

2.6 — Intellectual Property

ECON 315 • Economics of the Law • Spring 2021

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🌐 [ryansafner/lawS21](https://github.com/ryansafner/lawS21)

🌐 lawS21.classes.ryansafner.com



Outline



Sequential Games

The Problem With Ideas

Patents

Copyrights

Interlude: Intellectual *Property Rights*?

Trademarks

Trade Secrets

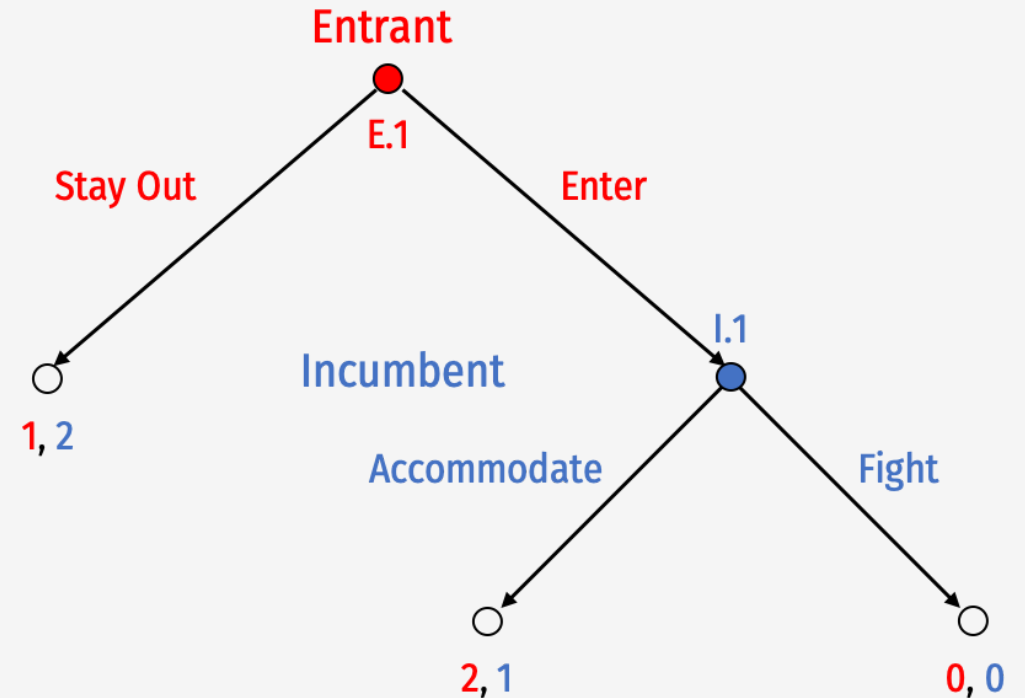


Sequential Games

Sequential Games: Extensive Form



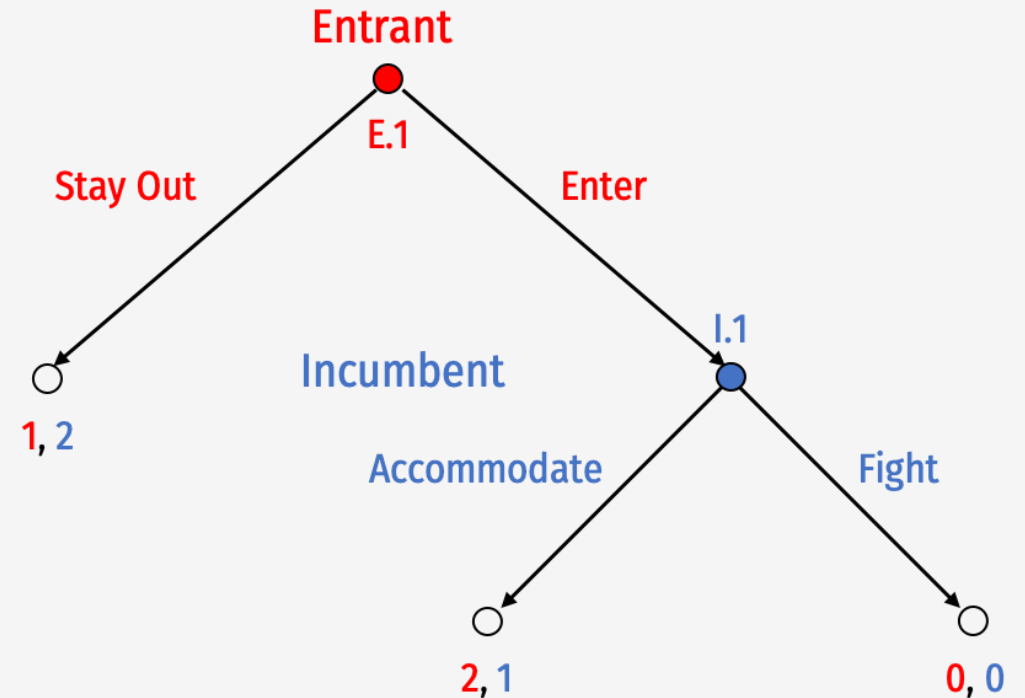
- We consider an **Entry Game**, a **sequential** game played between a potential **Entrant** and an **Incumbent**
- A sequence of play: **Entrant** moves first, **Incumbent** moves second
- Note: the magnitude of the payoffs don't really matter, only their *relative sizes*
 - Hence, my simple numbers



Pure Strategies



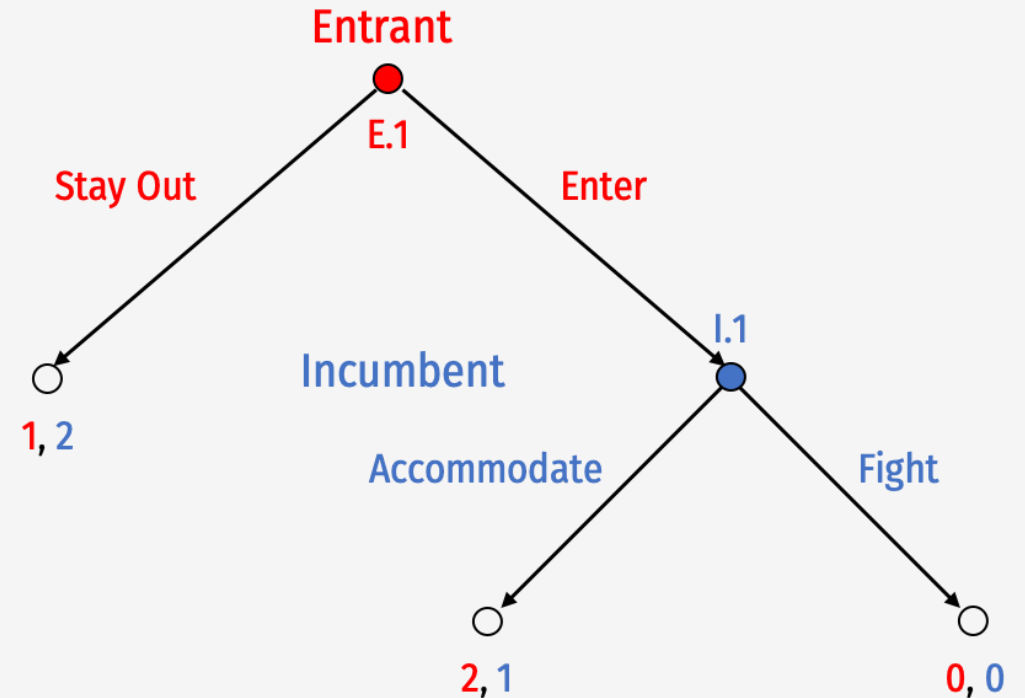
- This game is depicted in “**Extensive form**” or a **game tree**
- Each player faces at least one “**decision node**” (solid, colored by player)
 - **Entrant** chooses between **Enter** or **Stay Out** at node **E.1**
 - **Incumbent** chooses between **Accommodate** or **Fight** at **I.1**
 - Game ends at any “**terminal node**” (hollow), and each player earns payoffs (**Entrant**, **Incumbent**)



Pure Strategies



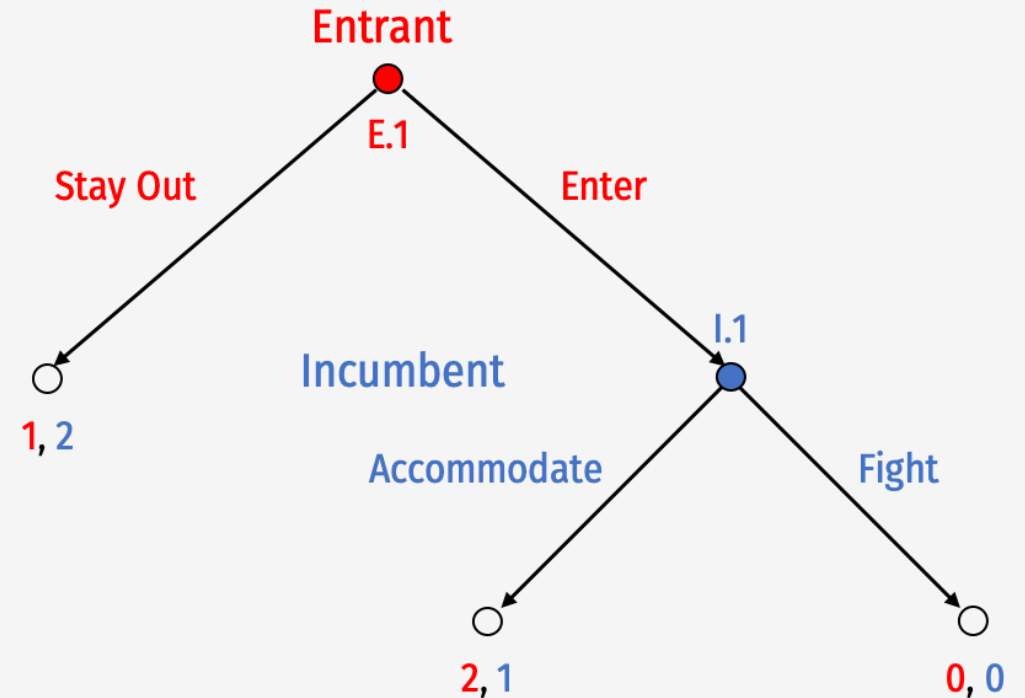
- We need to talk more about **strategies**
- **“Pure” strategy**: a player's *complete* plan of action for every possible contingency
 - i.e. what a player will choose at *every* possible decision node; think like an **algorithm**:
If we reach node 1, then I will play X;
if we reach node 2, then I will play Y;
if ...
- **“Mixed strategy”**: play a strategy with some probability



Solving a Sequential Game



- **Entrant** has 2 pure strategies:
 1. Stay Out at E.1
 2. Enter at E.1
- **Incumbent** has 2 pure strategies:
 1. Accommodate at I.1
 2. Fight at I.1
- Note **Incumbent**'s strategy only comes into play if **Entrant** plays **Enter** and the game reaches node I.1

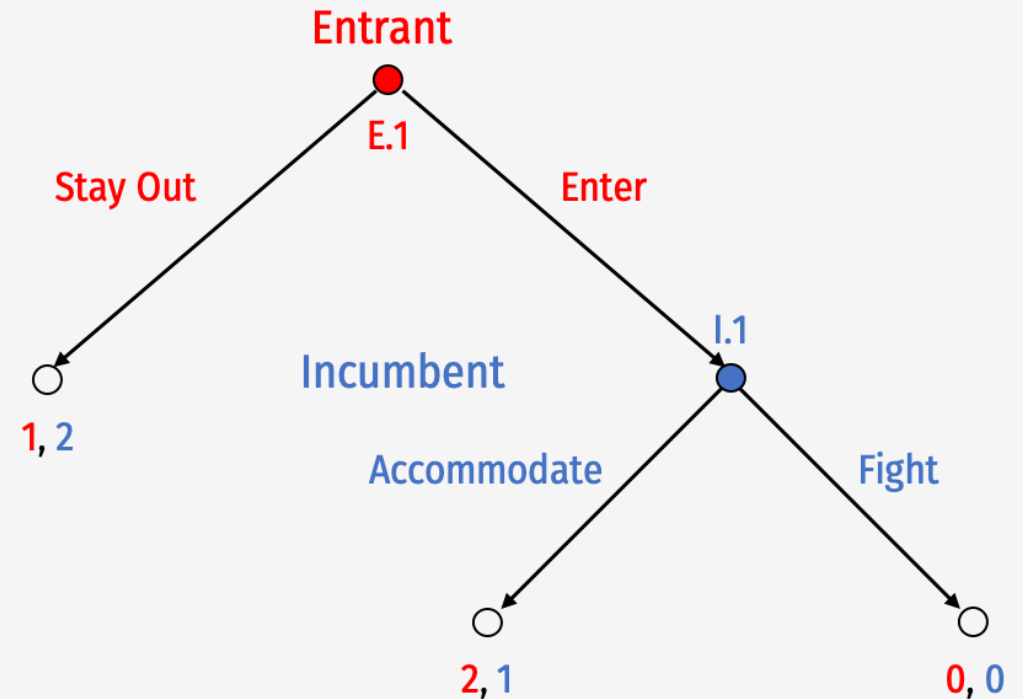


Solving a Sequential Game: Backward Induction



- **Backward induction**: to determine the outcome of the game, start with the *last-mover* (i.e. decision nodes just before terminal nodes) and work to the beginning
- A process of considering “**sequential rationality**”:

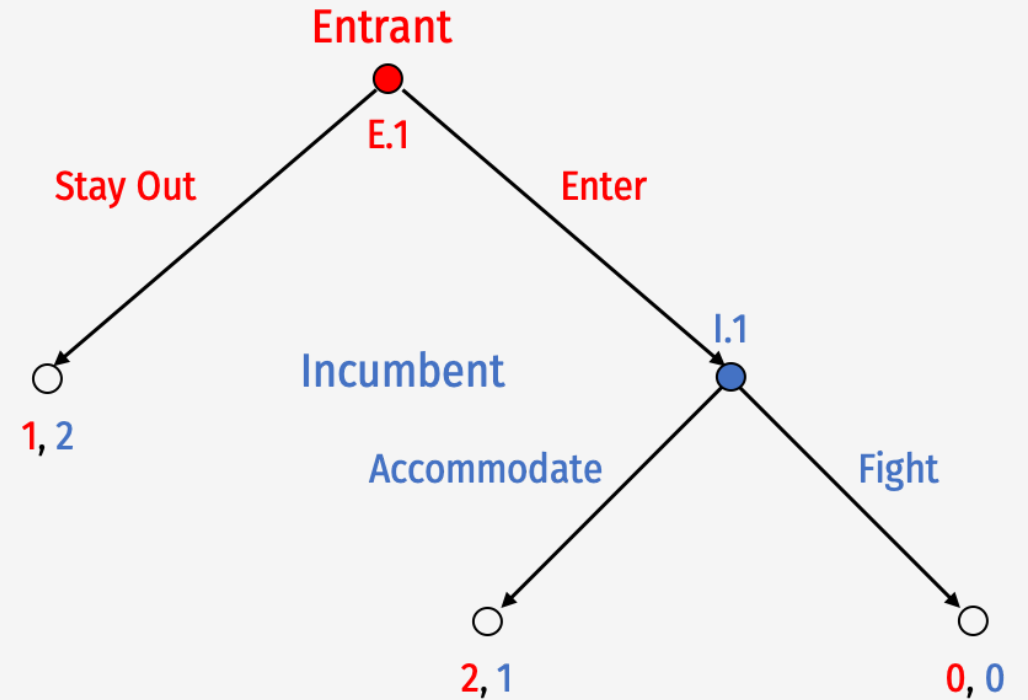
“If I play X, my opponent will respond with Y; given their response, do I really want to play X?”



Solving a Sequential Game: Backward Induction



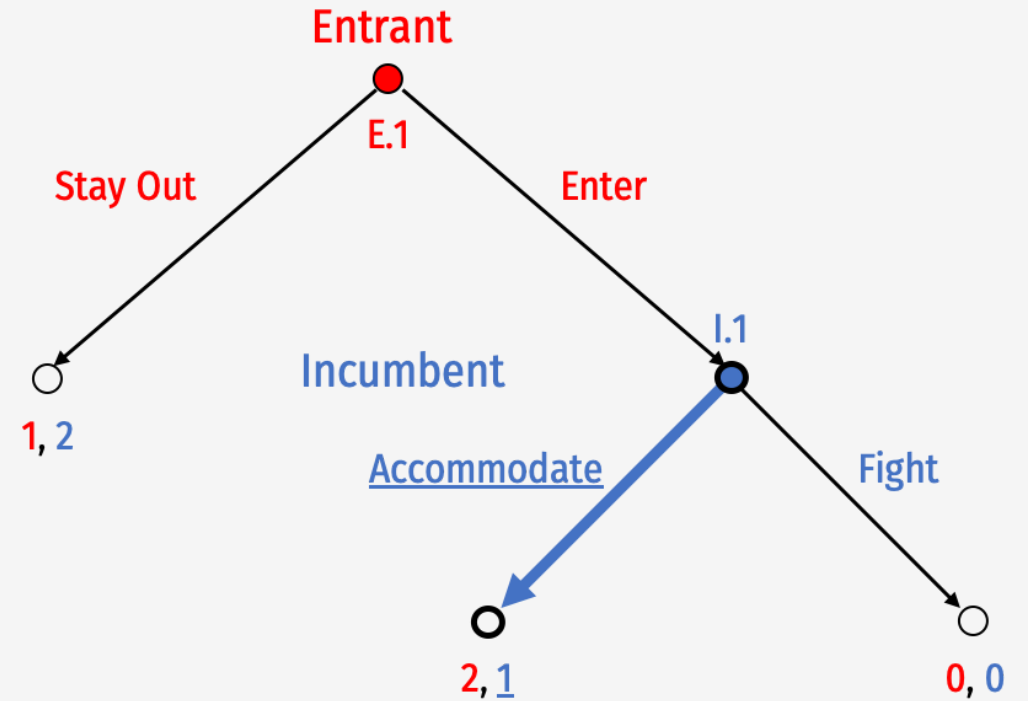
- We start at I.1 where **Incumbent** can:
 - Accommodate to earn 1
 - Fight to earn 0



Solving a Sequential Game: Backward Induction



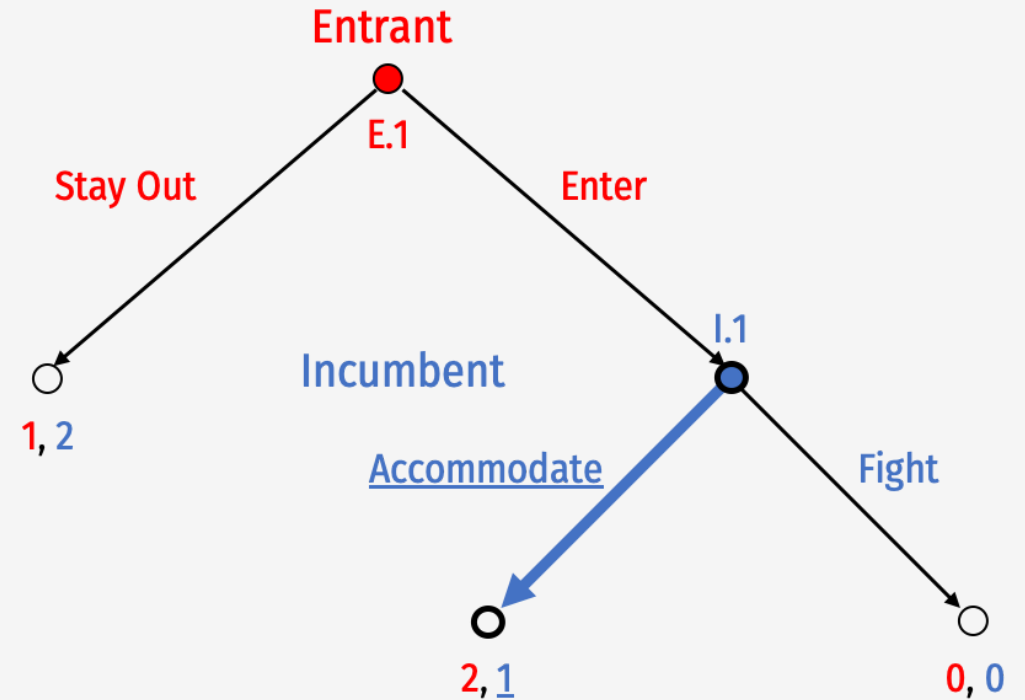
- **Incumbent** will **Accommodate** if game reaches **I.1**



Solving a Sequential Game: Backward Induction



- **Incumbent** will **Accommodate** if game reaches **I.1**
- Given this, what will **Entrant** do at **E.1**?
 - **Stay Out** to earn **1**
 - **Enter**, knowing **Incumbent** will **Accommodate**, and so will earn **2**



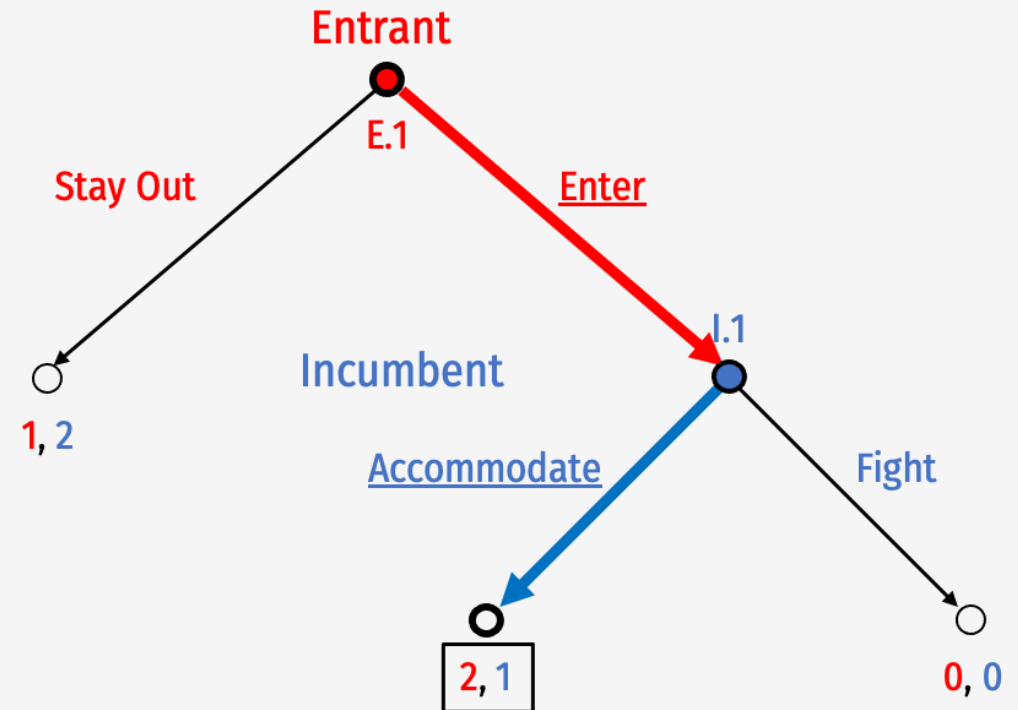
Solving a Sequential Game: Backward Induction



- **Entrant** will **Enter** at E.1
- Continue until we've reached the initial node (beginning)
- We have the outcome:

(**Enter**, **Accommodate**)

- Some textbooks call this a “**rollback equilibrium**”
 - more technical name: **subgame perfect Nash equilibrium**



Sequential Games: Normal vs. Extensive Form



- Any game in extensive form can also be depicted in “**normal**” or “**strategic**” form (a payoff matrix)
- Note, if **Entrant** plays **Stay Out**, doesn't matter what **Incumbent** plays, payoffs are the same
- Solve this for Nash Equilibria...

		Incumbent	
		Accommodate	Fight
Entrant	Enter	2, 1	0, 0
	Stay Out	1, 2	1, 2

Nash Equilibria



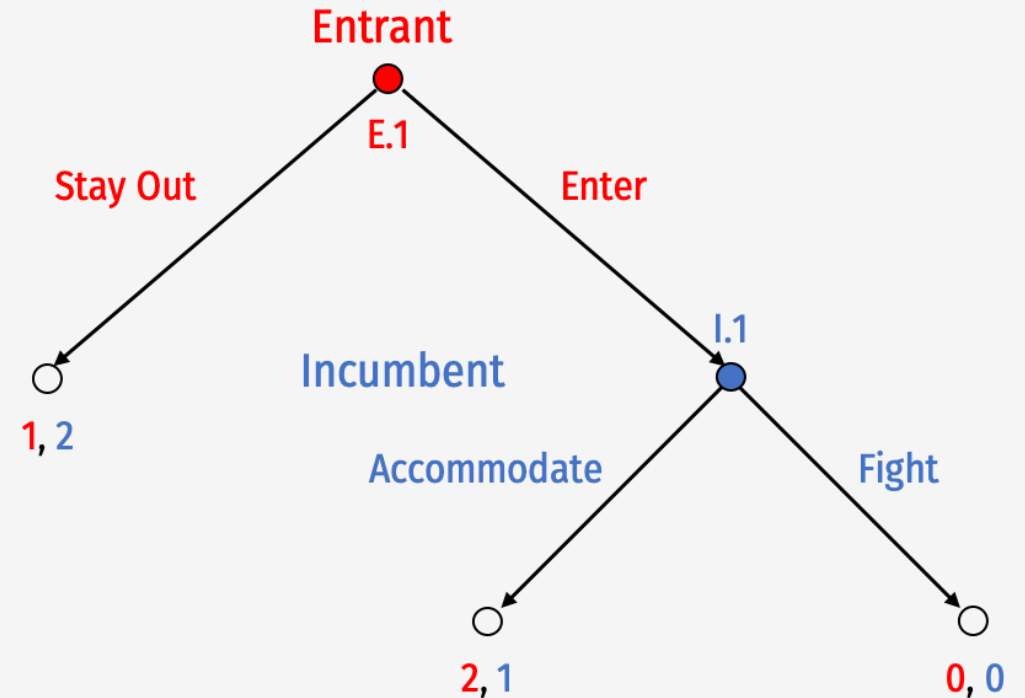
- Two Nash Equilibria:
 1. (**Enter**, **Accommodate**)
 2. (**Stay Out**, **Fight**)
- But remember, we ignored the *sequential* nature of this game in normal form
 - Which Nash equilibrium is **sequentially rational?**
- New solution concept: **subgame perfect Nash equilibrium (SPNE)**

		Incumbent	
		Accommodate	Fight
Entrant	Enter	<u>2</u> , 0	0, 0
	Stay Out	1, <u>2</u>	<u>1</u> , <u>2</u>

Subgames



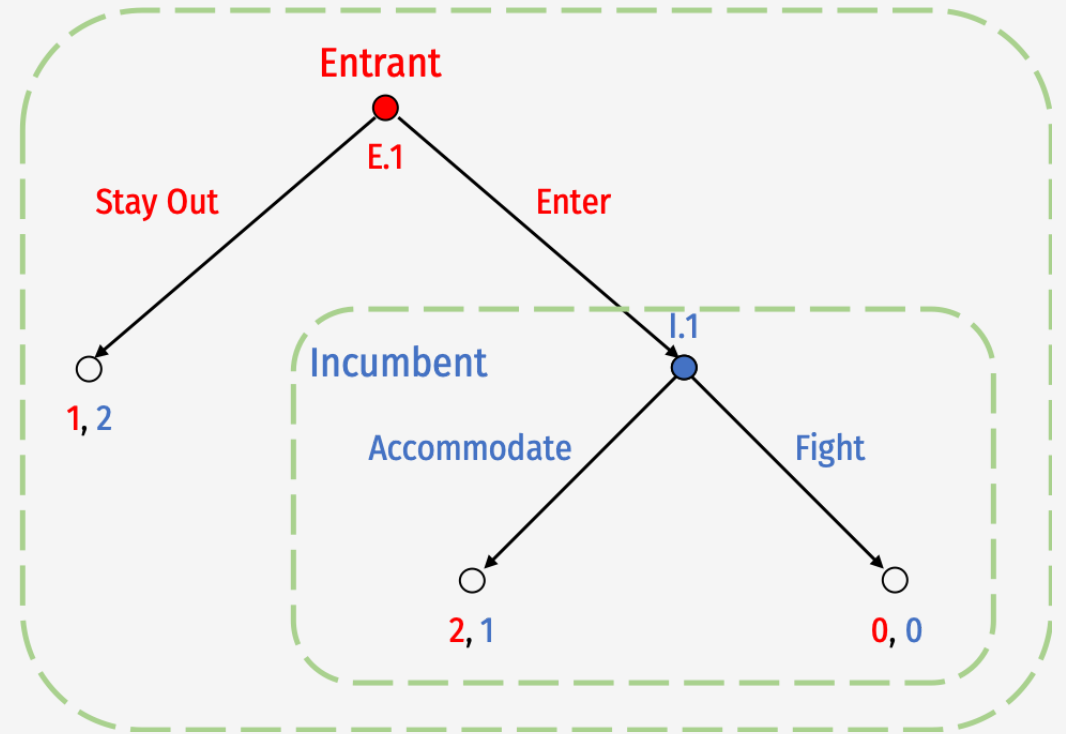
- **Subgame**: any portion of a full game beginning at one node and continuing until all terminal nodes
 - i.e. any decision node starts a subgame containing all the "branches" of that decision node
- Every full game is itself a subgame
- How many subgames does *this* game have?



Subgames



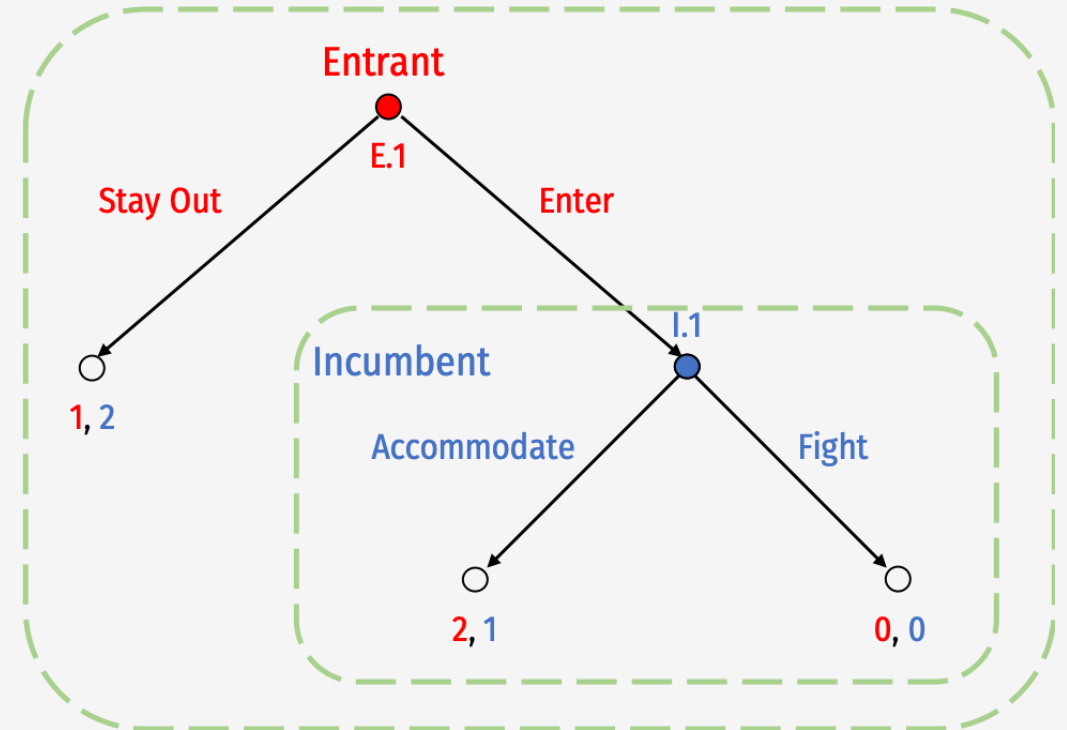
1. Subgame initiated at decision node **E.1**
(i.e. the full game)
2. Subgame initiated at decision node **I.1**



Subgame Perfect Nash Equilibrium



- Consider each subgame as a game itself and ignore the “**history**” of play that got a to that subgame
 - What is optimal to play in *that* subgame?
- Consider a set of strategies that is optimal for all players in *every* subgame it reaches
- That is a **subgame perfect Nash equilibrium**

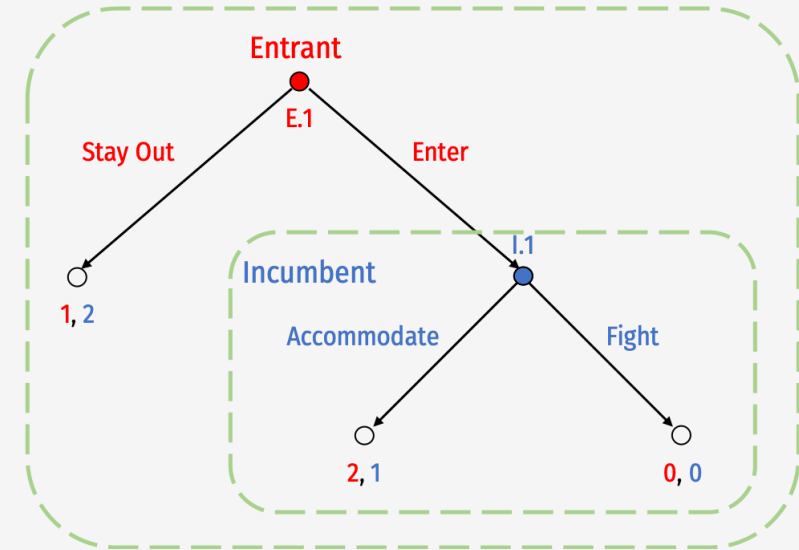


Subgame Perfect Nash Equilibrium



- Recall our two Nash Equilibria from normal form:

- (Enter, Accommodate)
- (Stay Out, Fight)

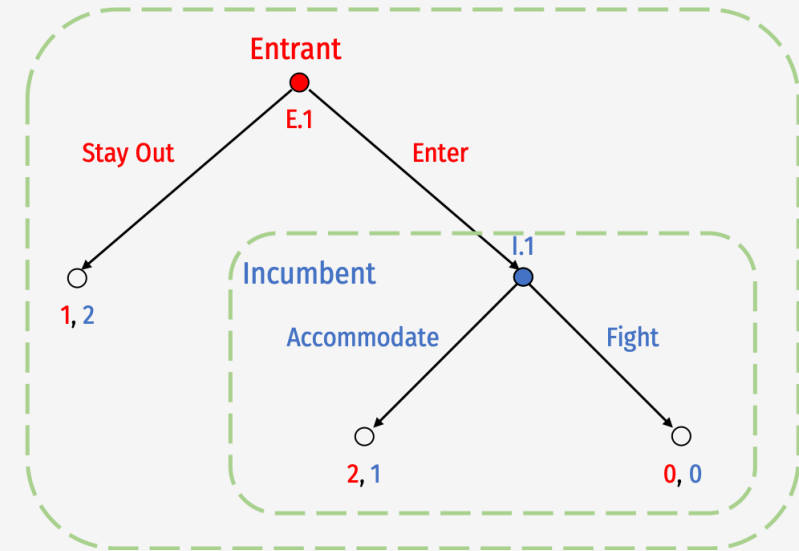


		Incumbent	
		Accommodate	Fight
Entrant	Enter	<u>2</u>	0
	Stay Out	1	<u>1</u>
		<u>2</u>	<u>2</u>

Subgame Perfect Nash Equilibrium



- Recall our two Nash Equilibria from normal form:
 - (**Enter**, **Accommodate**)
 - (**Stay Out**, **Fight**)
- Consider the second set of strategies, where **Incumbent** chooses to **Fight** at node I.1
- What if for some reason, **Incumbent** is playing this strategy, and **Entrant** unexpectedly plays **Enter**?

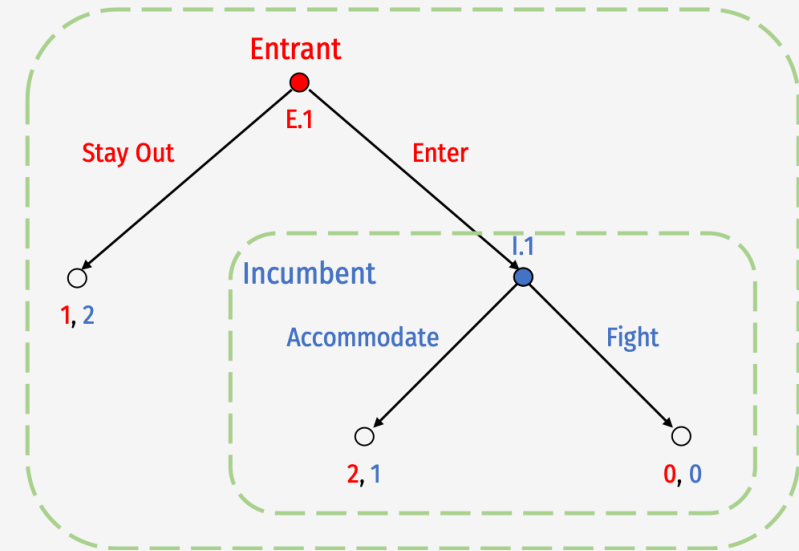


		Incumbent	
		Accommodate	Fight
Entrant	Enter	<u>2</u> 0	1 0
	Stay Out	1 <u>2</u>	<u>1</u> <u>2</u>

Subgame Perfect Nash Equilibrium



- It's **not rational** for **Incumbent** to play **Fight** if the game reaches **I.1**!
 - Would want to switch to **Accommodate**!
- **Incumbent** playing **Fight** at **I.1** is **not a Nash Equilibrium in this subgame!**
- Thus, Nash Equilibrium (**Stay Out**, **Fight**) is **not sequentially rational**
 - It *is* still a Nash equilibrium!

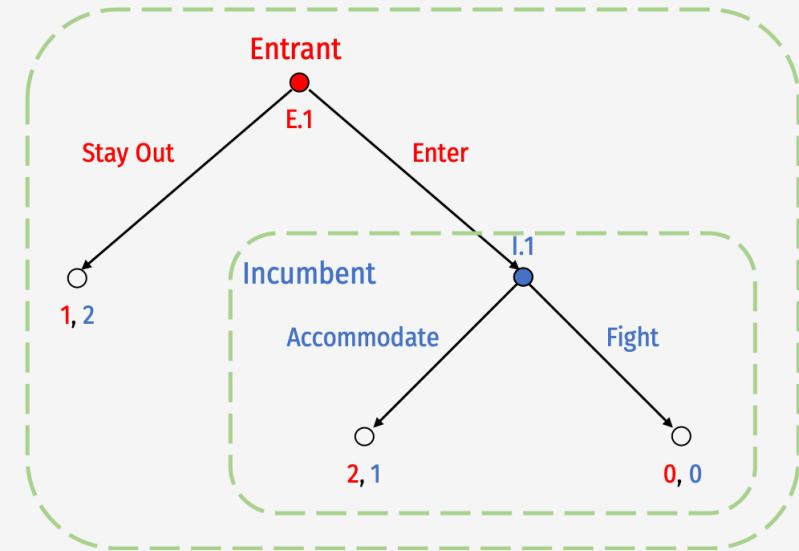


		Incumbent	
		Accommodate	Fight
Entrant	Enter	<u>2</u> 0	1 0
	Stay Out	1 <u>2</u>	<u>1</u> <u>2</u>

Subgame Perfect Nash Equilibrium



- Only (**Enter, Accommodate**) is a **Subgame Perfect Nash Equilibrium (SPNE)**
- These strategy profiles for each player constitute a Nash equilibrium in every possible subgame!
- Simple connection: rollback equilibrium is always SPNE!

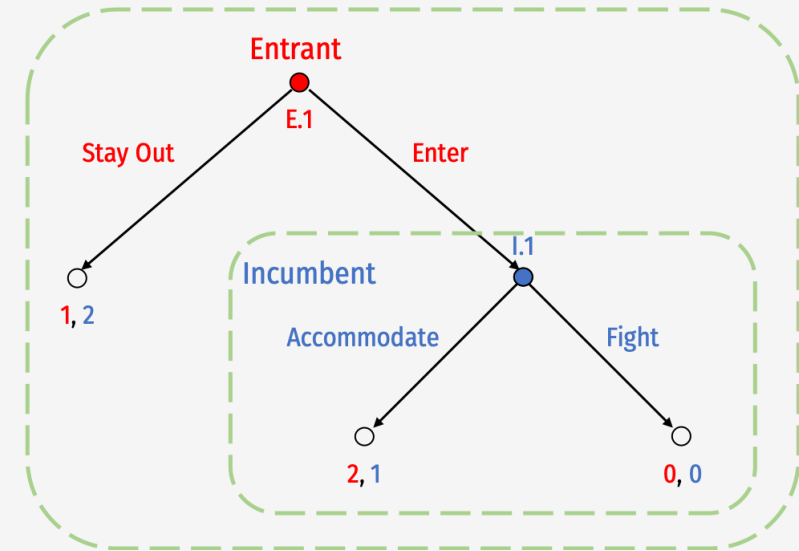


		Incumbent	
		Accommodate	Fight
Entrant	Enter	<u>2</u>	0
	Stay Out	1	<u>1</u>
		<u>2</u>	<u>2</u>

SPNE and Credibility



- Suppose before the game started, **Incumbent** announced to **Entrant** “if you **Enter**, I will **Fight**!”
- This **threat** is **not credible** because playing **Fight** in response to **Enter** is not rational!
- The strategy is not Subgame Perfect!



		Incumbent	
		Accommodate	Fight
Entrant	Enter	<u>2</u>	0
	Stay Out	1	<u>1</u>
		<u>2</u>	<u>2</u>



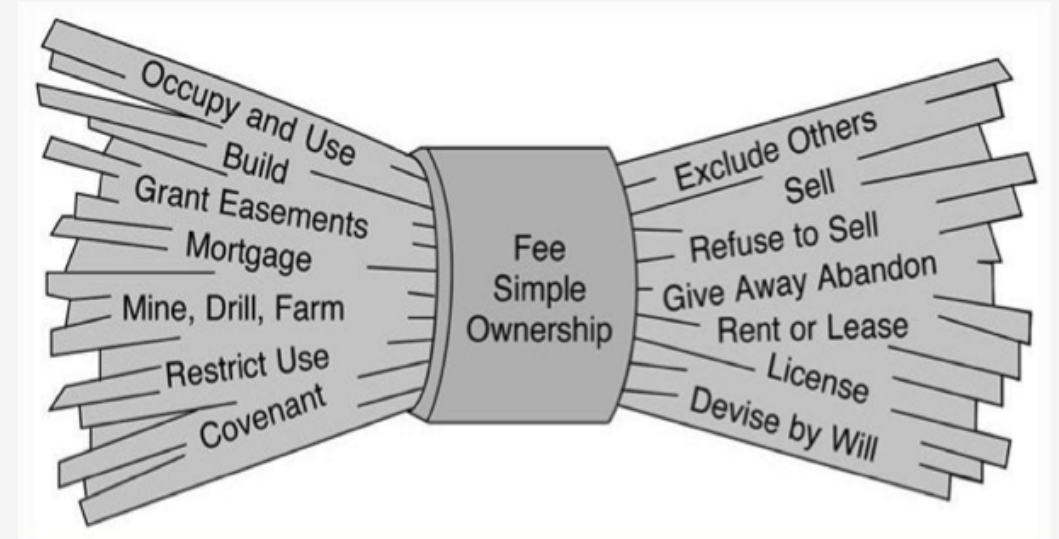
The Problem With Ideas

What Would an Efficient Property Law Look Like?



- Recall the 4 questions any property system must answer:

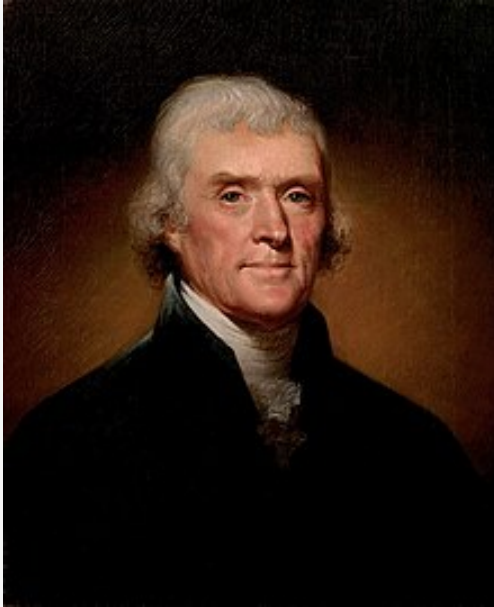
1. **What can be privately owned?**
2. What can (and can't) an owner do with her property?
3. How are property rights established?
4. What remedies are available when property rights are violated?



The Economic *Problem* with Ideas I



The Economic *Problem* with Ideas II



Thomas Jefferson

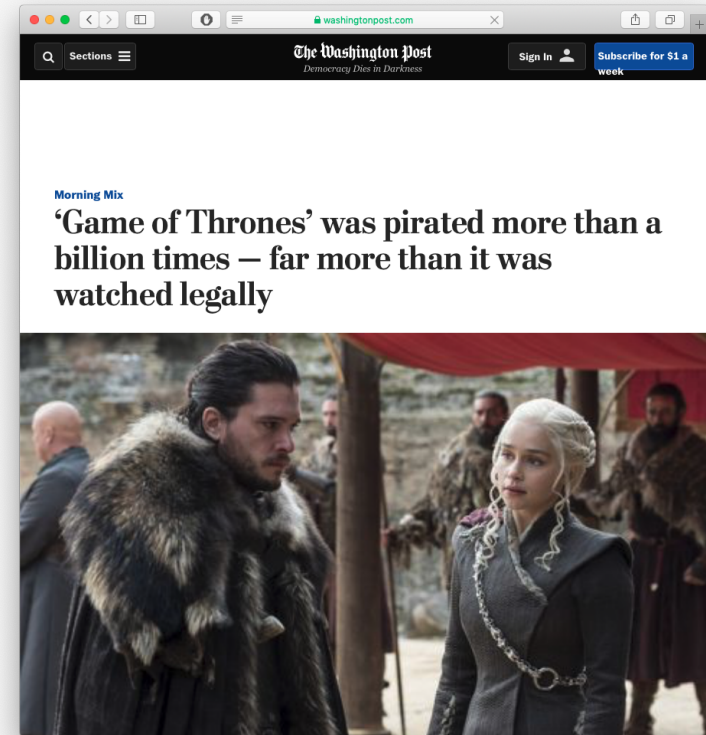
(1743-1826)

"He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation."

High Fixed Costs, Low Marginal Costs I



High Fixed Costs, Low Marginal Costs II



Source: [Washington Post \(Sept 8, 2017\)](#)

Positive Spillovers



William Nordhaus

(1941-)

Economics Nobel 2018

"We conclude that [about 2.2%] of the social returns from technological advances over the 1948-2001 period was captured by producers, indicating that most of the benefits of technological change are passed on to consumers rather than captured by producers," (p.1)

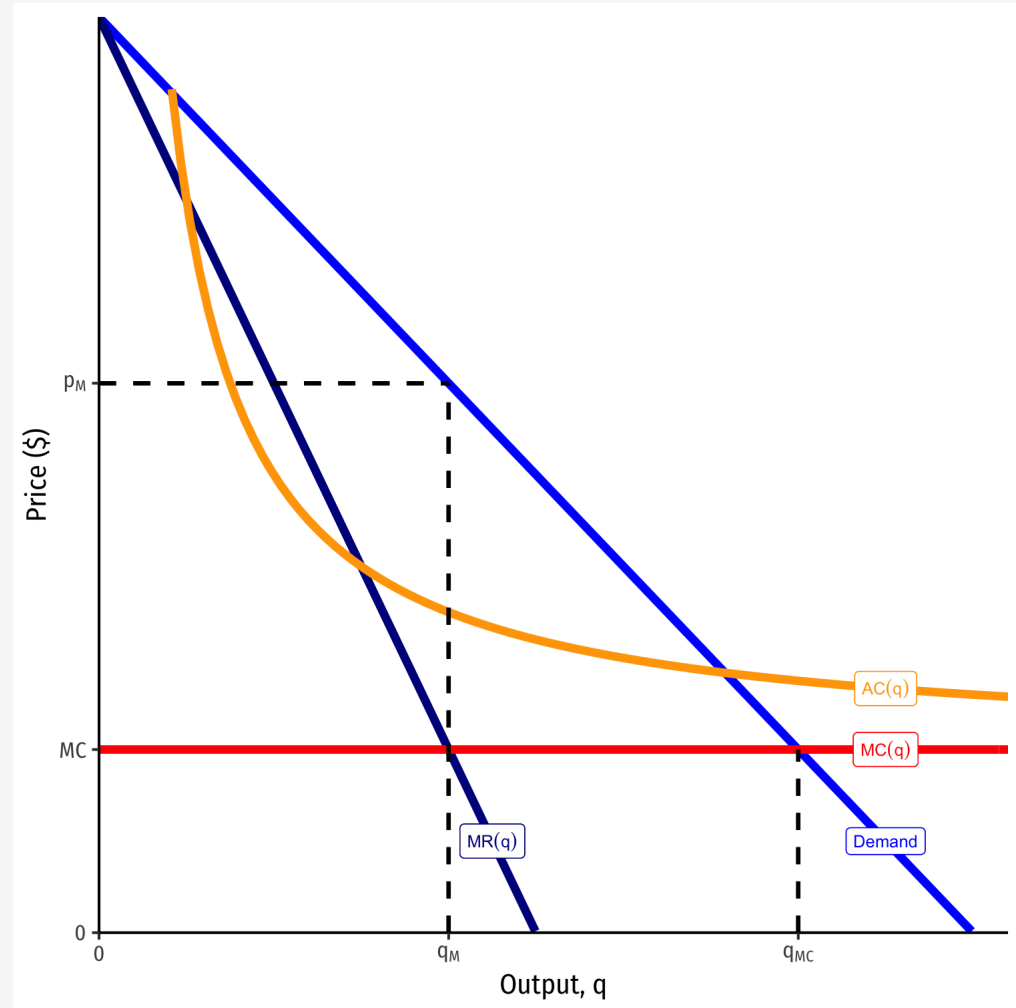
Nordhaus, William, 2004, "[Schumpeterian Profits in the American Economy: Theory and Measurement](#)," *NBER Working Paper* 10433

The Economic Problem With Information



- Information is very costly to generate, very easy to disseminate/imitate
- High fixed costs f , constant low/zero marginal costs c
 - Implies **economies of scale**, falling average costs

$$AC(q) = \frac{f}{q} + c$$



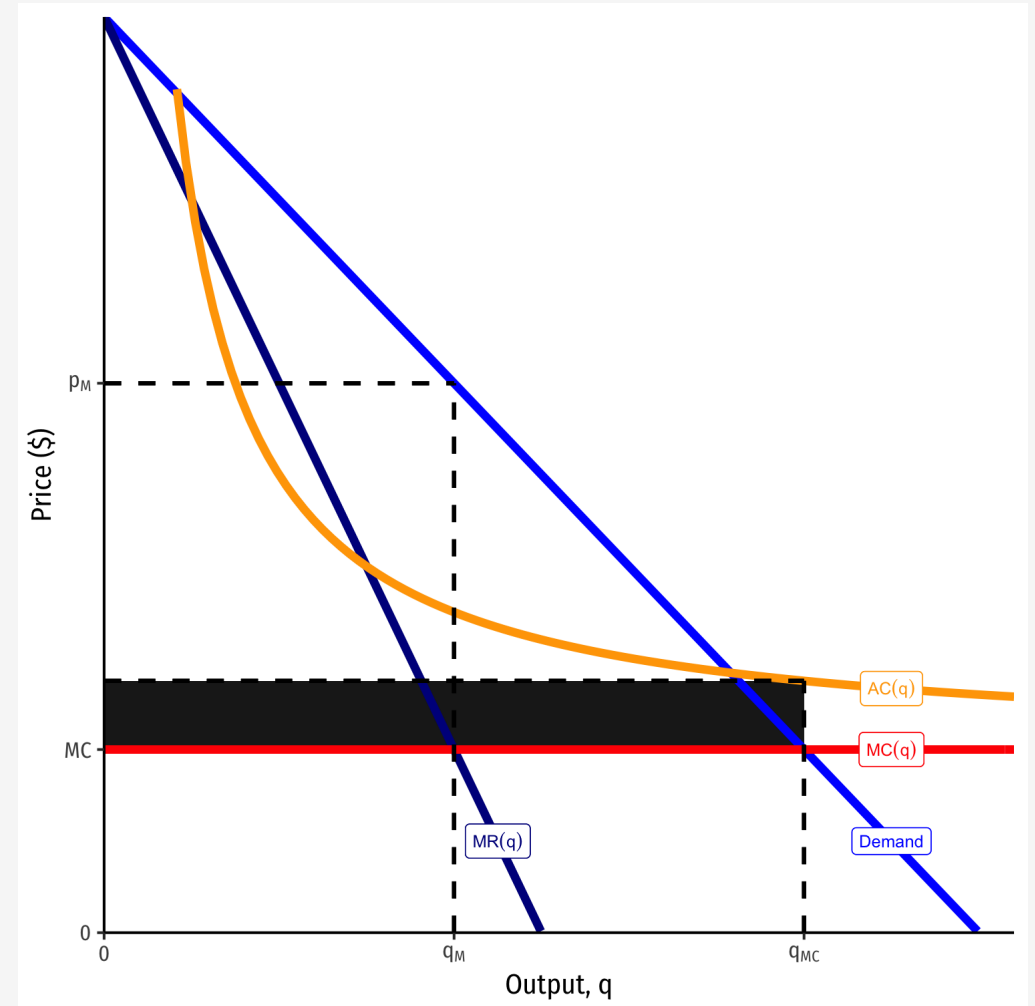
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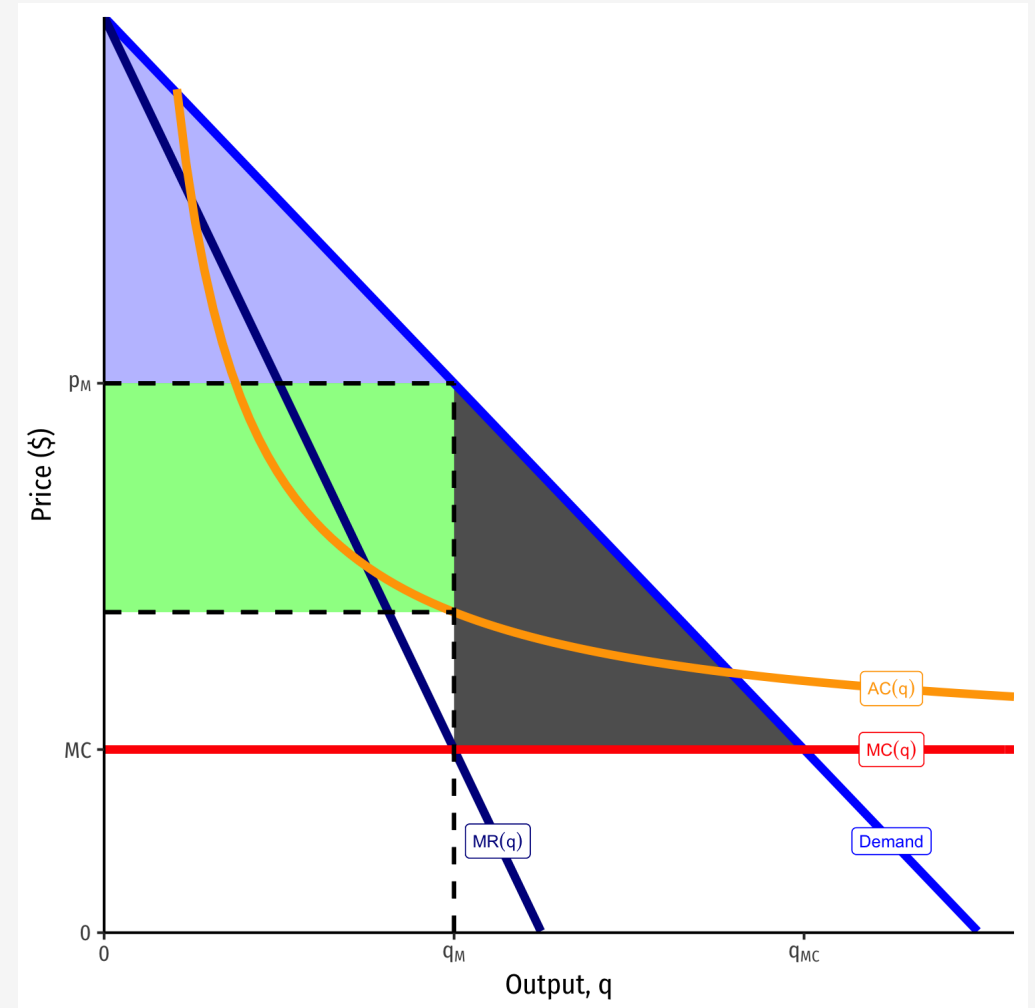
- $AC(q) > MC(q)$ always
 - Socially-efficient **marginal cost pricing is not profitable**
 - Producing q_c where $p = MC$, is below $AC(q)$



The Economic Problem With Information



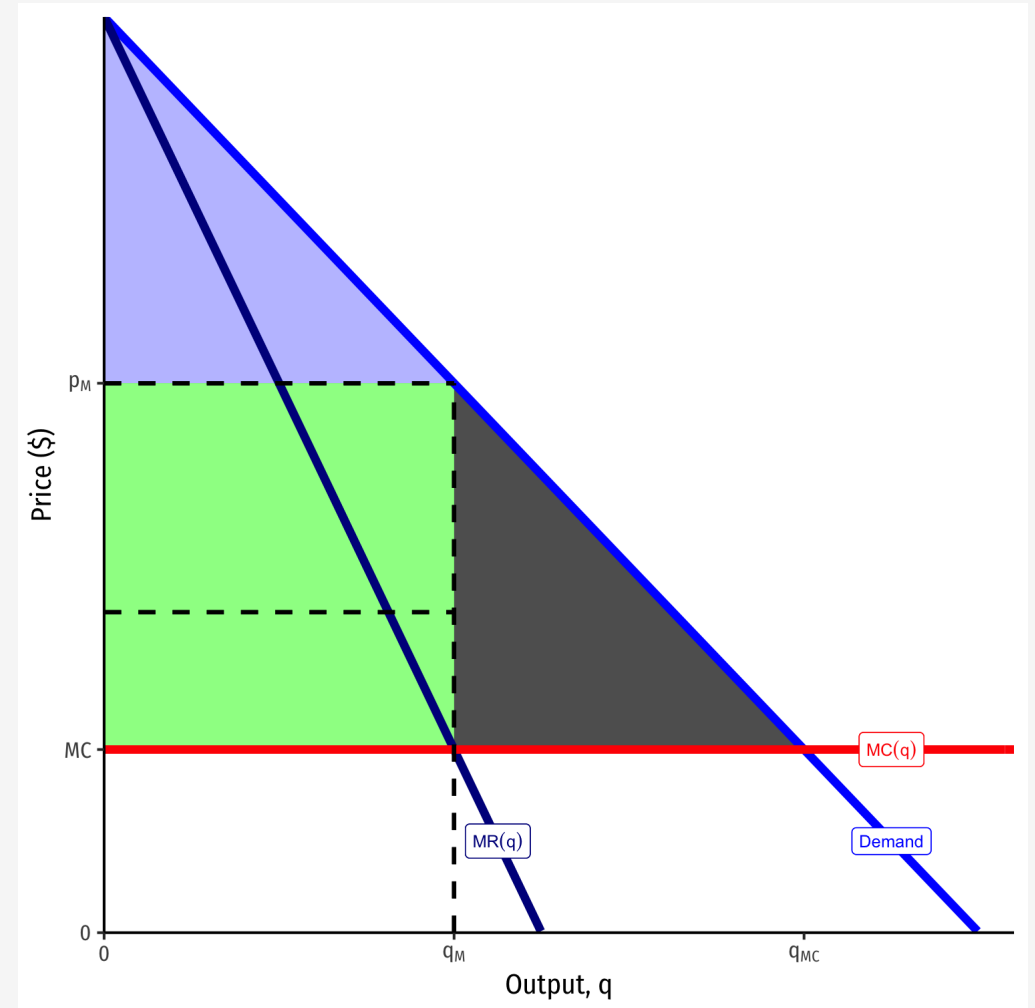
- If left to own devices, acts like a monopoly
- Creates inefficiency
 - Restrict output to q_M where $MR(q) = MC(q)$
 - Mark up price to consumers' max WTP at p_M
 - Small **consumer surplus**
 - Generates **DWL**



The Economic Problem With Information



- But now consider a **second firm**, with same $MC(q) = c$ but **no fixed costs f**
 - Doesn't have to invest in R&D, just copy the first firm!
- If by itself, could maximize profits at p_m
 - But so long as it can charge $p < AC(q)$ of the first firm, can capture the market and push the first firm out of business



A Game-Theoretic Example



Example: Suppose a company discovers a new drug.

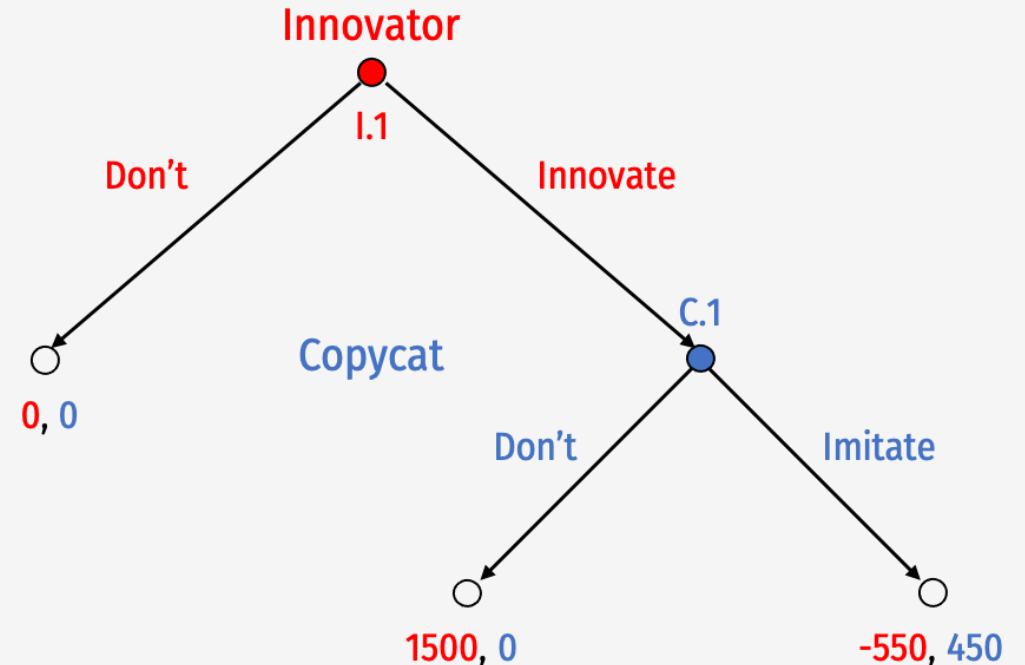
- Fixed costs of \$1,000 for R&D
- Monopoly profits of \$2,500
- Second firm can imitate for free, duopoly profits would be \$450 each

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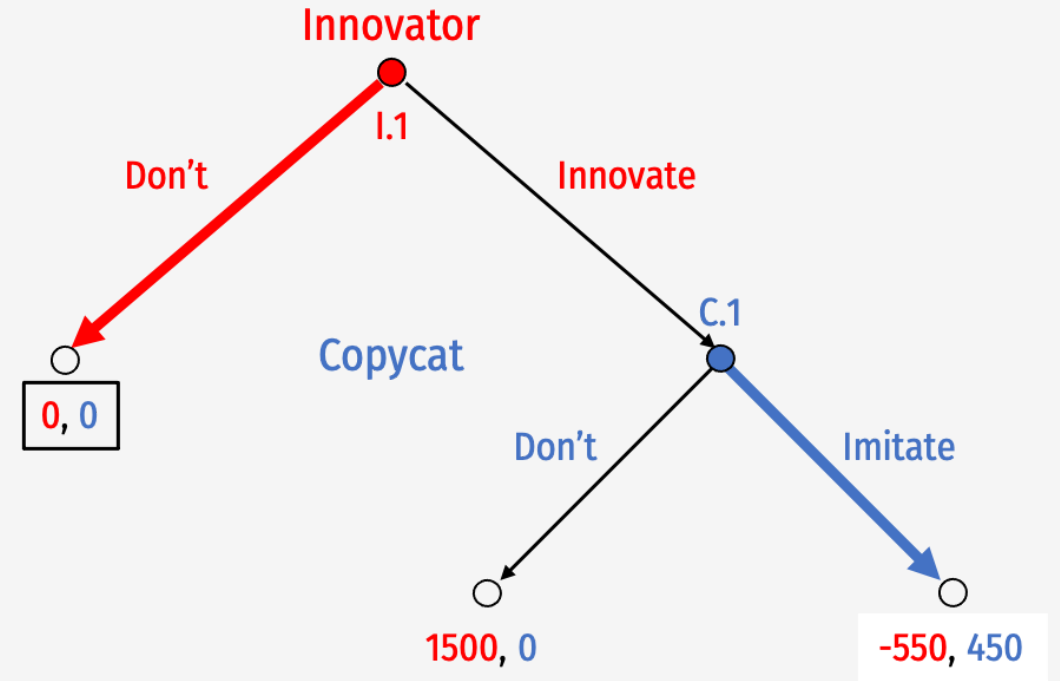


A Game-Theoretic Example



Example: Suppose a company discovers a new drug.

- **SPNE:** {**Don't**, **Imitate**}
 - Lose valuable innovation
- Note: **Copycat** could *promise* not to **Imitate**, but it would not be a **credible** promise!

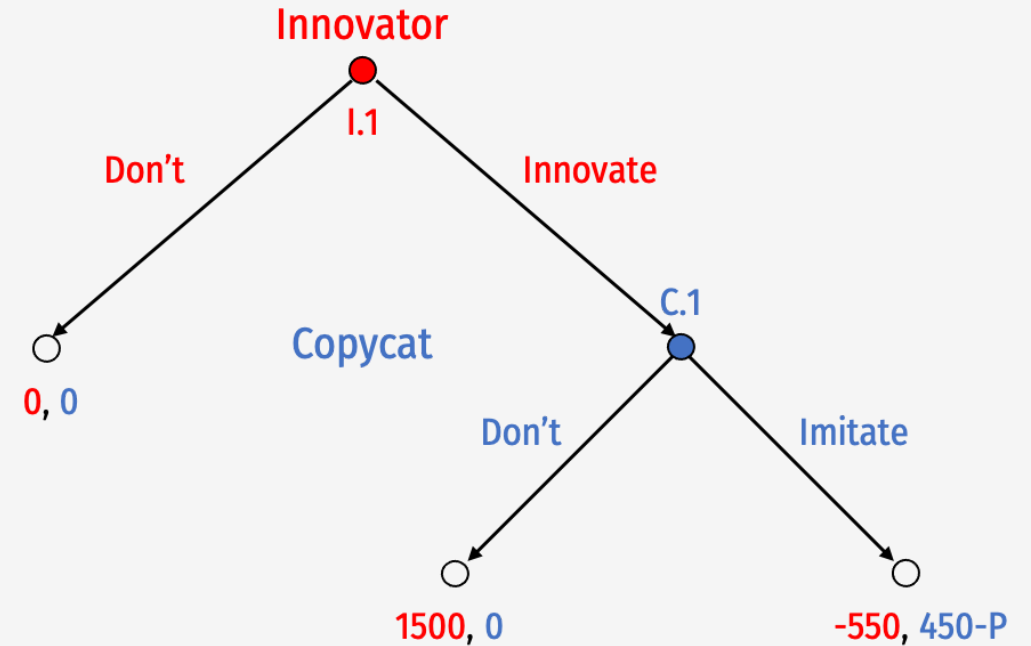


A Game-Theoretic Example



Example: Suppose a company discovers a new drug.

- Suppose instead, **Innovator** can obtain a **patent** and sue **Copycat** (whether for damages or injunction) for **infringement**
 - **Copycat** would suffer some penalty P

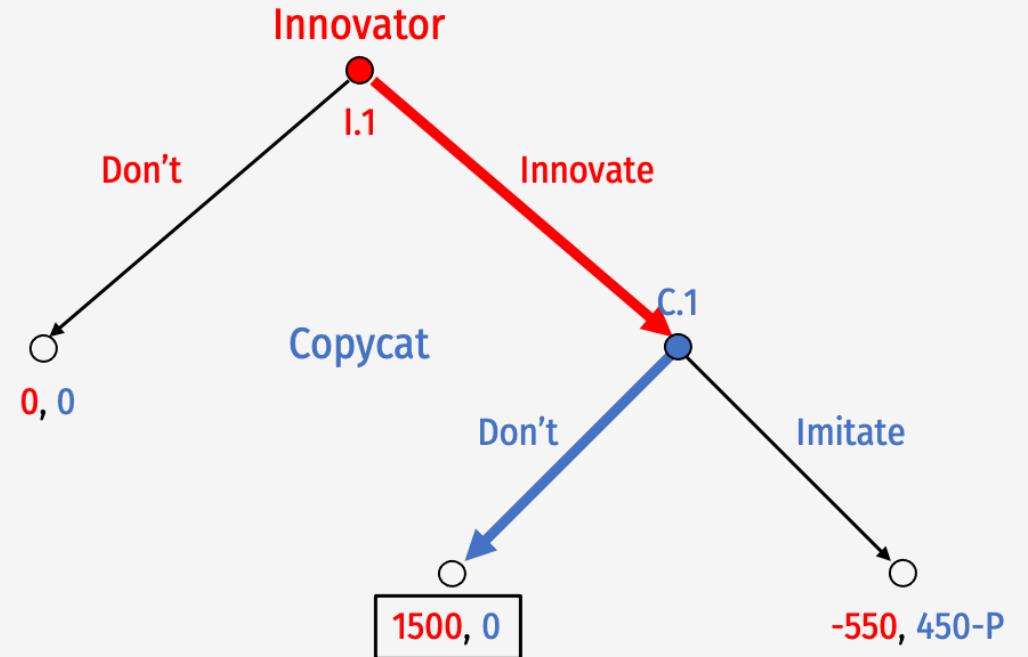


A Game-Theoretic Example



Example: Suppose a company discovers a new drug.

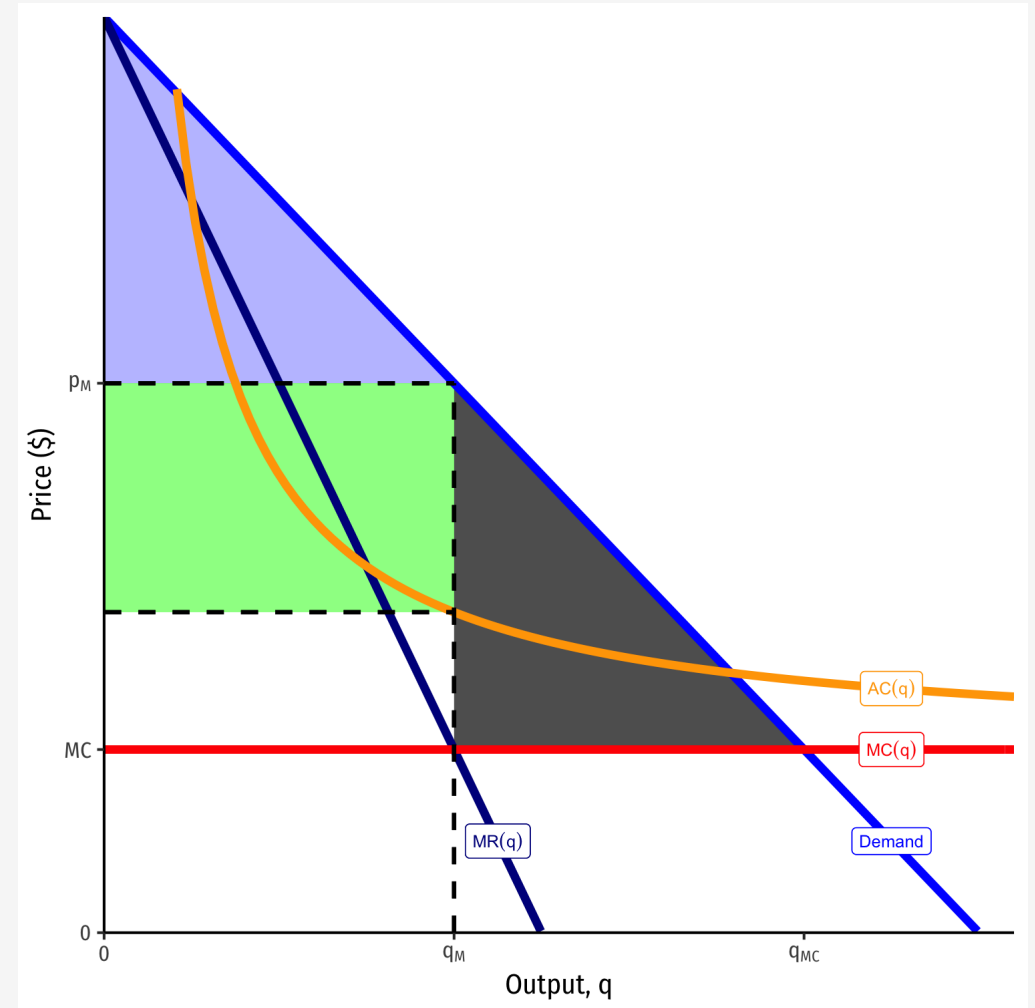
- Suppose instead, **Innovator** can obtain a **patent** and sue **Copycat** (whether for damages or injunction) for **infringement**
 - **Copycat** would suffer some penalty P
- If $P > 450$, **Copycat** chooses **Don't**



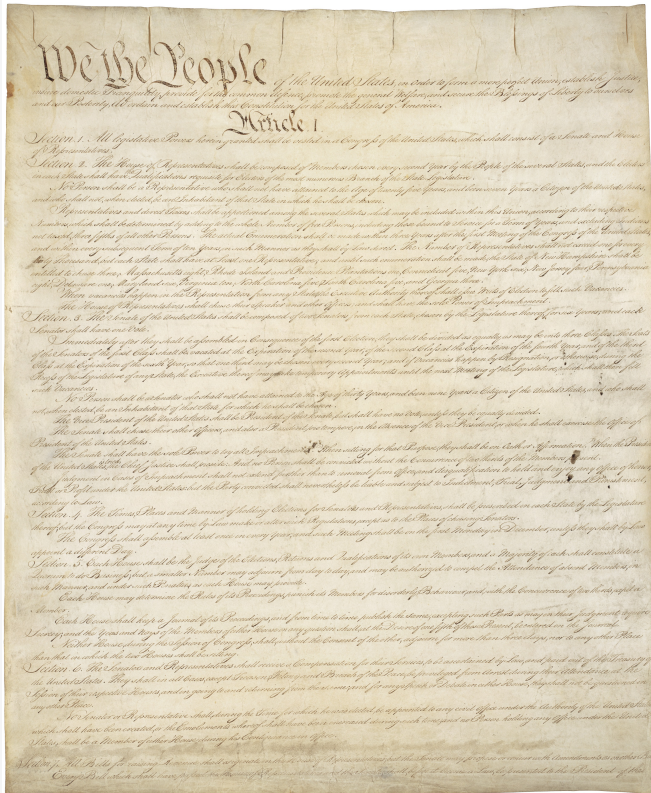
The Economic Problem With Information



- But now we're back to the outcome where the **Innovator** becomes a **monopoly!**
- We're trading off one inefficiency for another
 - Without patents: no innovation
 - With patents: monopoly



The Purpose of Intellectual Property



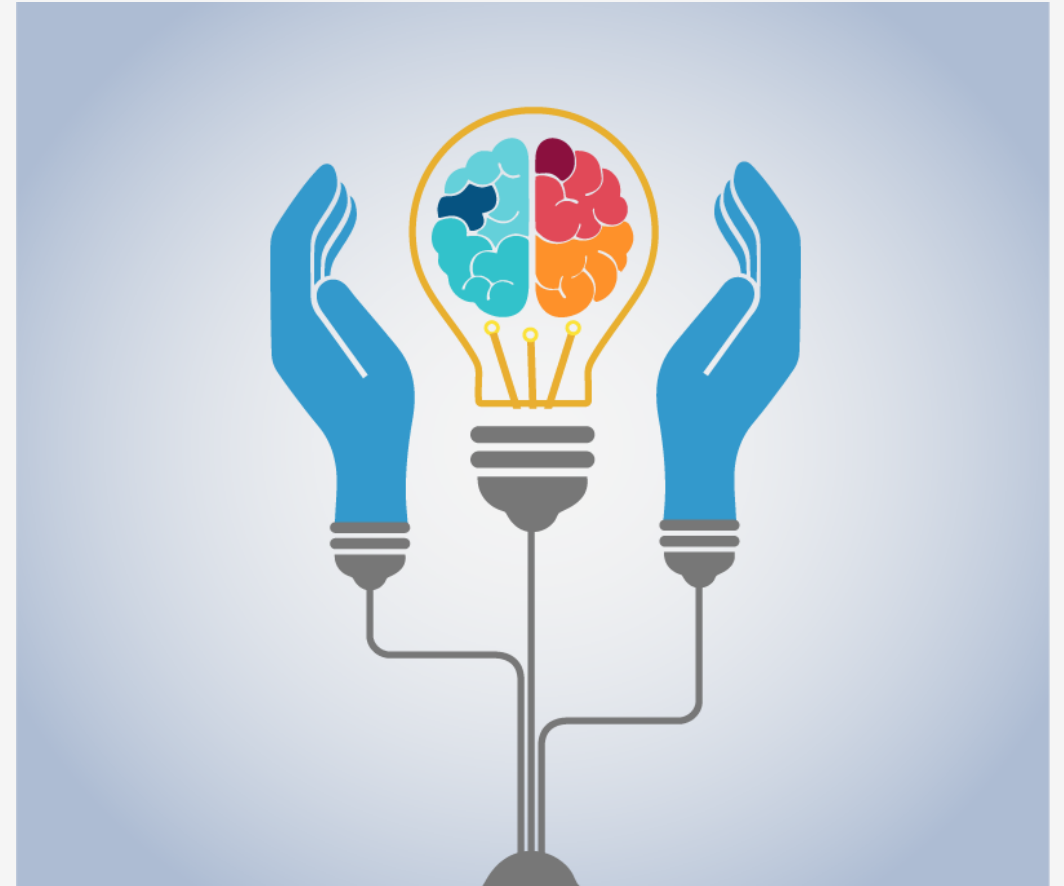
“The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

United States Constitution, Article I, § 8, Clause 8

Intellectual Property



- **Intellectual property (IP)**: ways that individual/s (or firm) can claim ownership of **information**
- **Patents** over products, commercial processes
- **Copyrights** over expressions
- **Trademarks** over brand names, logos
- **Trade secrets**





Patents

Patents



- **Patent** grants the holder the **exclusive rights** to prevent others from producing and selling a product for a limited time

Patents: Rights



- **Patent** grants the holder

“the right to exclude others from making, using, offering for sale, or selling the invention throughout the U.S. or importing the invention into the U.S”

- Lasts only for a limited time
 - 20 years from date of application
 - Optional 20 year renewal

Patents: Acquisition



- Apply to government **Patent and Trademark Office (PTO)**
- For application to be approved, invention must be:
 1. **Novel**
 2. **Non-obvious**
 3. Have **practical utility**

[35 U.S.C. § 101-103](#)



Patents and the Public Domain



- Patent requires detailed instructions and figures for how to produce the product
- Upon expiration, invention enters the **public domain**, where all at liberty to use
- Cannot patent “laws of nature, natural phenomena, and abstract ideas”

US008992082B2

(12) **United States Patent**
Zhang et al.

(10) **Patent No.:** US 8,992,082 B2
(45) **Date of Patent:** Mar. 31, 2015

(54) **G-ARM X-RAY IMAGING APPARATUS**

(71) Applicants: **Jun Zhang**, Needham, MA (US); **Liu Cao**, Needham, MA (US); **Shiyu Wei**, Needham, MA (US)

(72) Inventors: **Jun Zhang**, Needham, MA (US); **Liu Cao**, Needham, MA (US); **Shiyu Wei**, Needham, MA (US)

(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 52 days.

(21) Appl. No.: 13953,776

(22) Filed: Jul. 30, 2013

(65) **Prior Publication Data**
US 2015/0036799 A1 Feb. 5, 2015

(51) **Int. Cl.**
H05G 1/02 (2006.01)
A61B 6/00 (2006.01)

(52) **U.S. Cl.**
CPC *A61B 6/4429* (2013.01)
USPC 378/197

(58) **Field of Classification Search**
CPC H05G 1/02; A61B 6/4441; A61B 6/4405; A61B 6/4429
USPC 378/193-198
See application file for complete search history.

(56) **References Cited**
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Primary Examiner — Courtney Thomas
(74) *Attorney, Agent, or Firm* — David J. Connaughton, Jr.; Gary E. Lambert; Lambert & Associates

(57) **ABSTRACT**
An X-ray imaging apparatus is provided having advantages of both C-shaped, G-shaped, and ring-shaped arm configurations. The device consists of a gantry that supports X-ray imaging machinery. The gantry is formed to allow two bi-planar X-rays to be taken simultaneously or without movement of the equipment and/or patient. The gantry is adjustable to change angles of the X-ray imaging machinery. Further, in some embodiments, the X-ray receptor portion of the X-ray imaging machinery may be positioned on retractable and extendable arms, allowing the apparatus to have a larger access opening when not in operation, but to still provide bi-planar X-ray ability when in operation.

20 Claims, 8 Drawing Sheets

Patents



- Patents are property rights
 - Can be sold or gifted to others
 - Can be **licensed** to others (others can produce/sell/use product in exchange for a **royalty** fee)
 - Holder can choose *not* to exercise rights
- Use/sale of product without consent of patent-holder constitutes **infringement**
 - Patent-holder can sue for **damages** & **injunction** against future use



History of Patents



- “Letters Patent” by English Crown (esp. 17th C.–18th C.)
- 1623 Statute of Monopolies
- Patent Act of 1790 (U.S.)



Issues With Patents: The PTO



- Patents are managed by government bureaucrats
 - Underpaid, overworked
 - Lot of bad patents getting through



Issues With Patents: The PTO



US006004596A

United States Patent [19] **Patent Number:** **6,004,596**
Kretchman et al. [45] **Date of Patent:** **Dec. 21, 1999**

[54] **SEALED CRUSTLESS SANDWICH** 5,853,778 12/1998 Mayfield 426/89

[75] Inventors: **Len C. Kretchman**, Fergus Falls, Minn.; **David Geske**, Fargo, N. Dak.

[73] Assignee: **Menusaver, Inc.**, Orrville, Ohio

[21] Appl. No.: **08/986,581**

[22] Filed: **Dec. 8, 1997**

[51] Int. Cl.⁶ **A21D 13/00**

[52] U.S. Cl. **426/94; 426/274; 426/275; 426/297**

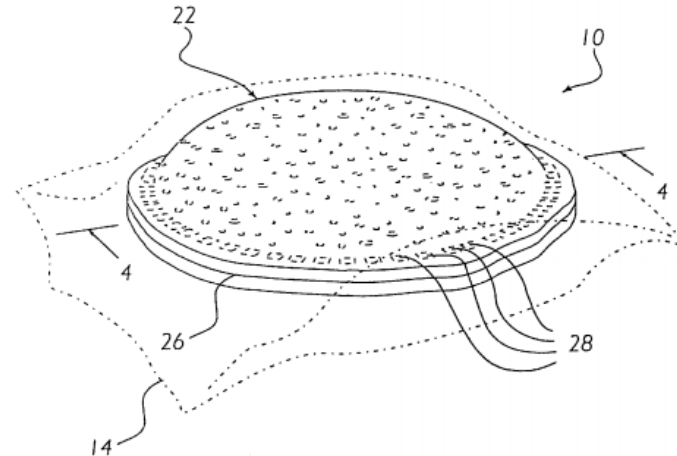
[58] Field of Search **426/94, 274, 275, 426/297, 138**

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 3,862,344 1/1975 Zobel 426/244
 4,382,768 5/1983 Lifshitz et al. 426/275

10 Claims, 4 Drawing Sheets



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"50 Great Sandwiches", Carole Handslip, pp. 81-84, 86, 95, 1994.

Primary Examiner—Lien Tran
Attorney, Agent, or Firm—Vickers, Daniels & Young

[57] **ABSTRACT**

A sealed crustless sandwich for providing a convenient sandwich without an outer crust which can be stored for long periods of time without a central filling from leaking outwardly. The sandwich includes a lower bread portion, an upper bread portion, an upper filling and a lower filling between the lower and upper bread portions, a center filling sealed between the upper and lower fillings, and a crimped edge along an outer perimeter of the bread portions for sealing the fillings therebetween. The upper and lower fillings are preferably comprised of peanut butter and the center filling is comprised of at least jelly. The center filling is prevented from radiating outwardly into and through the bread portions from the surrounding peanut butter.



US005443036A

United States Patent [19] [11] **Patent Number:** **5,443,036**
Amiss et al. [45] **Date of Patent:** **Aug. 22, 1995**

[54] **METHOD OF EXERCISING A CAT** 5,194,007 3/1993 Marshall et al. .

[76] Inventors: **Kevin T. Amiss**, 255 S. Fickett St., #301, Alexandria, Va. 22304; **Martin H. Abbott**, 10549 Assembly Dr., Fairfax, Va. 22030

[21] Appl. No.: **144,473**

[22] Filed: **Nov. 2, 1993**

[51] Int. Cl.⁴ **A01K 29/00**

[52] U.S. Cl. **119/707**

[58] Field of Search **119/702, 707, 174, 905; 446/485**

[56] **References Cited**

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3,877,171 4/1975 Sloop et al. 446/485
 4,208,701 6/1980 Schock
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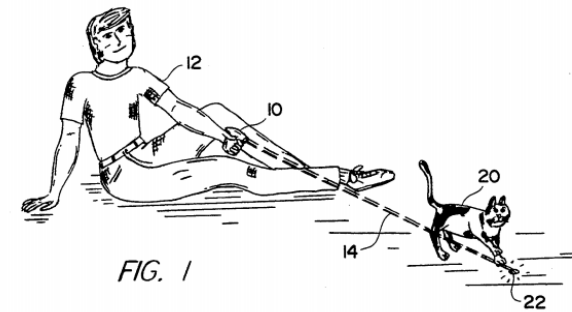
Carayan et al., "Effects of tianeptine on the Performance of a reaching movement in a cat", *Psychopharmacology*, vol. 104, Issue 3, Berlin, 1991, pp. 328-336.
 Levesque et al., "Visual 'cortical-recipient' and tectal-recipient pontine zones play distinct roles in cat visuomotor performance", *Behavioral Brain Research*, vol. 39, Netherlands, 1990, pp. 157-166.

Primary Examiner—Todd E. Manahan

[57] **ABSTRACT**

A method for inducing cats to exercise consists of directing a beam of invisible light produced by a hand-held laser apparatus onto the floor or wall or other opaque surface in the vicinity of the cat, then moving the laser so as to cause the bright pattern of light to move in an irregular way fascinating to cats, and to any other animal with a chase instinct.

4 Claims, 1 Drawing Sheet



Issues With Patents: Breadth



Example: Consider two similar, but distinct inventions



Issues With Patents: Breadth



Example: Consider two similar, but distinct inventions



- If patent breadth is **narrow**, each be able to patent our own invention, regardless of who invented first
 - Focus on quality, price, better product vs competition

Issues With Patents: Breadth



Example: Consider two similar, but distinct inventions

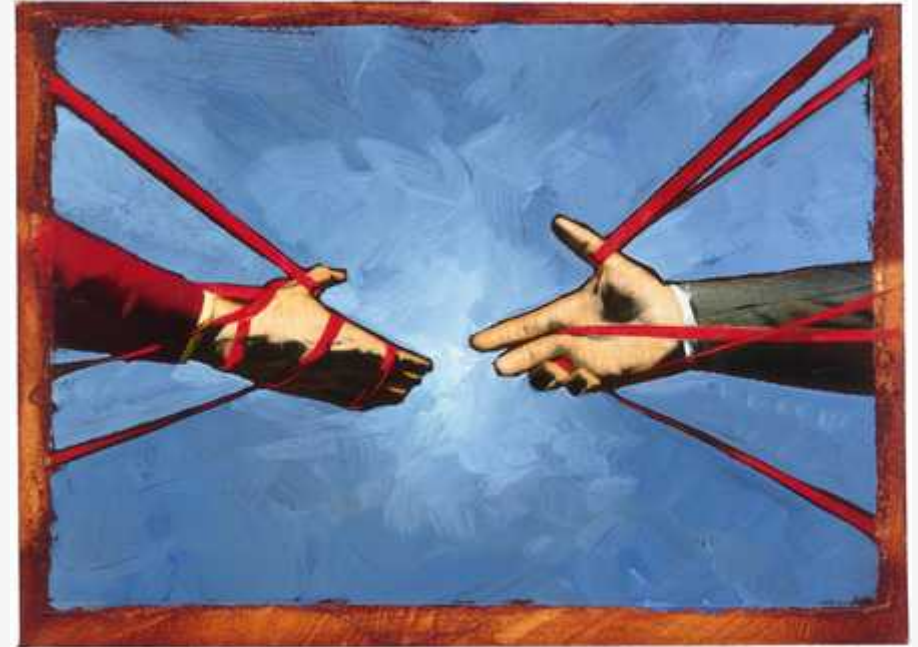


- If patent breadth is **narrow**, each be able to patent our own invention, regardless of who invented first
 - Focus on quality, price, better product vs competition
- If patent breadth is **narrow**, first filer will be able to block the second producer

Issues With Patents: Litigation and “Weak Patents”



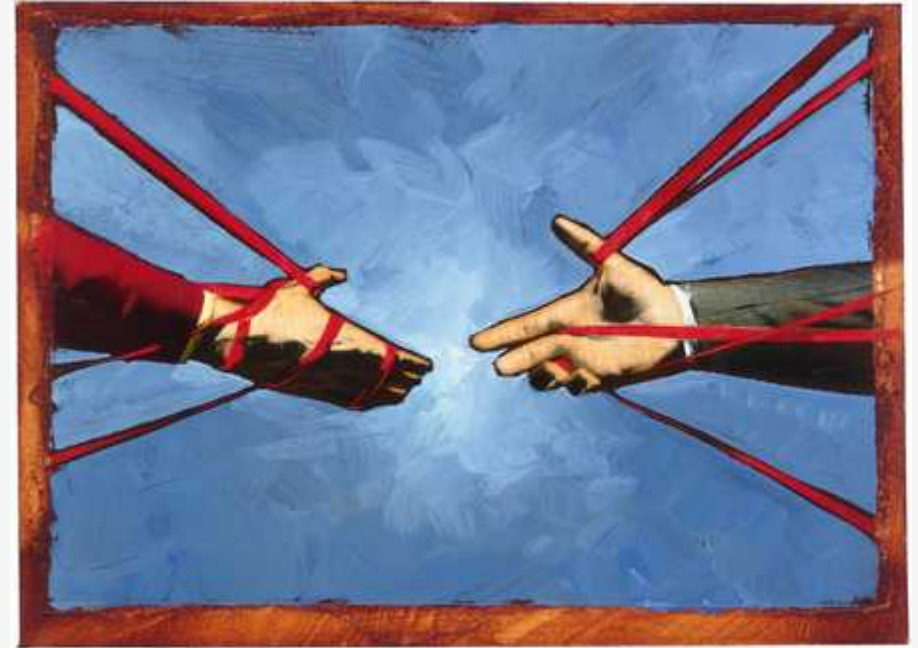
- Individuals have been allowed to patent a wide variety of things, often extremely broad and vague
- “Weak” patents: many of these would not hold up in court
 - But requires **going to court** to determine; the average patent lawsuit costs \$2-5 million



Issues With Patents: Litigation and “Weak Patents”



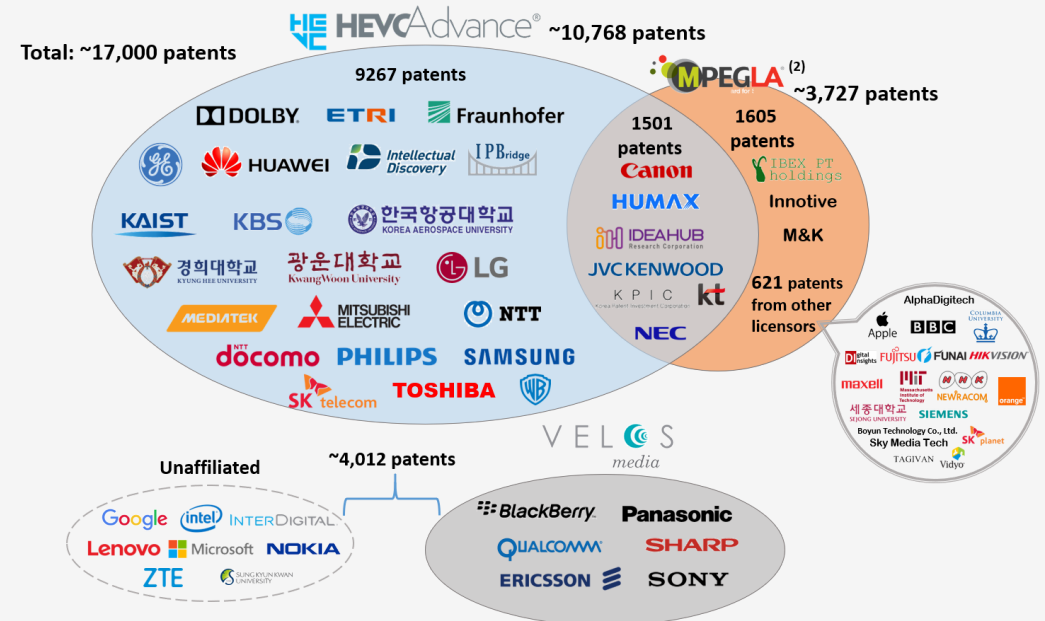
- Makes Coasian bargaining too difficult
- Unclear who owns property rights (what is the valid breadth of a vague patent?)
- Raises transaction costs of production
 - Some products, especially in tech sector, touch upon hundreds of patents!



Industry Response: Patent Pools



- **Patent pools:** multiple firms with their own patents reach an agreement to **cross-license** their patents
 - Effectively all firms in the pool can use all the accumulated patents for a fee
- Reduces transaction costs...if you're *in* the patent pool
 - Market power, oligopoly



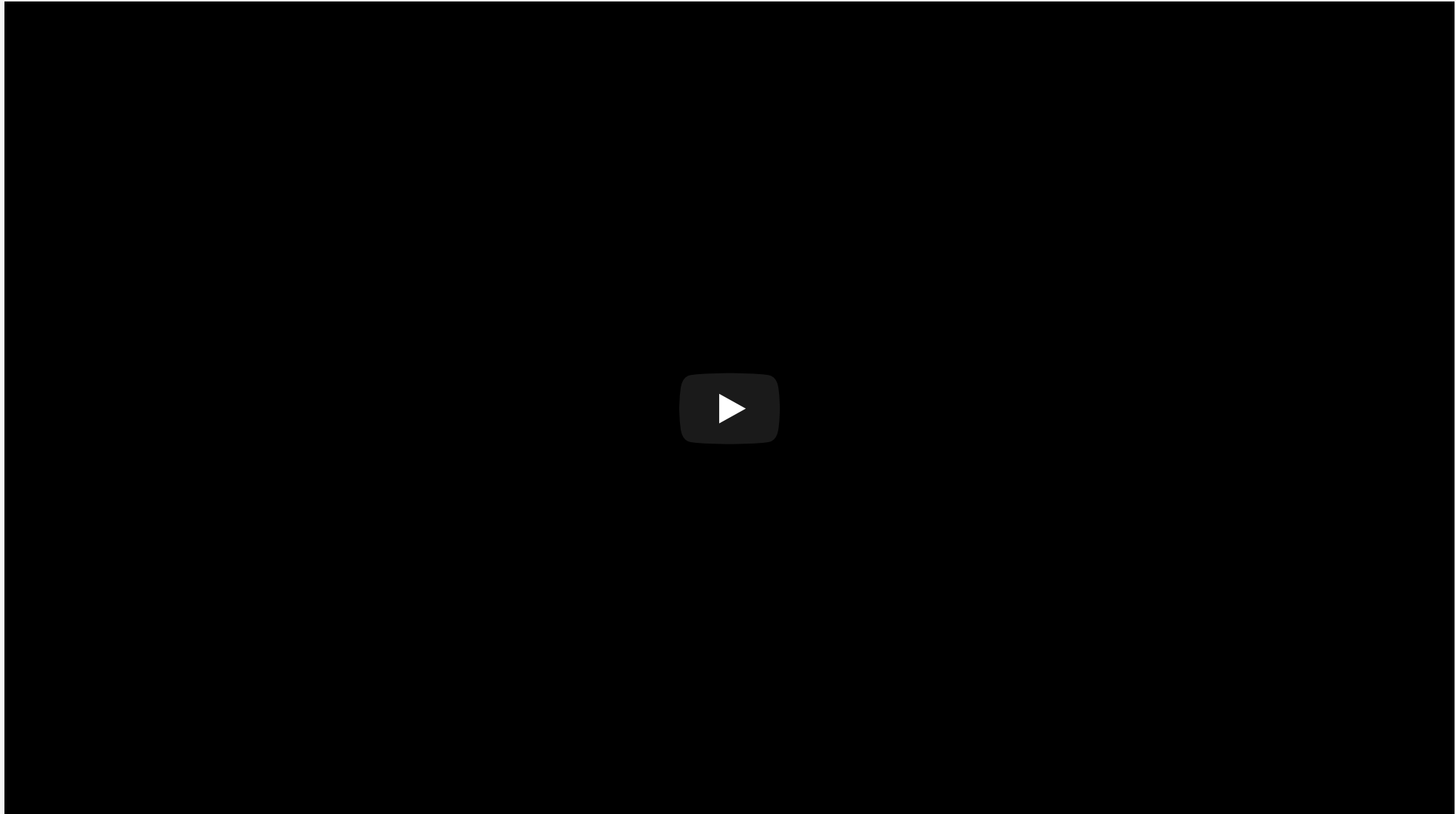
Issues With Patents: Submarine Patents & Patent Trolls



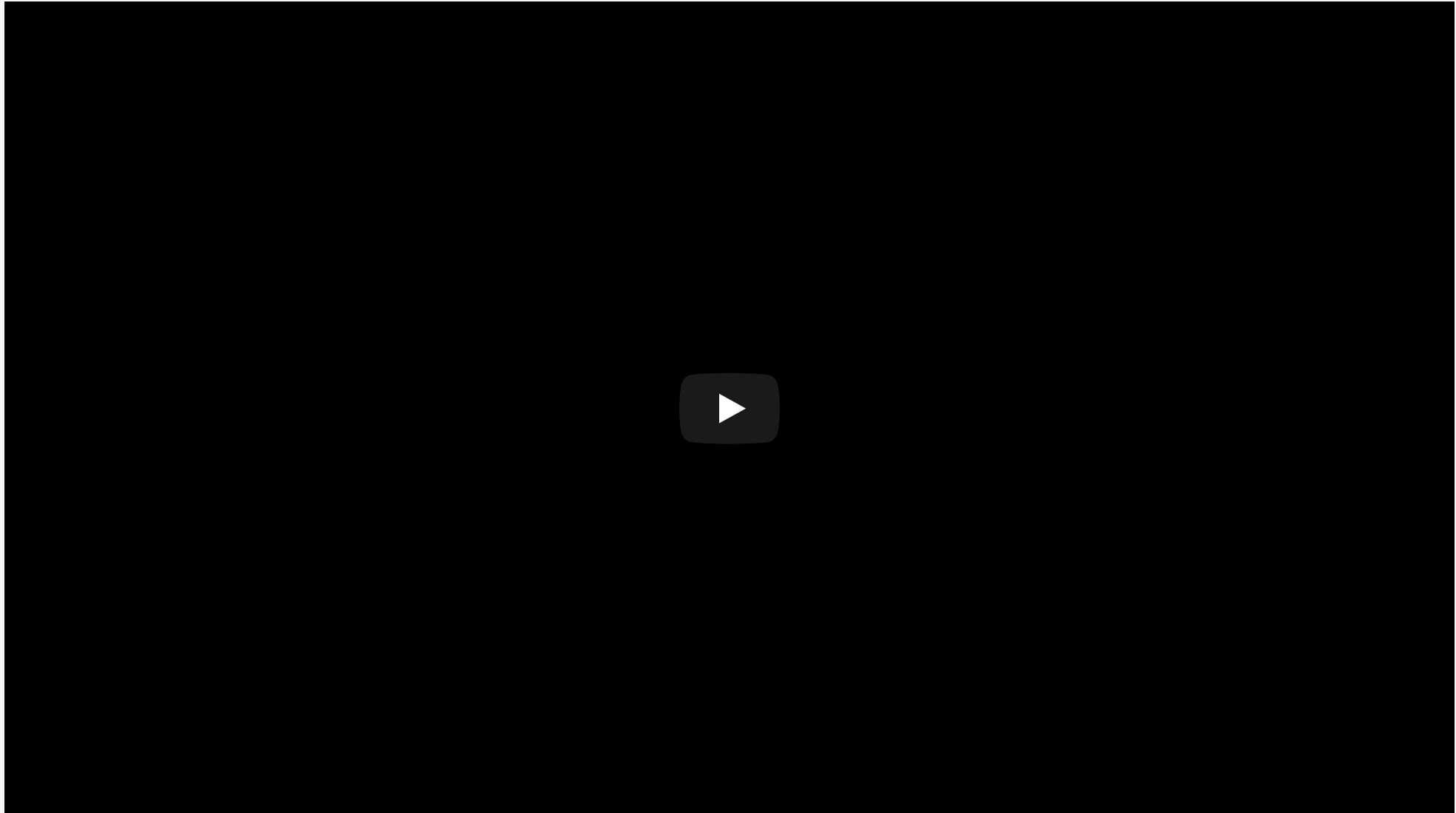
- **Submarine patent**: individual takes out a patent on something extremely broad, doesn't enforce it for many years ("stays under the surface"), until a producer comes along (thinking the idea is not patented)
- **Non-practicing entity (NPE)** aka **Patent troll**: buys up patents not with intention to produce anything, but only to sue individuals and firms for infringement



Issues With Patents: Submarine Patents & Patent Trolls



Issues With Patents: Submarine Patents & Patent Trolls



Tragedy of the Anticommons



- **Tragedy of the anti-commons:** too many holders of right to exclude others, blocks productive action
 - Symmetric to tragedy of the commons (not enough holders of right to exclude others)!



This Is Extra Problematic Now




techdirt

TECHDIRT GREENHOUSE TECH & COVID FREE SPEECH DEALS JOBS SUPPORT TECHDIRT

PODCAST Techdirt - How The Techlash Happened SOUNDCLLOUD

<< Will Wall Street Get In The Way Of Jack Dorsey's Lofty Pl... Clearview Was A Toy For Billionaires Before It Became A ... >>

SoftBank Owned Patent Troll, Using Monkey Selfie Law Firm, Sues To Block Covid-19 Testing, Using Theranos Patents

 from the *and-that's-not-even-all-the-insane-parts dept*
Mon, Mar 16th 2020 3:19pm – [Mike Masnick](#)

Honestly, I wasn't sure how to begin this story or how to fit all the insanity into the title. It's a story involving patents, patent trolling, Covid-19, Theranos, and even the company that brought us all WeWork: SoftBank. Oh, and also Irell & Manella, the same law firm that once claimed it could **represent a monkey** in a copyright infringement dispute. You see, Irell & Manella has now **filed one of the most utterly bullshit patent infringement lawsuits you'll ever see**. They are representing "Labrador Diagnostics LLC" a patent troll which does not seem to exist other than to file this lawsuit, and which claims to hold the rights to two patents (US Patents **8,283,155** and **10,533,994**) which, you'll note, were originally granted to Elizabeth Holmes and Theranos -- the firm that shut down in scandal over medical testing equipment that appears to have been oversold and never actually worked. Holmes is **still** facing federal charges of wire fraud over the whole Theranos debacle.

However, back in 2018, the remains of Theranos **sold its patents to Fortress Investment Group**. Fortress Investment Group is a SoftBank-funded massive patent troll. You may remember the name from the time last fall when **Apple and Intel sued the firm**, laying out how Fortress is a sort of uber-patent troll, gathering up a bunch of patents and then shaking down basically everyone. Lovely, right?

So, this SoftBank-owned patent troll, Fortress, bought up Theranos patents, and then set up this shell company, "Labrador Diagnostics," which decided that right in the midst of the Covid-19 pandemic it was going to sue one of the companies making Covid-19 tests, saying that its test violates those Theranos patents, and **literally demanding that the court bar the firm from making those Covid-19 tests**.

Source: [Techdirt \(March 16, 2020\)](#)

Patent Challenges in a Nutshell





Copyright

Copyright



- **Copyright** grants the holder the **exclusive rights** to prevent others from publishing and selling a particular expressive work for a limited time



Copyright: Rights



- **Copyright** grants the holder

“the exclusive rights to reproduce the [work]...to prepare derivative works...to distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending,...to perform,...to display publicly”

17 U.S.C. § 106



Copyright: Acquisition



- Since the Copyright Act of 1976, copyright is **automatic**

“in original works of authorship fixed in any tangible medium of expression, now known or later developed”

- Applies to “literary works, musical works, dramatic works, choreographs, pictorial, graphic, and sculptural works, motion pictures, sound recordings, and architecture”



Copyright: Duration



- Copyright lasts for

“a term consisting of the life of the author and 70 years after the author’s death.”

- Afterwards, works enter the **public domain** where all are at liberty to use

17 U.S.C. § 302



Copyrights



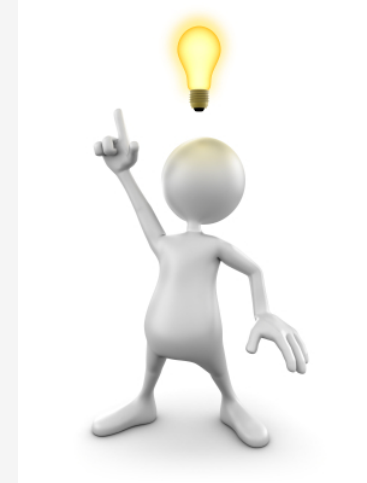
- Copyrights are property rights
 - Can be sold or gifted to others
 - Can be **licensed** to others (others can produce/sell/use product in exchange for a **royalty** fee)
 - Holder can choose *not* to exercise rights
- Use/sale of product without consent of copyright-holder constitutes **infringement**
 - Copyright-holder can sue for **damages** & **injunction** against future use



Copyright vs. Patents



- **Idea-expression dichotomy**: copyright scope is limited to the particular **expressions**, not to the **ideas** themselves
 - patents cover *ideas per se*
 - *Baker v Selden* (1879) – can you copyright an accounting system? (no, just a book explaining it)
- e.g. for an adventure novel/movie
 - Can copyright characters, text, scenes, artwork, film, etc.
 - Can't copyright the general *idea* of the plot (“boy meets girl” or “the hero's journey”)



Copyrights and Fair Use



- One legal defense against infringement (unique to copyright): **“fair use”**

“for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”

17 U.S.C. § 107

Ⓕair **Ⓕ**se

Copyrights: History



- Stationers' Company since 1557 — London publishers guild & censorship
 - monopoly over all publishing
 - created their own private “copy right”
- English Civil Wars (1630s—1660s)
 - Censorship, abuses by Crown & Parliament
 - Spurred origins of freedom of speech, freedom of press, habeas corpus
- 1710 Statute of Anne creates statutory copyright
 - 1774 *Donaldson v. Beckett*, replaced Stationers' “copy right”



The Stationers' Company

Copyright: History



- Copyright Act of 1790 creates federal copyright in U.S.
 - Covers “books, maps, and charts”
 - 14 year terms, with optional 14 year renewal
 - authors must both register & declare on their works if they want copyright protection
- Almost verbatim 1710 Statute of Anne



Copyright: History



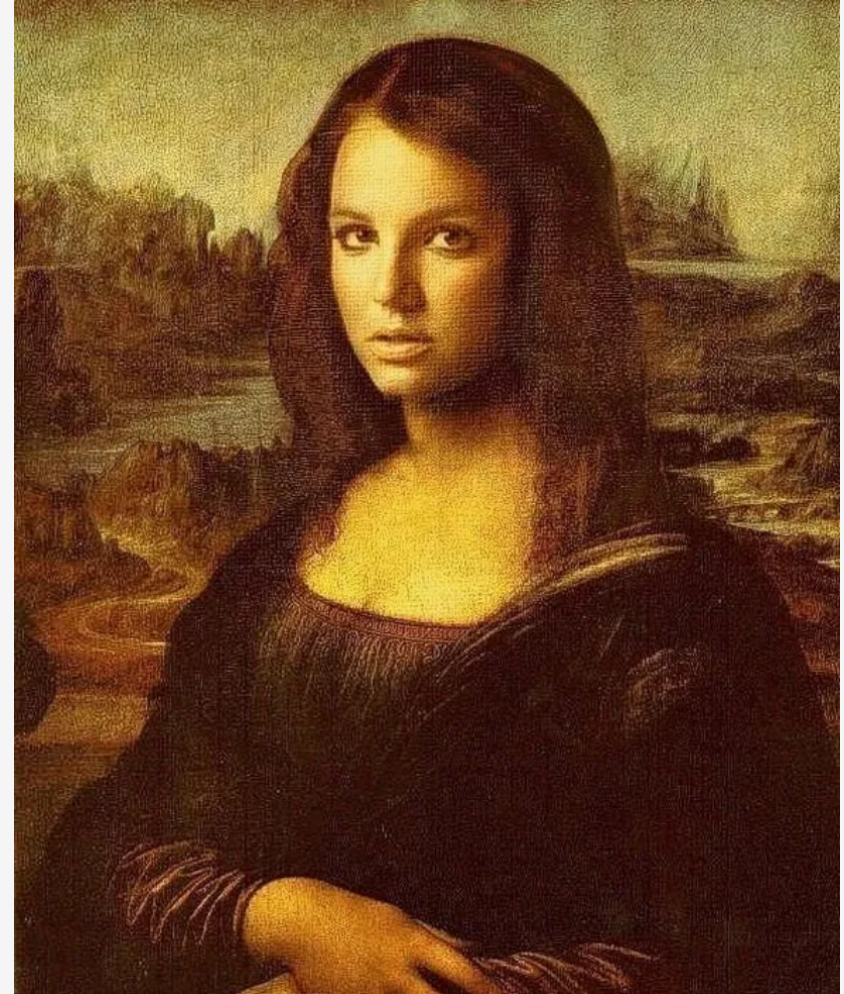
- 1790—1891 U.S. did not recognize copyrights to foreign authors
- U.S. publishing industry largely pirated famous British authors
 - Set up “courtesy of the trade” system of voluntary norms to avoid tragedy of commons
 - Created pseudo-property rights in foreign authors works
 - Ended up paying authors despite no obligation to, nor any legal protection earned



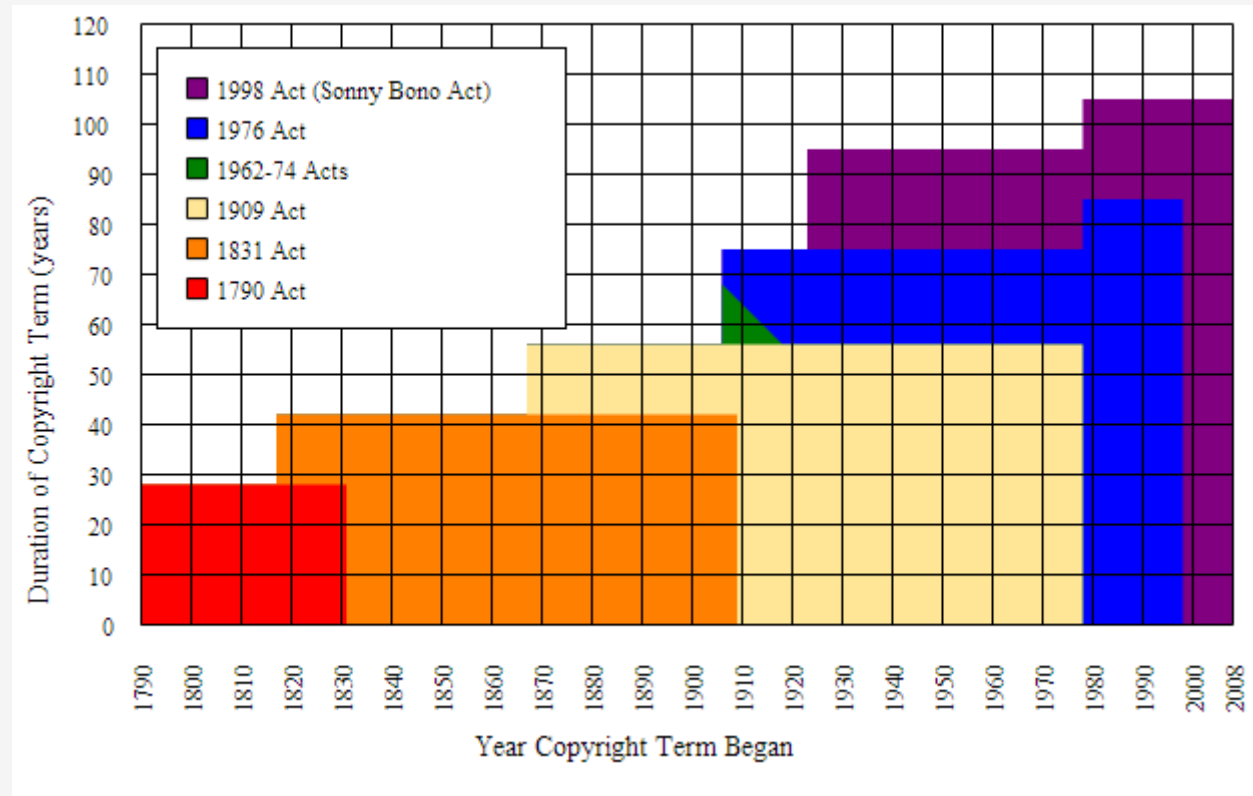
Copyright Challenges: Derivatives



- Copyright-holders have rights over **derivative works**
- But most media (books, music, films) need to borrow from originals!



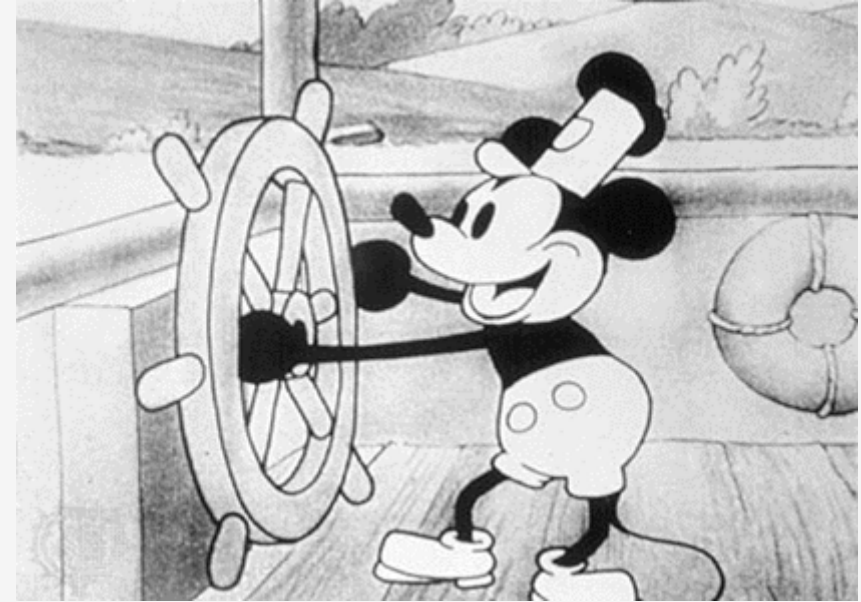
Copyright Challenges: “Limited” Duration



Copyright Challenges: Rent-Seeking



- **Copyright Term Extension Act (CTEA)** of 1998 aka the “**Sonny Bono Act**” extended copyright from author’s life + 50 years to (current) author’s life + 70 years
- More controversially, it *retroactively* extended this duration to works about to expire in 1998
 - “**The Mickey Mouse Protection Act**”
 - Enormous lobbying by Disney



Copyright Challenges: “Limited” Duration



- 2003 *Eldred v. Ashcroft*
 - Eldred sued U.S., claiming the 1998 CTEA makes copyright no longer a reasonable “limited time”
- *Amicus brief* by 17 top economists (5 Nobel prize winners, including Coase!) agreed
 - Argued that the expected value of extending existing copyrights decades into future is very small, but increase in transaction costs is very large
- U.S. Supreme Court (7-2) upheld law



Copyright Challenges: “Limited” Duration

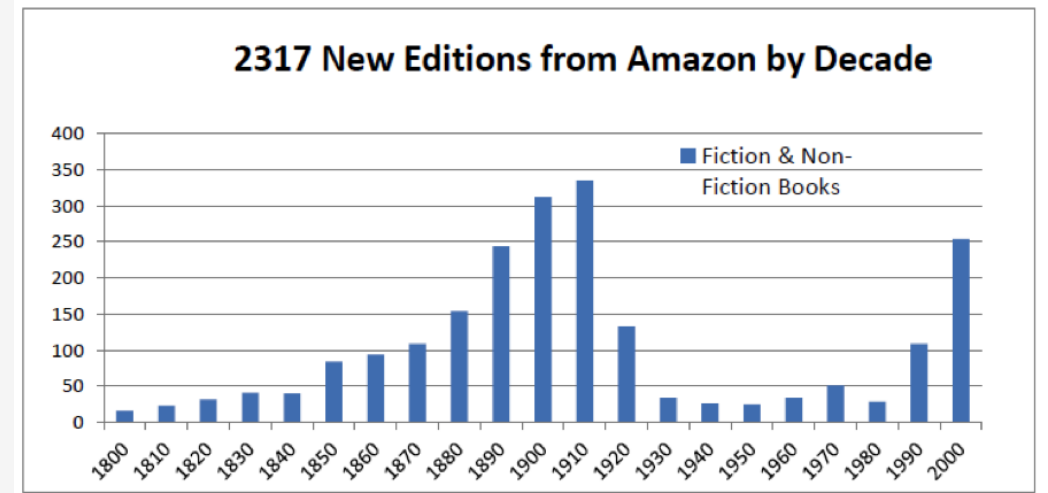


Works from 1925 that entered the public domain in 2021, [Center for the Study of Public Domain](#)

Copyright Challenges: Orphan Works



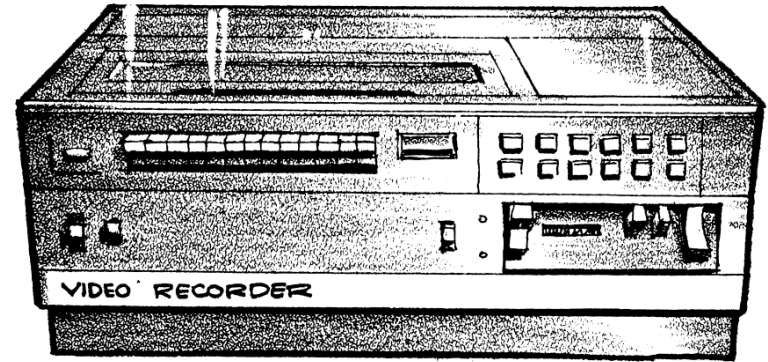
- **Orphan works:** many works are out of print, but still technically copyrighted, nobody knows who the owner is (and too afraid to publish)
- Music, movies, and books produced in 1923-1946 (first 23 years affected by Sunny Bono Act), <6% available today



Copyright Challenges: Over-criminalization



- **No Electronic Theft (NET) Act** (1997): infringing copyright even if for purposes other than commercial resale is illegal
- **Digital Millennium Copyright Act (DMCA)** (1998):
 - §512 Safe Harboring Provisions: any website-owner can avoid liability for users uploading infringing content by automatically removing the material (“DMCA Takedown Notices”)
 - §1201 Anti-Circumvention Provisions: manufacturing or using any device that could potentially be used to infringe copyright is illegal



CONRAD
© 1981
ON WHICH ITEM HAVE THE COURTS RULED THAT MANUFACTURERS AND RETAILERS BE HELD RESPONSIBLE FOR HAVING SUPPLIED THE EQUIPMENT?

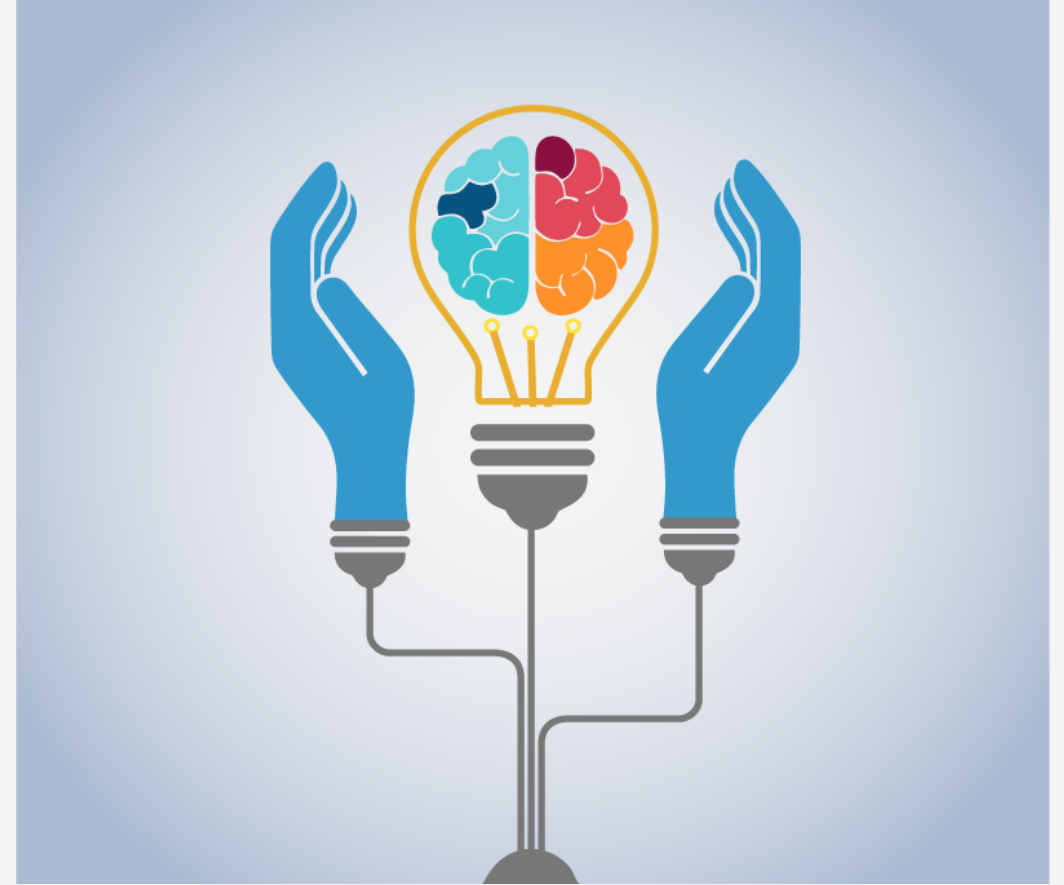


Interlude: Intellectual *Property Rights*?

Interlude: Is IP Property? Should it Be?



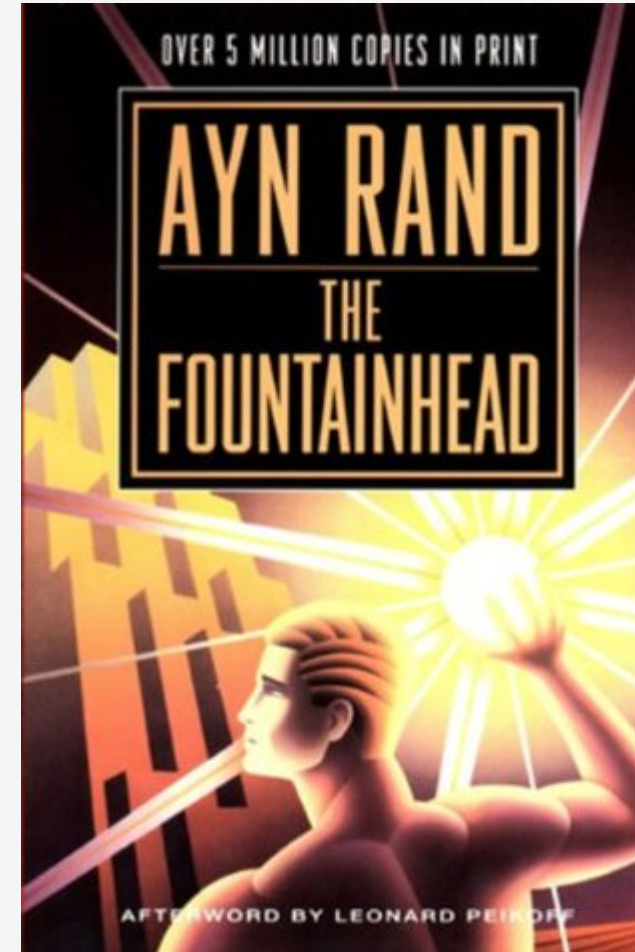
- Trade secrets, trademarks are longstanding concepts in common law
- Patent & copyright are entirely **statutory** creations, not common law
 - Legislature creates artificial scarcity, barriers to entry, & monopoly power
- Is copying the same thing as theft?



Arguments *for* IP Rights



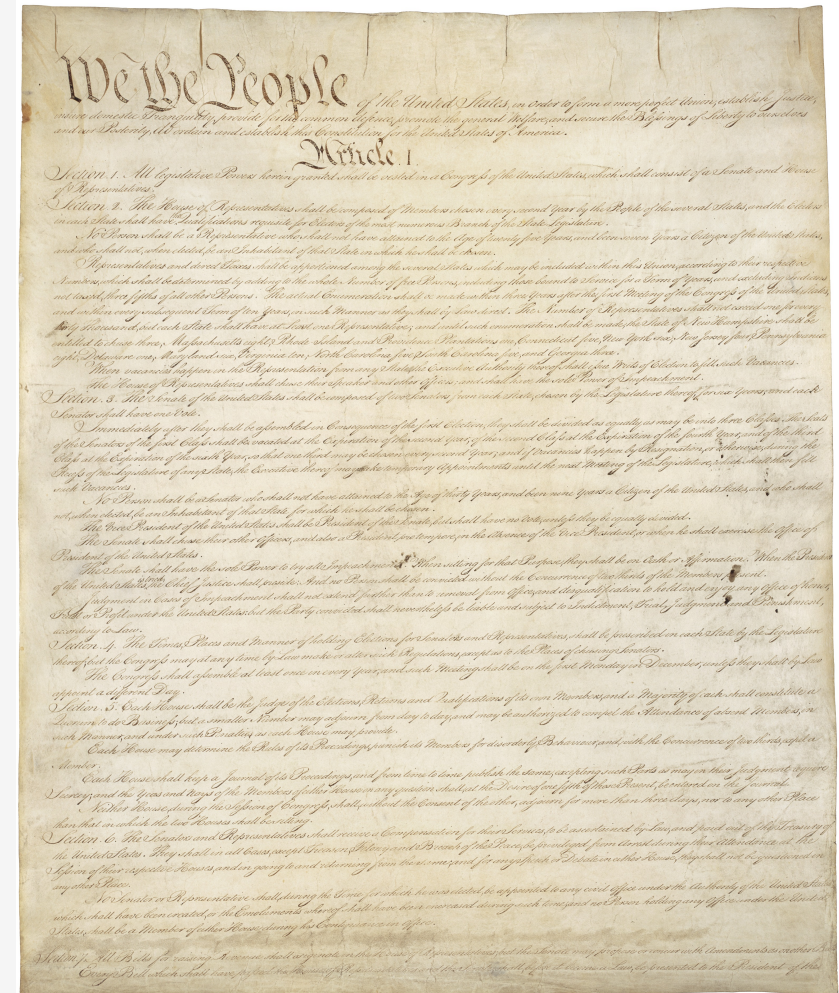
- Moral/deontological arguments
- IPR are natural rights
- Extension of Lockean self-ownership and “mixing your labor” with nature
- Should be entitled to profit off of your own ideas



Arguments *for* IP Rights



- Utilitarian tradeoff between incentives and access
 - Patents & copyrights preserve incentives to innovate (free of copying)
 - But restrict access (monopoly power)
 - So make them temporary
- Purpose is not to enrich authors or inventors, but to “promote the Progress of Science and the useful Arts”
 - At most, let producers recover their fixed costs



Arguments *for* IP Rights



Thomas Macaulay

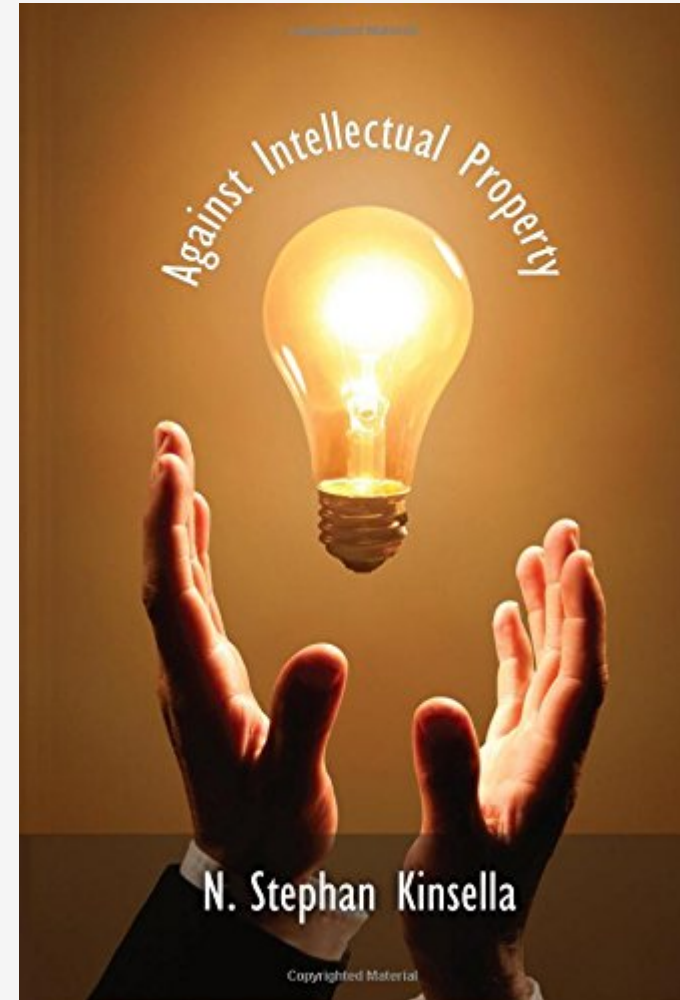
(1800-1859)

"It is then on men whose profession is literature, and whose private means are not ample, that you must rely for a supply of valuable books. Such men must be remunerated for their literary labour...It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated, and the least objectionable way of remunerating them is by means of copyright...The system of copyright has great advantages, and great disadvantages...Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly...Monopoly is an evil...For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good..."

Arguments *against* IP Rights



- Natural rights arguments – IP *violates* natural rights
- Unlike real property, ideas are not scarce
- Restricts what private persons are able to do with their property
- Nobody has a *right* to guaranteed profits



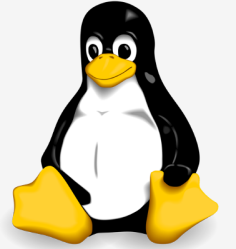
Arguments *against* IP Rights



- Utilitarian arguments – IP *doesn't* boost innovation much, and may actively *reduce* it
- IP is mostly rent-seeking
- Innovation & creation occurs *despite* or *without* IP

Limits to IP

- Many valuable things exist but are not patentable or copyrightable
 - **Examples:** jokes, recipes, the news, government reports, fashion
- Many valuable things exist (for-profit & non-profit) but don't rely on patents or copyright
 - Open source software
 - Creative commons



Limits to IP



- Reasons other than IP that innovators and artists produce
- Not-maximizing profits
 - intrinsic motivation, creativity, altruism
- Profit-maximizing alternatives to IP
 - reputation, speaking fees, merchandising
 - trade secrets, first mover advantage



Alternatives to IP



- Trade secrets
- Prizes
 - Longitude
 - Google X prize
- Government R&D subsidies
 - grants for scientific research
- Crowdfunding?
- Patent buyouts (Kremer)



IP Controversy in a Nutshell





Trademarks

Trademarks



- A **trademark** or **tradenname** grants protection for a word, phrase, symbol, or design which **identifies** a particular seller of goods or services, distinct from other sellers
- Prohibits sellers from using marks that are “confusingly similar” to protected marks, this constitutes **infringement**
 - Is basically **fraud**
- Trademarks last **indefinitely**, so long as the mark is being used in commerce



Trademarks: Economic Purpose



- Allows companies to securely invest in reputation and quality
 - Consumers can easily identify quality based on seller's brand name
- If others could use same markings, consumers can't tell the difference between sellers, lose incentive to invest in high quality goods



Trademarks: Exceptions



- Can't trademark generic names (“camera”, “app”)
- Sometimes the reverse happens: a brand name becomes so dominant, people refer to a whole product category by it
 - **Examples:** Kleenex, Xerox, Band-Aid, Google
 - Story of Aspirin (acetylsalicylic acid); Coca-Cola investigators



Trademarks: Registration



- Unregistered trademarksTM or service marksSM
 - “Common law trademark rights” emerge automatically from use of a distinguishing mark in commerce, enforceable in court
- Registered trademarks[®]
 - Can register with PTO for extra protection
 - Lasts 10 years with optional 10 year renewal

Int. Cl.: 9

Prior U.S. Cl.: 26, 38

United States Patent and Trademark Office

Reg. No. 1,114,431
Registered Mar. 6, 1979

TRADEMARK
Principal Register



Apple Computer, Inc. (California corporation)
10260 Bandle Drive
Cupertino, Calif. 95014

For: COMPUTERS AND COMPUTER PROGRAMS
RECORDED ON PAPER AND TAPE, in CLASS 9
(U.S. CLS. 26 and 38).

First use during January 1977; in commerce January 1977.

The mark consists of a silhouette of an apple with a bite removed.

Owner of Reg. No. 1,078,312.

Ser. No. 162,799, filed Mar. 20, 1978.

J. TINGLEY, Examiner

Trademark Infringement



THE WALL STREET JOURNAL. Ryan

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Lars Johnson Has Goats on His Roof and a Stable of Lawyers to Prove It

Having Trademarked the Ungulate Look, Restaurateur Butts Heads With Imitators

By *Justin Scheck And Stu Woo*
Updated Sept. 17, 2010 12:01 am ET

SAVE PRINT TEXT

SISTER BAY, Wis.—Lars Johnson is proud of his restaurant’s Swedish-meatball sandwich and pickled herring. But the signature offering at his Al Johnson’s Swedish Restaurant isn’t on the menu; it’s the goats grazing on the grass-covered roof.

Any other business thinking of putting goats on the roof will have Mr. Johnson’s lawyers to contend with.

MOST POPULAR NEWS

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2. Europe Confronts Covid Rebound as Vaccine Hopes Recede 
3. Biden's \$1,400 Stimulus Checks Hit Bank Accounts 

“But the signature offering at his Al Johnson's Swedish Restaurant isn't on the menu; it's the goats grazing on the grass-covered roof...Some patrons drive from afar to eat at the restaurant and see the goats that have been going up on Al Johnson's roof since 1973. The restaurant 14 years ago trademarked the right to put goats on a roof to attract customers to a business. ”

“Last year, he discovered that Tiger Mountain Market in Rabun County, Ga., had been grazing goats on its grass roof since 2007. Putting goats on the roof wasn't illegal. The violation, Al Johnson's alleged in a lawsuit in the U.S. District Court for the Northern District of Georgia, was that Tiger Mountain used the animals to woo business...Tiger Mountain Market opened a grocery store and gift shop in buildings with grass on the roofs and allows goats to climb on the roofs of its buildings...Al Johnson's "demanded that Defendant cease and desist such conduct, but Defendant has willfully continued to offer food services from buildings with goats on the roof," the suit continued.”

Source: [WSJ Sept 17, 2010](#)

Trademark Dilution



Trademark Dilution



Trademark Dilution



- Can sue for “**dilution** of the distinctive quality of a mark or trade name” even in “absence of competition between the parties or the absence of confusion as to the source of goods or services.”
- Less clear economic argument
 - Do we really think consumers can't tell the difference between Coca-Cola the soft drink and an auto-parts store calling itself “Coca-Cola”?



Trademarks Have No “Fair Use” Defense



You Can Trademark Some Crazy Things



Trademarks Apparently *Can* Be “Disparaging”





Trade Secrets

Trade Secrets



- **Trade secret** is any information “used in one's business” that gives its owner “an opportunity to obtain an advantage over competitors who do not know or use it.”
 - formula, device, process, or piece of information
 - valuable only so long as others don't know it



Trade Secrets



- Plaintiff can sue Defendant for **"misappropriation"** (basically, theft) of a trade secret if can demonstrate:
 1. It is a valid trade secret
 2. The Defendant acquired it illegally
 3. Plaintiff took reasonable steps to protect it



Trade Secrets



- Unlike normal property rights, possessor of trade secrets must continually make efforts to keep them secret!
- If they leave their “secrets” lying around, they lose claim to them
 - Kind of like adverse possession in property



Trade Secrets vs. Patents



- Strategic choice by firms/inventors to use trade secrets vs. patents
- Tradeoff of indefinite secrecy vs. guaranteed temporary monopoly
 - Patents require public disclosure of secrets, once they expire, firm loses competitive advantage



The Limits of Trade Secrets



- **Non-disclosure agreements**
 - Suppose B works for A, who has her sign an NDA
 - B then leaves to work for competitor, C, and reveals A's secrets to C
 - A can sue B for breach of contract (our next unit)
 - But A has no recourse against party C, if C had no reasonable way of knowing about the NDA
- NDAs tend to be very difficult to enforce

