysis and not technically a part of the merger doctrine. Still, the no-copyright and thin-copyright approaches are alternative ways to respond to the same problem—indirect protection of unprotectable ideas—and thus are sensibly grouped together.

advantage. This provides some, if only a weak, impetus to creation. Thin-copyright also induces others to alter copyrighted expression in order to avoid infringement. This can reap social benefits when there are significant gains to be had from improving the particular expressive form. On the other hand, no-copyright is superior to thin-copyright when standardization is important or when substantial network benefits are possible by allowing verbatim copying.

These factors apply to legal texts. The number of alternatives depends on the type of legal document involved.²² For example, bond documents and securities filings tend to be sharply constrained by legal convention and official requirements, and a constrained environment favors no-copyright.²³ Moreover, the network benefits of standardization vary according to the generality of the legal provision and the range of potential application and use. General provisions of a novel corporate charter, for example, might have many potential uses and also benefit from a uniform body of interpretive precedent, whereas the more specific terms of a contract or a civil complaint might not. The possibility for improvement in expressive form also figures into the analysis. Since lawsuit complaints serve mostly a notice and limited screening function and are heavily constrained by procedural rules and substantive law, it is not clear that there is much social benefit to be gained from encouraging improvements. And this points toward a no-copyright approach.

3.1.2. Patent

²² See, e.g., *Int'l Code Council, Inc. v. Nat. Fire Prot. Ass'n, Inc.*, 2006 WL 850879 *16 (N.D. Ill. 2006) (noting that the “mandatory or proscriptive language commonly employed in model codes reduces the number of potential expressions”).

²³ See, e.g., *Continental. Cas. Co.*, 253 F.2d, *supra*, at 705.

Novel legal ideas fall generally within the scope of patentable subject matter as business methods.²⁴ In fact, the Patent Office issued patents on legal inventions in the form of novel tax strategies before the American Invents Act put a stop to that practice in 2011. The Patent Office has granted other legal method patents but, as far as I know, not many. (Kobayashi & Ribstein 2011a)

The main statutory obstacle to obtaining a patent on a novel legal method is the nonobviousness requirement, which requires that the invention reflect more than an ordinary advance over the prior art.²⁵ If most legal innovation proceeds incrementally, as I believe it does, few legal ideas will be able to meet this condition. Occasionally someone comes up with a radically new approach to a legal problem, such as the poison pill, but lawyers mostly innovate in small steps. Thus, patents should not be widely available for legal method innovations.

3.1.3 Other IP Theories

There are other IP theories that apply to legal creations. Trade secret law protects secret and valuable information of any sort from improper acquisition, use, and disclosure. However, the information must actually be secret and subject to reasonable secrecy precautions. (Bone 1998) As a result, trade secret law is useful for legal ideas during the pre-marketing phase—and after marketing only when those ideas can be commercially exploited without public disclosure.

Trademark law protects brand names and other source-identifying symbols against uses that are likely to cause consumer confusion or dilution. Accordingly, trademark law does not play a direct role in incentivizing private lawmaking, but it can assist indirectly by supporting a reputation market. I discuss this idea below.

²⁴ The United States Supreme Court recently confirmed the availability of business method patents. *Bilski v. Kappos*, 130 S.Ct. 3218, 3228-29 (2010).

²⁵ 35 U.S.C. § 103. Other potential obstacles include the prohibition of patents on abstract ideas, the novelty requirement, and the Section 112 disclosure and written description requirements.

Contract law is also available. A legal provider might impose limits on use or disclosure of an innovation in its contract with a commercial licensee or consumer. As long as courts are willing to enforce these contractual limits, a vendor can rely on contract law to prevent unauthorized copying and use.

3.2 *Expanding IP Rights*

Thus, current IP law grants a very limited set of rights in legal creations. These limitations are not doctrinal glitches. They are supported by important social policies, and any proposal to expand IP rights must take account of these same policy factors. In general, evaluating the case for expanded IP rights in legal creations involves balancing the social benefits from additional creation incentives against the social costs from restricted access.

3.2.1 *Social Benefits*

The basic case for expanded IP rights focuses on the advantages of a private lawmaking market in producing high quality laws and the need for broader IP rights to incentivize that lawmaking activity. Kobayashi and Ribstein (2012) argue that parties have weak incentives to produce laws in a private market because the act of adopting privately-made law as official law severely limits the availability of IP protection. As a result, privately-made laws are created mostly as a byproduct of litigation aimed at other goals or political rent-seeking by groups creating model laws to serve their own interests, and byproduct lawmaking produces suboptimal law. The conclusion is that broader IP rights in law will fuel a private market that, through competition, will improve the quality of the laws that are produced.²⁶

²⁶ In Kobayashi's and Ribstein's spatial model, laws are distributed over the [0,1] interval and firms have uniform preferences over that interval. Kobayashi and Ribstein show that private lawmakers with copyright protection will produce laws that are spaced as far away from one another as possible. While not socially optimal, this result is better than what public lawmakers create when public choice incentives render the location of a public law indeterminate. (Kobayashi & Ribstein 2012)

I must admit to some skepticism that limited IP rights are the chief cause of byproduct lawmaking and an anemic private lawmaking market. Barriers to entry created by the legal profession might well be a more significant cause. After all, many private firms, such as LegalZoom, are clamoring to enter the legal services market today despite limited IP protection. To be sure, much of what these firms sell involves advice rather than lawmaking services. But many of them do engage in some lawmaking when they draft simple contracts and wills.

Nevertheless, let us assume limited IP rights are a significant cause and take a closer look at the case for strengthening them. Since the argument focuses on incentives, it is important at the outset to distinguish clearly between two different types of incentives: the incentive to create a new legal product, and the incentive to market a legal product that has already been created. IP rights focus on the first kind of incentive. These rights can affect the second, to be sure, but they are not designed to do so directly. Usually the profit-making incentive is all that is needed to market products. Every firm must invest in creating its own marketing infrastructure—purchase its own delivery system, hire its own sales force, and advertise its products—so these types of investments are not vulnerable to free riding. In any event, the following discussion focuses on incentives to create, not incentives to market. If the latter need a boost, IP is probably not the best way to do it.

Two factors affect the need for stronger IP rights: (1) how much creators have to invest on average to make new law and (2) the availability of alternative strategies to recoup that investment. While it is ultimately an empirical question, ordinary experience suggests that creativity in law involves only modest upfront investment compared to other types of creativity. One might argue, as Kobayashi and Ribstein do, that broader IP protection produces larger economic returns, which incentivizes more innovation. (Kobayashi and Ribstein 2011a) I am

skeptical that this is true for most legal innovation. It seems more likely that there is an upper limit on how effective a legal instrument can be. For example, a lawyer might invest a huge amount in trying to figure out a new takeover deterrent, but there is likely to be a limit to how effective a deterrent can be and thus a maximally effective strategy to be discovered. Even if this is not true, however, still the marginal cost of additional protection in terms of chilled downstream innovation will at some point exceed the marginal benefit of enhanced upstream incentives. (Frischmann & Lemley 2007) This insight has an important bearing on the second factor. The shorter the necessary period of exclusivity, the less protection is needed and the more likely it is that existing recoupment strategies are sufficient.

As to recoupment strategies, we must start with the existing protection that copyright and patent afford. Patent is not terribly helpful, but the possibility of being lucky and creating something very new can still add some impetus to general efforts at innovation from an ex ante perspective. Moreover, even a thin copyright forces others to modify the legal document while still preserving its functionality, which reduces the free-riding advantage by requiring competitors to incur fixed costs of their own.

It is true that a legal text can lose much of its copyright protection if it is adopted as official law. Moreover, as Kobayashi and Ribstein point out, this can have the perverse effect of denying copyright protection to precisely those legal innovations that are most valuable and thus most likely to be adopted as law. (Kobayashi & Ribstein 2012) However, the impact of this limitation depends on the nature of the legal product. Not all legal products that are sold to private consumers risk losing their copyright protection just because they are involved in official legal proceedings. (Cunningham 2005: 298) For example, copyright in a new form of contract is not lost when the contract becomes the subject of litigation and is quoted in a published

judicial decision any more than a poem or piece of music loses its copyright by being the subject of litigation. Even those legal creations sold to private consumers and at risk of losing copyright—such as provisions of a corporate charter marketed to private companies and later codified as part of a state’s corporation statute—have a period of copyright exclusivity before codification, and this period might be long enough to allow recoupment of fixed costs. Moreover, legal products designed specifically for governmental adoption are still protected by copyright before they become official law, and to that extent can be sold at a supra-competitive price.

To be sure, the resulting scope of protection is quite limited. But there are other recoupment strategies available. For customized legal products and services, a firm can use trade secret and contract law, provided the product can be delivered and used without public disclosure. For example, a customized joint venture contract could be coupled with a nondisclosure agreement (NDA) that prohibits further disclosure and use. To be sure, negotiating NDAs can sometimes be difficult because of Arrow’s Information Paradox, but NDAs are a fairly routine part of transactions involving trade secrets.

The contract might become public knowledge in a later breach of contract suit, but disclosure is not inevitable given the availability of litigation protective orders, and in any event, the vendor-creator would still enjoy a first-mover advantage during the period of secrecy. If the fixed costs of creation are not too high, even a short lead time might be enough for incentives, in which case the later public disclosure would be socially beneficial by making the creation freely available to the public. Furthermore, as Kobayashi and Ribstein (2012) recognize, network effects can reinforce the lead-time advantage of the first mover if a body of interpretive precedent develops during the lead-time period.

In addition, the specific features of a customized contract are not likely to be generally marketable if they are tailored closely enough to the customer's particular circumstances. To be sure, the creator-vendor's know-how and general ideas used to make the customized contract might be valuable to other firms. But it should be difficult to reverse-engineer know-how from the contract itself, and anyway it is not clear that general ideas should be tied up by property rights given the chilling effect on future innovation.

The trade-secret-plus-contract strategy does not work nearly as well for mass-marketed legal products, such as simple wills or contracts, or for products, such as corporate charters, that must be filed with government authorities. Trade secrecy does not protect the legal text of a document once that text is made publicly available. Nevertheless, there are other ways to mitigate the free rider problem in these cases. For example, a vendor selling over the Internet can use encryption and clickwrap licenses to protect content. Enforcement might be difficult and costly, but enforcement is also difficult and costly with expanded IP rights when there are many infringers—as the experience with P2P file sharing demonstrates. Moreover, when legal products are mass marketed, the seller is able to spread its fixed costs over many individual items. Provided the total fixed cost of creation is not too high and the number of items sold is large enough, the additional price per item is likely to be so small that other market factors will swamp the competitor's price advantage.

Reputation can also help. For example, a firm that develops a reputation for designing effective corporate charters or contracts is likely to enjoy a market advantage over its competitors. To be sure, a free-riding competitor might offer the same corporate charter or contract at a lower price. However, legal products are rarely perfectly standardized and fungible—or at least consumers are unlikely to believe they are. Even a simple will might need

to be tweaked in some way to take account of specific aspects of a family situation. Thus, it makes sense for consumers to rely on firm reputation as a signal that the right adjustments will be made. Furthermore, legal products are difficult for consumers to value, so they have reason to rely on a strong reputation for quality to ensure that the resulting product will operate effectively.

Reputation markets work only if the original creator receives credit for its creation. As a result, the law might have to recognize an attribution right that requires competitors to clearly identify authorship. Such a right, however, would not prevent copying or use; it would only require the copier to give authorial credit.

Finally, weak property rights are sometimes superior to strong ones for driving a robust innovative environment, as studies of the computer industry in Silicon Valley attest. (Gilson 1999; Hyde 2003; Saxenian 1994) In Silicon Valley, useful ideas and know-how spread rapidly as mobile employees moved from firm to firm relatively unimpeded by noncompete agreements, which are mostly unenforceable in California. Each firm benefited from the know-how and ideas of its competitors, improved on that information, and then spread those improvements to other firms via its departing employees. The resulting reciprocity of advantage assured that a robust diffusion of information would not impair incentives to create.

It is difficult to predict in advance whether and to what extent this rosy scenario can be duplicated in a private lawmaking market. Some of the conditions are likely to hold, but some are not. Still, the possibility of reciprocity should not be ignored, and to the extent it exists, it can reduce the free rider problem.

To be sure, the above analysis is not decisive against expanding IP rights. The existence of alternative ways to recoup fixed costs does not necessarily eliminate the free rider problem. Moreover, some of the alternatives, such as trade secrecy and encryption, might not be the best

methods for solving the free rider problem. Secrecy, for example, impedes the diffusion of ideas and increases the costs of enforcement. (Bone 1998; Burk & McDonnell 2007) Thus, it might make sense in some cases to beef up patent and copyright in order to direct incentives away from the more problematic alternatives, although any decision to do this must address complex empirical and normative questions. Still, the availability of alternatives is likely to mitigate the free rider problem and thus the social benefit side of the cost-benefit ledger, which makes it more likely that the social costs of expanded IP rights will outweigh the benefits.

3.2.2 *Social Costs*

There are three major sources of cost associated with giving IP rights in law. First, restricting public and lawyer access to law creates due-process-related costs. (Kobayashi & Ribstein 2011a, 2004) Second, IP rights impede further innovation, which risks high social costs for creative activity that is cumulative. Third, IP rights create administrative and enforcement costs.²⁷

First, consider access to law. When legal creations become part of the official law or formal legal process, members of the public must have free access so they can exercise their rights and seek legal redress. This clearly applies to model codes in the form of official law, and it also applies to corporate charters and other public documents to which lawyers must refer in regulatory and other filings and to complaints, motions, and briefs that form the centerpiece of litigation. Kobayashi and Ribstein (2011a) suggest handling this problem through liability exemptions based on fair use principles. This is a promising approach, but it adds problems of its own. For one thing, fair use exemptions compound the costs of enforcing IP rights. They

²⁷ In addition, the monopoly power created by property rights in information can lead to monopoly pricing and deadweight loss depending on the number of substitutes. (Kitch 1986)

also introduce a new source of uncertainty about the scope of those rights, and uncertainty can adversely affect innovation incentives for risk-averse creators.

In fact, it is not exactly clear how fair use would work for legal creations. For example, suppose Firm A creates a corporate charter with a new provision useful for allocating risk and Firm B lobbies the legislature to adopt it as a statutory default. If B is given a fair use privilege to use A's creation in this way, other firms will employ the same strategy and seek legislative adoption as a way to circumvent IP rights. In addition, building on an example from Kobayashi and Ribstein (2004), suppose Firm A drafts and sells a class action complaint for a securities fraud dispute and Firm B sells a modified version in competition with A. If B is allowed to sell its modified version, all firms will be able to escape infringement simply by selling modified versions of complaints. One could give A the right to prevent the sale of modified complaints, but that would disable the market for improvements. One might limit A's rights to complaints that are only trivially different and allow free use for significant improvements. But then courts and other enforcement agencies would have to define what constitutes a "significant improvement," and litigation and decision costs would increase accordingly. I do not mean to suggest that a set of fair use exemptions cannot be constructed. My point is that doing so will likely be complicated and costly and still leave a fair degree of uncertainty.

A second problem with IP rights in law has to do with effects on downstream innovation. Legal innovation, like innovation in the tax planning field (Burk & McDonnell 2007: 997), tends to be a cumulative and modular process. Lawyers build on existing legal strategies, ideas, and texts. Giving upstream innovators property rights in legal creations will make it more difficult for downstream innovators to use those creations to make something new.

Indeed, current IP law recognizes the importance of a robust public domain. Copyright denies protection to some functional works and adjusts the scope of infringement for others. Patent imposes a nonobviousness requirement that excludes incremental innovation from the patent system. As a result, many novel functional ideas are freely available as building blocks for further creativity. The care with which current IP law limits rights in useful innovations should give us pause before expanding rights in legal creations. I am not suggesting that the current IP law perfectly balances social benefits and costs. Rather, my point is that given the complexity and uncertainty of the task, we should proceed cautiously in modifying the current system.

The social costs of chilling downstream innovation depend on a number of factors. Chief among them is the ease of licensing. Property rights facilitate licensing by overcoming Arrow's Information Paradox, but licensing in a property rights regime also creates problems of its own. For one thing, in a world without perfect price discrimination, some potential licensees will not be willing to pay the licensor's price, and since licensing is the primary means of distributing IP-protected information, these potential innovators will be fenced out. Moreover, bargaining failure is a particular risk for legal creations when uncertainties about the scope of rights and the likelihood of enforcement frustrate agreement on valuation. Finally, a right holder might choose not to license based on private benefits and costs even when licensing would be optimal from a social point of view. For example, a firm marketing a legal creation might delay licensing a major improvement that promises substantial social benefits if it anticipates making more from selling its existing product for a bit longer.

Chilling costs also depend on the scope of IP rights. The broader those rights, the more intellectual ground the property right holder can fence off and the greater the risk to downstream

innovation. One way IP law tries to handle this problem, in addition to fair use exemptions discussed above, is to create a compulsory licensing regime. However, compulsory licensing creates problems of its own. The royalty amount must be set periodically to take account of changing conditions and this is difficult to do without market benchmarks. Furthermore, collecting and distributing royalties is a costly process and those costs increase with the number of users.

Not only do expanded IP rights restrict public access and impede further innovation; they also increase enforcement and administrative costs. Broader IP rights lead to more enforcement actions, and the availability of IP rights encourages right holders to search for infringers and infringers to hide from detection, which can create a wasteful arms race. (Bone 1998) In addition, IP rights make it prudent to search prior art before embarking on a creative venture, thereby increasing search costs. This is certainly true of patent-type rights that bar independent replication, but it is also true for copyright-type rights involving functional subject matter. Even independently-created functional works are likely to end up looking very similar because of the constraints that function imposes on form. Therefore, a firm that does not search prior art runs the risk of creating something so similar to a prior creation that it will be hard to convince a fact finder that it was not copied.

3.2.3 Balancing Benefits and Costs

There are no firm conclusions to be drawn from the foregoing analysis, but that is my point. Examining all the relevant factors makes it unclear whether additional IP rights are socially desirable and identifies potentially serious social costs. This suggests staged implementation of any private lawmaking model. It might be wise first to relax the professional rules and eliminate the artificial barriers to entry for private firms interested in providing legal

services. After all, many private firms are trying to provide legal services today despite limited IP protection.

After observing how a more vigorous market operates under the existing IP framework, we can make a more informed judgment about whether stronger IP rights are needed. Moreover, if they are needed, the fact that the social cost-benefit balance varies with the type of subject matter and context suggests the desirability of a varied menu of IP rights targeted to different types of cases.

4. A Special Case: Adjudication and the Common Law

One special case of property rights in law deserves particular mention. *In Class Action Lawyers as Lawmakers*, Kobayashi and Ribstein argue for giving class action lawyers IP rights in litigation documents such as complaints and even motions and briefs. (Kobayashi & Ribstein 2004: 736-37) In *Law's Information Revolution*, they go one step further and speculate about privatization of the common law and in particular about giving private parties some kind of property rights in the common law opinions they help create. (Kobayashi & Ribstein 2011a: 1206-07; see also Kobayashi Ribstein 2011b: 29-30, 36, 41) Once again, their rationale relies on the *quasi-public-goods* theory for IP rights: Without some way to internalize the social benefits of their creative effort, parties, lawyers, and private firms have suboptimal incentives to investigate disputes, draft complaints, file lawsuits, and invest in creating socially useful common law precedents.

Much of what I have already said about the costs and benefits of IP rights applies to the common law as well. An optimal system does not necessarily require internalization of all social benefits because there are costs to internalization. Still, the cost-benefit balance raises special concerns for common law adjudication.

To pick just one example, it is not clear that granting IP rights in complaints would have much of an impact on the quality of common law precedents. Complaints are fairly standardized litigation documents and they serve mainly a limited notice and screening function in adjudication. While the complaint does provide a legal framework for the suit, that framework is provisional at best. It is not uncommon for the original complaint in a complex case to be quickly superseded as discovery reveals more facts and invites new legal theories. Briefs and oral argument can have a stronger impact on the quality of judicial decisions. However, their effect is also attenuated. Judges do not rely exclusively on what the lawyers say. Judges do their own research and rely on law clerks to analyze complicated legal issues.

On the cost side of the ledger, lawyers have incentives to game IP rights in litigation documents. For instance, a class action lawyer who first investigates and drafts a complaint can use IP rights to monopolize the market for class representation by making it harder for others to prepare complaints for the same class action. Even if another attorney drafts her complaint independently, the threat of costly litigation could still have a chilling effect, especially as functional constraints might produce similarities even for independent creation. Because of the serious agency problems in class litigation, there is no assurance that any particular lawyer will conduct the class action in the best interests of the class or the public, so a monopoly over class representation could be socially costly. This is the reason why Rule 23(g) of the Federal Rules of Civil Procedure assigns the task of choosing class counsel to the judge and why the Private Securities Litigation Reform Act aims to assign it to those class representatives who are in a position to monitor. To incentivize optimal search and filing, it might be necessary to compensate the lawyer who first investigates a problem, drafts a complaint, and files a lawsuit. (Kobayashi & Ribstein 2004) But a reward is likely to be better than IP rights for this purpose.

In a more speculative vein, some have toyed with the idea of giving judges property rights in their opinions in order to incentivize optimal investment in decisionmaking and opinion writing. However, if incentives are inadequate, it is better to deal with the problem directly, such as by increasing judicial compensation or disciplining wayward judges. Giving IP rights to judges seems an awkward and risky way to handle the problem. For example, a judge might invest more in cases of first impression because her decision would be used more often and thus generate more profit, thereby jeopardizing values of equal treatment that lie at the core of adjudication.

There is a more general point here. Common law adjudication is a complex lawmaking institution that has evolved over centuries. Any effort to reform it should proceed cautiously, guided by an understanding of the institution's essential structure and function. I have argued elsewhere that the core feature that defines the distinctive function of common law adjudication is its commitment to a particular mode of principled reasoning. (Bone 2012) A judge interprets the law as she enforces it, and she does so by moving back and forth between her best understanding of what the law requires and whatever moral or practical intuitions are generated by the facts, adjusting law and intuition until they fit together in a reflective equilibrium. (Dworkin 1986)

It is difficult to predict how IP rights in litigation inputs and common law precedents would affect this reasoning process. Nevertheless, I worry that the effects could be profound. Property rights might impede the fluid process of adversarial interaction that supports the kind of principled reasoning essential to adjudication. In a different context that is nonetheless

illuminating, courts have been reluctant to grant common law copyright in normal conversation because of concerns about chilling fluid and spontaneous debate and discussion.²⁸

In any event, there is good reason to demand a strong showing from those who would make major changes in as complex an institution as common law adjudication. I, for one, am not convinced that the case for IP rights has met this heavy burden.

IV. Conclusion

We live in a remarkable time of rapid technological innovation and unprecedented globalization. We also live in a time when many people are priced out of access to essential legal services. The traditional model of lawyer hegemony and centralized lawmaking might not be suitable for generating good law and providing access. This was the insight of Professor Ribstein's work. His contribution was to imagine a world in which private parties compete to make law and then to explore with some care how well that world would work and what it would need to flourish.

There is much to admire in this vision of private lawmaking. Certainly, the legal profession exercises too much control over the production of law and greater decentralization with enhanced competition makes a great deal of sense. Still, there are limits. Decentralization should be approached carefully, with an eye to its costs as well as its benefits. This Article has sought to identify some of the less obvious but still important sources of problems. The conclusion is that private lawmaking is more attractive for some types of legal innovation and less attractive for others. Furthermore, it is not clear that IP rights are needed to spur legal innovation in a private market.

²⁸ See *Estate of Hemingway v. Random House*, 23 N.Y.2d 341 (1968).

In the end, my goal is to inject a note of caution, not to stop efforts to explore the potential of private lawmaking. Markets have many virtues and the law is hardly immune from their beneficial influence. At the same time, law is a special institution with distinctive features, some of which do not fit market competition at all well. The challenge is to sort between the laws and legal institutions that would benefit from a private market and those that would not. This is no easy task, but it is one well worth pursuing.

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