

AN INTELLECTUAL PROPERTY FIX FOR PLATFORM SALESJACKING

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ABSTRACT—The aim of this Essay is to introduce an intellectual property angle to a current controversy that has been understood to be a matter for antitrust law. The controversy arises when a platform company—most famously Amazon—uses its platform to host a marketplace for independent retailers while simultaneously hosting itself as a retailer on the platform, thus competing as a retailer with an inside advantage. Critics say this setup allows platform firms to cherry-pick the best product ideas from small, independent retailers and then hijack their sales. This Essay seeks to advance the conversation about this controversy, making at least four contributions. First, this Essay shows that the complained-about problem—in which platform providers take sales away from platform participants—is not best understood as a competition-harming concern but as an innovation-harming concern. Second, and following from the first point, this Essay suggests such problems are productively viewed as challenges for the domain of intellectual property law rather than, or in addition to, the domain of antitrust law. Third, this Essay explains how the particular anti-innovative harm in this area is to soft innovation, which is distinguished from the type of hard innovation that is the principal concern of copyright and patent law. Previously, such soft innovation has been incentivized by the lure of supracompetitive profits that are sustained by market friction, often spoken of as “first-mover advantage.” The reduction of that market friction by way of technology-enabled platform commerce has had the effect of subverting the innovation incentives that naturally existed in the brick-and-mortar world. Fourth, this Essay provides an initial foray into thinking about how a new intellectual property entitlement should be designed. To that end, this Essay identifies various ways of attempting to ensure that a newly created intellectual property right in this area does not do more harm than good.

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INTRODUCTION

Brandon Young had a profitable business on Amazon selling a hanging toiletry bag.¹ The Miami-based entrepreneur was able to sell around 140 bags per day, each one retailing for \$14.99.² Then, in 2018, Amazon entered as a competitor itself, selling an AmazonBasics hanging toiletry bag for \$12.22.³ The AmazonBasics bag appeared high on the site’s search-results page, while Young’s bag sunk to the bottom where only downward-scrolling shoppers would find it.⁴ Young’s sales immediately halved.⁵

Many third-party retailers selling through Amazon or other big platform companies have similar stories to Young’s.⁶ I call this phenomenon “salesjacking.”⁷ Thanks to the massive amounts of data that platform giants

¹ See Jay Greene, *Third-Party Sellers Feel a Squeeze from Amazon*, WASH. POST, Oct. 4, 2019, at A1.

² *Id.*

³ See *id.* (the AmazonBasics bag was additionally listed under a “Top rated from our brands” heading).

⁴ *Id.* On the search results page, Young’s bag had been in the top two rows. *Id.*

⁵ *Id.*

⁶ See, e.g., Reed Albergotti, *Apple Grafting: Tech Giant Uses Its App Store to Copy the Best Ideas, Critics Say*, VANCOUVER SUN, Sept. 14, 2019, at H1 (reporting independent developers’ stories about selling apps through Apple).

⁷ One author has referred to this as “information appropriation.” See Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 980 (2019) [hereinafter Khan, *Separation*]. As a label for speaking about a unique phenomenon, however, “information appropriation” suffers from the

are able to collect about what is sold through their site, they can cherry-pick the bestselling items from third-party retailers⁸ and then enter as a retailer, grabbing much of the sales volume. This practice allows a platform company to capture much of the profits that would otherwise go to third-party retailers who have discovered unmet demand in the market.

To many, this kind of conduct seems wrong. One business consultant, for instance, said “it feels *yucky*.”⁹ Indeed, there seems to be a groundswell of support to do something about it—using antitrust law. Legal scholarship has weighed in.¹⁰ Congress has held hearings.¹¹ And the European Union has announced an investigation.¹² But there is a problem with looking to antitrust law for a solution. Antitrust law was built to protect competition. Yet in these stories, independent sellers are asking to be protected *from* competition.¹³

fact that the phrase could be used as a generic synonym for just about any kind of intellectual property infringement or misappropriation. I am grateful for feedback I’ve received that suggests “salesjacking” is an intuitive label for this phenomenon.

⁸ Many of these third-party retailers may be quite small. See Tugba Sabanoglu, *Amazon Seller Business Size 2018, by Employees*, STATISTA (Dec. 1, 2020), <https://www.statista.com/statistics/886904/amazon-seller-business-size-by-employees> [<https://perma.cc/YA7E-8GXE>] (“According to a 2018 survey of mostly U.S.-based Amazon sellers, 73 percent of businesses only had one to five employees.”).

⁹ George Anderson, *Is Amazon Undercutting Third-Party Sellers Using Their Own Data?*, FORBES (Oct. 30, 2014, 9:23 AM), <http://www.forbes.com/sites/retailwire/2014/10/30/is-amazon-undercutting-third-party-sellers-using-their-own-data> [<https://perma.cc/3TD8-6YQ5>] (quoting Mark Price, managing partner of LiftPoint Consulting as saying, “Amazon is probably within their rights to mine the data on marketplace transactions At the same time, it feels *yucky* which suggests that Amazon may be on some ethically unstable ground.” (internal quotation marks omitted)); see Thomas Lee, *Rethinking Amazon*, S.F. CHRON., July 27, 2017, at C1 (saying a study “suggests that Amazon will use the pricing data from outside merchants who sell through it to ultimately compete with them” and quoting an expert articulating “[t]he possibility that Amazon is ‘stalking’ its vendors for their assortment” (internal quotation marks omitted)).

¹⁰ See Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 780–83 (2017) [hereinafter Khan, *Paradox*] (observing that Amazon can use its massive data advantage to target selected product categories dominated by independent third-party sellers and then enter those categories with Amazon’s own products, wrecking the independents’ profit margins); Ben Bloodstein, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187, 214 (2019) (arguing that the two-sided injury requirement of *Ohio v. American Express*, 138 S. Ct. 2274 (2018), should not apply to Amazon’s marketplace platform).

¹¹ Ryan Tracy, *Tech Giants Draw Fire in Congress*, WALL ST. J. (July 16, 2019, 7:05 PM), <https://www.wsj.com/articles/congress-puts-big-tech-in-crosshairs-11563311754> [<https://perma.cc/9L2H-PHSU>]; Ryan Tracy, *House Committee Requests Tech Executives’ Emails in Antitrust Probe*, WALL ST. J. (Sept. 13, 2019, 3:34 PM), <https://www.wsj.com/articles/house-committee-requests-tech-executives-emails-in-antitrust-probe-11568377800> [<https://perma.cc/TC29-7QHT>]; Dana Mattioli, *Amazon Search Change Boosts Its Own Products—E-commerce Giant Overcame Internal Dissent from Engineers, Lawyers*, WALL ST. J., Sept. 17, 2019, at A1 (discussing a U.S. House of Representatives hearing).

¹² Sam Schechner, *Amazon Faces Probe in Europe Over Use of Merchant Data*, WALL ST. J. (July 17, 2019, 7:14 PM), <https://www.wsj.com/articles/amazon-to-overhaul-marketplace-terms-as-part-of-german-settlement-11563353036> [<https://perma.cc/2MMB-FP3P>].

¹³ For some important nuance in this regard, see *infra* Part I, including notes 32–46 and accompanying text.

This Essay considers a different approach. Instead of viewing salesjacking as a matter for antitrust law, this phenomenon might usefully be viewed as an intellectual property matter. Thus, this Essay explores the possibility of a new, limited intellectual property right that independent sellers could assert against big-tech platforms that use the data they've accumulated from independent retailers' transactions to compete with those retailers. Part I discusses salesjacking and why its harms are more anti-innovative than anticompetitive. This sets the stage for considering intellectual property law, as opposed to antitrust law, as a potentially promising solution. Part II distinguishes between "hard" and "soft" innovations and explains why soft innovations, such as Young's hanging toiletry bag, are economically important. Part III discusses how soft innovation has been incentivized in the past and why platform salesjacking threatens to undo those incentives. Part IV proposes a legal response to salesjacking: a "retail-data right." Finally, Part V examines some reasons for caution in creating and fine-tuning a retail-data right.

I. SALESJACKING: ANTICOMPETITIVE OR ANTI-INNOVATIVE?

The opportunity to use a data advantage to track, replicate, and appropriate value from the successes of independent retailers materializes from the fact that platform firms can operate in multiple roles simultaneously—as platform providers and as participants on the platform. Vis-à-vis platforms, independent platform participants are often called "complementors," as a platform depends on its complementors to thrive.¹⁴ Yet when platform firms enter into competition with their complementors, the interests of the platform and the complementors come into conflict.

Various platform giants, including Apple, have been accused of salesjacking behavior.¹⁵ But the leading example seems to be Amazon.¹⁶ Amazon began in the 1990s as a retailer at the end of a distribution chain, buying products from manufacturers and wholesalers and then selling those products to consumers.¹⁷ After some years, Amazon added another mode of

¹⁴ The term "complementor" has a broader meaning beyond the platform context. The word was proposed by Adam M. Brandenburger and Barry J. Nalebuff. See ADAM M. BRANDENBURGER & BARRY J. NALEBUFF, CO-OPETITION 16–17 (1996) ("There's no word for people who provide complements, so we're going to propose one: *complementor*.").

¹⁵ See Albergotti, *supra* note 6.

¹⁶ See Schechner, *supra* note 12.

¹⁷ Jack Nicas, Karen Weise & Mike Isaac, *4 Tech Giants, One Issue: Power*, N.Y. TIMES, Sept. 9, 2019, at B1; see also Khan, *Separation*, *supra* note 7, at 985–86 (discussing Amazon's history).

business, “Amazon Marketplace.”¹⁸ With Amazon Marketplace, Amazon functions as a platform provider, matching up third-party independent sellers with buyers. Later, Amazon launched a third mode of business in which Amazon operates as a producer and sells its own products directly to consumers—a business often done under the company’s “AmazonBasics” house brand.¹⁹

Opportunity for salesjacking arises from a confluence of circumstances. Take, for example, the following scenario: An independent consumer-goods company may find itself compelled to use Amazon Marketplace because it cannot become a high-volume seller any other way.²⁰ If its products turn out to fill a niche in the market by tapping into unmet consumer needs, then sales blossom. For a period of time, the independent seller reaps the reward. But then Amazon may swoop in. As Amazon detects sales spikes in products offered by independent sellers, it can target those products for direct sales. It is worth noting that Amazon’s opportunity for cherry-picking among the products introduced by complementors is vast. According to one estimate, Amazon’s platform offers more than 12 million products from Amazon itself versus more than 350 million when independent retailers are included.²¹ Once Amazon has picked a new target product, it can hijack the sales of complementors either by buying directly from their wholesale or manufacturing source or by producing its own version under an Amazon house brand.

An empirical study by business management scholar Feng Zhu and economist Qihong Liu has provided illuminating insight into Amazon’s motivations and strategy.²² The study looked at 163,853 products offered on Amazon only by third-party sellers and found that after 10 months Amazon had entered as a competitor for 3% of the products,²³ tending to pick popular

¹⁸ Khan, *Separation*, *supra* note 7, at 985; *see also* Nicas et al., *supra* note 17 (noting that by 2015, more than half of sales on Amazon were through Amazon Marketplace and the percentage continued to grow).

¹⁹ *See, e.g.*, Greene, *supra* note 1 (discussing AmazonBasics); Greg Magana, *AmazonBasics Dwarfs Amazon’s Other Private Labels in Popularity*, INSIDER (Mar. 19, 2019 8:46 AM), <https://www.businessinsider.com/amazonbasics-amazon-top-private-label-2019-3> [<https://perma.cc/8BM3-B7PV>].

²⁰ Khan, *Paradox*, *supra* note 10, at 780–81.

²¹ *See How Many Products Does Amazon Actually Carry? And in What Categories?*, BUS. WIRE (June 14, 2016, 11:40 AM), <https://www.businesswire.com/news/home/20160614006063/en/How-Many-Products-Does-Amazon-Actually-Carry-And-in-What-Categories> [<https://perma.cc/V5QJ-R2RH>] (providing estimates from May 2016, excluding books, media, wine, services, and product variants).

²² Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MGMT. J. 2618 (2018). Zhu and Liu note, “Many complementors with successful products have been pushed out of their markets not by competition from counterparts, but by platform owners that choose to compete directly with the complementors and appropriate the value from their innovations.” *Id.* at 2619.

²³ *Id.* at 2627.

products that presented profit-capture opportunities.²⁴ In particular, the products Amazon targeted for its own retailing tended to have higher customer ratings, higher demand, and higher prices;²⁵ and the targeted products were also marked by requiring relatively low effort on Amazon's part in order to enter as a retailer.²⁶ In other words, the evidence is that Amazon is effective at cherry-picking products for direct retail in such a way that it can capture much of the reward without the risk. Although one could postulate other explanations for platform entry—such as protecting platform customers from shoddy products²⁷—Zhu and Liu found the evidence from their research supports the view that “Amazon's entry is motivated by capturing profits from popular products.”²⁸

Another study, done by a private firm, tracked women's clothing first offered by independent sellers through Amazon Marketplace. That study found that within 12 weeks Amazon had begun its own direct sales of 25% of the top-selling items.²⁹ The firm's CEO called the results “more than a coincidence because the numbers are extremely significant,” observing, “This is probably a case where product selection and merchandising are being informed by competitive intelligence—and on a large scale[.]”³⁰ The takeaway was the conclusion that “Amazon tracks third-party sales on its site and uses that data to sell the most popular items in direct competition with marketplace members.”³¹

Working within an antitrust paradigm, Lina M. Khan has described this behavior as “anticompetitive.”³² Yet what Amazon is doing in this regard can most straightforwardly be understood to be *procompetitive*. At least that is the case with regard to first-order effects and insofar as the terms *procompetitive* and *anticompetitive* refer to the competitive process rather than being synonyms for *economically efficient* and *economically*

²⁴ *Id.* at 2627–28.

²⁵ *See id.* at 2630–31.

²⁶ *Id.* at 2629 (suggesting that a large number of sellers of a particular product indicates easy sourcing and thus easier entry into the market).

²⁷ *See id.* at 2622–23.

²⁸ *Id.* at 2627–28 (contrasting this explanation with “seeking to improve the customer experience by entering low-performing third-party product spaces”).

²⁹ *Upstream Commerce Retail Intelligence Research Finds Amazon Muscles in on Its Own Vendors' Best Sellers*, BUS. WIRE (Oct. 28, 2014, 9:50 AM), <https://www.businesswire.com/news/home/20141028005999/en/Upstream-Commerce-Retail-Intelligence-Research-Finds-Amazon-Muscles-In-On-Its-Own-Vendors-Best-Sellers> [<https://perma.cc/M6LQ-BHRB>].

³⁰ *Id.*

³¹ *See* Anderson, *supra* note 9.

³² Khan, *Paradox*, *supra* note 10, at 783.

inefficient.³³ After all, when Amazon begins selling a popular product previously only sold by one or more independent retailers, Amazon's entry means the addition of a new competitor. And if, in the worst case, Amazon drives an individual seller from the market by mimicking their product, then what occurs is the replacement of one competitor with another. Such a situation seems to be neutral in terms of competition and a net positive in terms of consumer welfare—at least in the short run.³⁴

Khan is correct when she says that “concentrated control over data can systematically tilt a market in [a firm like Amazon's] favor, dramatically reshaping the sector.”³⁵ Yet that does not equate with being anticompetitive. Indeed, Amazon's conduct may be harmful without being anticompetitive. An anticompetitive effect is understood to be one that “harm[s] the competitive *process*.”³⁶ The core of that process is “the free opportunity to select among alternative offers.”³⁷ Showing that something is bad or

³³ In this arena, it can sometimes be hard to distinguish between semantics and substance. It helps to define terms. In this Essay, I'm using *procompetitive* and *anticompetitive* to refer to positive and negative effects concerning the competitive process itself. I am not using the words as synonyms for *economically efficient* and *economically inefficient*. But in discussions of antitrust law, the meaning of *procompetitive* and *anticompetitive* can be uncertain, contested, and slippery. For instance, while one might expect that *procompetitive* and *anticompetitive* are simple opposites as terms, it turns out that something of a double standard is often employed—one tending to benefit antitrust defendants. In particular, the word *procompetitive* may be given a generous interpretation that embraces whatever is economically positive or efficient. See, e.g., *In re Dealer Mgmt. Sys. Antitrust Litig.*, 360 F. Supp. 3d 788, 799 (N.D. Ill. 2019) (listing “increasing allocative efficiency” as an example of something being “procompetitive”). This low bar for what counts as procompetitive makes it easier for defendants to argue their conduct is not prohibited by antitrust law. By contrast, courts can be stingy with the word *anticompetitive*, insisting that it means not merely economically inefficient but that it also involves harm to the competitive process itself. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (stating that “anticompetitive effect” means “harm[ing] the competitive *process* and thereby harm[ing] consumers”). This high bar makes it harder for plaintiffs to prove defendants' antitrust liability. In the vein of turnabout being fair play, perhaps one arguing for expanded antitrust enforcement can claim some high ground in using *anticompetitive* to broadly mean economically inefficient or negative in an economic sense. At any rate, my intent in this Essay is to try to steer clear of any contestation over terms, focusing instead on substantively distinguishing between innovation and competition as two separate processes that are both positive in an economic sense but that can involve trade-offs with one another.

³⁴ Zhu and Liu's empirical study suggests the real-world effects are consonant with what one would theoretically expect: more transactions, lower costs to consumers, and some competitors squeezed out. See Zhu & Liu, *supra* note 22, at 2632 (“Overall, our results suggest that Amazon's entry reduces shipping cost and, hence, the cost to consumers of affected products, resulting in increased sales, but it also discourages third-party sellers from continuing to offer the products.”).

³⁵ Khan, *Paradox*, *supra* note 10, at 783.

³⁶ *Microsoft*, 253 F.3d at 58.

³⁷ *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (“The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).

undesirable is not equivalent to showing it is anticompetitive.³⁸ Indeed, arguments that competition itself is somehow bad are rejected by the courts.³⁹

An instructive case on this point is *Fashion Originators' Guild of America, Inc. v. FTC*, in which a cartel of fashion labels formed a design-registration/boycott system—a sort of private intellectual property regime—for the purpose of protecting consumers, designers, and manufacturers from what the defendants decried to be “the devastating evils growing from the pirating of original designs.”⁴⁰ The Supreme Court rejected this rationale as a defense to federal antitrust law.⁴¹ The guild’s conduct was prohibited by antitrust law because it was “the direct suppression of competition from the sale of . . . copied designs.”⁴² Correspondingly, a platform company’s salesjacking—even if characterizable as devastating piracy—would not be, without more, anticompetitive conduct. Thus, condemnation under antitrust law would seem to be a stretch, at the very least.

None of this is to say that it is undesirable or entirely impossible for the salesjacking behavior of platforms to be constrained by antitrust law. In fact, it is fair to say that the core concern of Khan’s critique in her *Amazon’s Antitrust Paradox* article is that modern antitrust law can’t be easily mapped onto various sorts of troublesome behavior of Amazon, including salesjacking.⁴³

This is where an intellectual property perspective may be useful. When it comes to salesjacking behavior, it is useful to observe that the essence of the problem is not anticompetitive effects. Instead, anti-innovative effects are the core problem. To be specific, the increase in competition from a platform company decreases the incentive to innovate for independent retailers. Indeed, one could concede that salesjacking is not anticompetitive

³⁸ See *id.* (“Even assuming occasional exceptions to the presumed [beneficial] consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.”).

³⁹ See, e.g., *id.* (recognizing “[t]he assumption that competition is the best method of allocating resources” and holding “the statutory policy precludes inquiry into the question whether competition is good or bad”); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940) (“Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.”).

⁴⁰ *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 461–63, 467 (1941).

⁴¹ *Id.* at 467–68.

⁴² *Id.* at 465 (citing *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 389 (1923)).

⁴³ See Khan, *Paradox*, *supra* note 10, at 710 (arguing that “the current framework in antitrust—specifically its pegging competition to . . . short-term price effects—is unequipped to capture the architecture of market power in the modern economy. . . . [This is because, in part,] current doctrine underappreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive”).

at all and that the immediate effects are significantly lower prices and higher output.⁴⁴ Notwithstanding these things, a platform company’s capacity for competitive entry against third-party retailers may be harmful because it leads to a stultified market lacking in innovative vitality—and that would eventually leave customers worse off over the long term.

The competition/innovation tradeoff is familiar to all who have considered the intersection of antitrust law and intellectual property law. Antitrust law is about using government intervention to preserve open competition⁴⁵—the most widely recognized ends being lower prices for consumers and enhanced economic efficiency.⁴⁶ Intellectual property law is about using government intervention to *prevent* competition—the most oft-stated aim being the encouragement of creativity and innovation.⁴⁷ This

⁴⁴ Cf. John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S.C. L. REV. 305, 339–40 (2020) (critiquing Khan and contending with regard to various examples of Amazon retail entry that “[w]hile it is most certainly clear that Amazon and its customers are better off, it seems far less clear that any of this is anticompetitive”).

⁴⁵ Antitrust law could have innovation as a primary aim. Yet courts today focus on competitive effects—the immediate object of antitrust law being to promote competition and guard against anticompetitive conduct. See, e.g., EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 54 (3d ed. 2018) (“Whatever interpretive path one chooses, the fact remains that today Sherman Act § 1 is in effect read to adopt the general standard that ‘Every agreement whose anticompetitive effects on trade outweigh its procompetitive effects is illegal.’”); *id.* at 211 (explaining that Sherman Act § 2 adds “a very general substantive rule forbidding a firm with monopoly power from engaging in any anticompetitive unilateral conduct to obtain, maintain, or enhance that power”); *id.* at 276–77 (similar). There is some authority for recognizing innovation as an antitrust aim. See generally Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. PA. L. REV. 761, 811–12 (2002) (discussing cases and authorities recognizing innovation as an antitrust goal). But, perhaps surprisingly, invoking innovation as a goal has not equated with supporting broader antitrust enforcement. In an influential case, the U.S. Supreme Court spoke of the encouragement of innovation as a key concern in interpreting Sherman Act § 2 doctrine in a way that has a limiting effect on antitrust enforcement. See *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”).

⁴⁶ See, e.g., Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1212 (2008) (stating that “[w]ithin the last few decades a broad consensus has emerged that consumer welfare and economic efficiency are the overriding, if not exclusive, goals” of antitrust law and that these two goals rarely conflict); cf. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051–54 (1979) (arguing that economic concerns, while paramount, are not the only goals of antitrust and that in addition, antitrust laws are concerned with ensuring the dispersal of economic power—sometimes even when doing so means forgoing efficiencies).

⁴⁷ See, e.g., U.S. CONST. art. I, § 8, cl. 8. (giving Congress the power to establish copyright and patent laws “[t]o promote the Progress of Science and useful Arts”); *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 204 (2016) (“Those objectives [of the Copyright Act] are well settled. As *Fogerty* explained, ‘copyright law ultimately serves the purpose of enriching the general public through access to creative works.’” (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994))); *FTC v. Actavis, Inc.*, 570 U.S. 136, 161 (2013) (Roberts, C.J., dissenting) (“The point of patent law is to grant limited

natural orientation of intellectual property law is precisely why it is useful to view the platform sales appropriation issue through an intellectual property lens: The desire is the encouragement of innovation; the hazard is fast-moving competition. Yet platform salesjacking is an area where current intellectual property law does not tread.

Amazon has acknowledged that it uses aggregated data from third-party retailers to determine which product lines to enter.⁴⁸ But the company has tried to downplay the significance of sales of its own products and has explained that it looks at overall sales of products, not sales of products from individual sellers.⁴⁹ Yet these distinctions are immaterial in terms of the effects on innovation incentives. With regard to innovation effects, it is not the amount of the business gained by Amazon that is relevant. What matters is the amount of sales that market innovators stand to lose. For the same reason, it does not matter that Amazon aggregates product sales data as opposed to looking at sales by individual retailers—what matters is that innovative sellers can get squeezed out and therefore lose much of their reward for risk-taking.

II. HARD AND SOFT INNOVATION

To understand how intellectual property law might contribute in this sphere, it is useful to draw a distinction between two different kinds of

monopolies as a way of encouraging innovation.”); *Golan v. Holder*, 565 U.S. 302, 346 (2012) (Breyer, J., dissenting) (stating that the economic philosophy of copyright “understands copyright’s grants of limited monopoly privileges to authors as private benefits that are conferred for a public reason—to elicit new creation”); *Bilski v. Kappos*, 561 U.S. 593, 621 (2010) (Stevens, J., concurring) (“Congress has passed a series of patent laws . . . as a means of encouraging innovation.”).

⁴⁸ Lauren Feiner, *Amazon Admits to Congress That It Uses ‘Aggregated’ Data from Third-Party Sellers to Come Up with Its Own Products*, CNBC (Nov. 20, 2019, 9:07 AM), <https://www.cnbc.com/2019/11/19/amazon-uses-aggregated-data-from-sellers-to-build-its-own-products.html> [https://perma.cc/U4AN-TKR7]; *Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship: Hearing before the Subcomm. on Antitrust, Com., and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 5 (2019) (Amazon Responses to Cicilline Questions for the Record) [hereinafter *Amazon Responses*], <https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD038.pdf> [https://perma.cc/FA9K-KT7U].

⁴⁹ See *Amazon Responses*, *supra* note 48, at 5 (stating that Amazon uses aggregated data to identify products and categories in the context of informing development of its private label products and that such data is not specific to individual sellers); Nicas et al., *supra* note 17 (“Amazon has told Congress that it uses aggregated data like overall sales, not information ‘related specifically to individual sellers,’ and that private-label products make up about 1 percent of total sales.”). Indeed, that Amazon targets products, not sellers, is consistent with independent empirical research. See Zhu & Liu, *supra* note 22, at 2629, 2631 (stating that “[t]he high means of seller ratings in both groups and the small difference between the means suggest that Amazon’s entry decision is likely dependent on product, but not seller, attributes” and “Amazon’s entry decision seems not to depend on seller ratings, nor to be deterred by seller size”). As a profit maximizing strategy, targeting products rather than sellers is what makes sense—because selling products is how Amazon makes money.

innovation. Intellectual property law is classically concerned with what might be called “hard innovation.” Utility patents⁵⁰ are available only to a small subset of innovations that qualify as “inventions” by having a nonobvious advance over what existed before.⁵¹ Copyright protects original expressive works such as books, movies, and songs that are fixed in a tangible form.⁵² Neither patents nor copyrights protect what can be called “soft innovation”—such things as product ideas, market insights, new angles on old lines of business, and so on.⁵³ Yet these nebulous pieces of business savvy are a key fuel for economic growth.⁵⁴ They are the bit-by-bit/getting-better-all-the-time of what society produces and consumes.

Brandon Young’s toiletry bag⁵⁵ is a good example of soft innovation. It is apparently not a patentable invention. Nor would it be a copyrightable expressive work. But it does represent a market insight that has value. It starts as a hunch that consumer preferences are currently unfulfilled by the market. An entrepreneur like Young then makes a risk-taking bet on that hunch by making the necessary investments to bring the product to consumers. This would not necessarily mean designing a new product. It

⁵⁰ Utility patents are the regular sort of patents. See Sarah Burstein, *Costly Designs*, 77 OHIO ST. L.J. 107, 111 (2016) (“When most people hear the word ‘patents,’ they think of utility patents—the patents that protect useful inventions.”). Utility patents are available for inventions that are new, useful, and which represent a nonobvious advance over prior technology. See 35 U.S.C. §§ 101–103.

⁵¹ See, e.g., Amy Kapczynski & Talha Syed, *The Continuum of Excludability and the Limits of Patents*, 122 YALE L.J. 1900, 1914 (2013) (“[T]he current criteria for patentability may fail to cover information that, although valuable and expensive to generate, nevertheless does not meet existing patent requirements such as novelty and nonobviousness.”). Regarding nonobviousness, see *Hotchkiss v. Greenwood*, 52 U.S. 248, 267 (1850), “[U]nless more ingenuity and skill in applying the old method of fastening the shank and the knob were required in the application of it to the clay or porcelain knob than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of the skilful mechanic, not that of the inventor.” See also *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 3, 11 (1966) (quoting *Hotchkiss* in context of interpreting the modern statutory provision on nonobviousness at 35 U.S.C. § 103).

⁵² 17 U.S.C. § 102 (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . [including] literary works . . . musical works . . . motion pictures . . .”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 355 (1991) (discussing copyright subject matter).

⁵³ It is blackletter law that copyright and patent cannot protect ideas. See 17 U.S.C. § 102(b) (“In no case does copyright protection . . . extend to any idea . . .”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (“No author may copyright his ideas . . .”); *Gottschalk v. Benson*, 409 U.S. 63, 71 (1972) (“[O]ne may not patent an idea.”). For a discussion of the distinction between IP-protected innovations and non-IP-protected market experimentation, along with a general endorsement of IP for the latter, see generally Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337 (2008).

⁵⁴ See, e.g., TYLER COWEN & ALEX TABARROK, *MODERN PRINCIPLES: MACROECONOMICS* 148 (2d ed. 2013) (explaining that better ideas can drive long-run economic growth because “[b]etter ideas let us produce more output from the same inputs of physical and human capital”).

⁵⁵ See *supra* notes 1–5 and accompanying text.

might simply mean identifying an already existing product that is not currently being marketed online to U.S. consumers. Bringing such a product to market might well be a relatively small risk. We can guess that Young didn't spend years of his life or millions in savings to bring a better hanging toiletry bag to the market. But if we want firms to take risks, those risks require rewards.

Soft innovations like Young's market insight, when amassed in sufficient number, add up to substantial economic growth. This is because soft innovations such as market insights, as well as hard innovations such as patentable inventions, all form a part of what economist Robert Solow called "knowledge" or "effectiveness of labor,"⁵⁶ which concerns how to obtain increasing levels of satisfaction and well-being from the same inputs of labor and physical capital accumulation.⁵⁷ To use Solow's language, Young's insight about unmet market demand for toiletry bags is part of how "[c]ontinuous innovation could stave off the effects of diminishing returns, which otherwise bring any such process [of rising productivity] to a halt."⁵⁸

III. THE ECONOMICS OF SOFT INNOVATION AND THE THREAT POSED BY PLATFORM SALESJACKING

What has incentivized soft innovation in the past, if not patents and copyrights? It turns out the bulk of economically important innovation is incentivized by a host of nonlegal mechanisms that historically have had nothing to do with intellectual property law. Instead, the most common rewards for innovation depend on a certain friction in the market, often called "first-mover advantage," which is the advantage that comes with being the first firm to market.⁵⁹ Empirical evidence indicates that first-mover

⁵⁶ See DAVID ROMER, *ADVANCED MACROECONOMICS* 10 (4th ed. 2012).

⁵⁷ See R.M. SOLOW, *GROWTH THEORY: AN EXPOSITION* 35, 37 (1970).

⁵⁸ *Id.* at 33.

⁵⁹ See Eric E. Johnson, *Calibrating Patent Lifetimes*, 22 *SANTA CLARA COMPUT. & HIGH TECH. L.J.* 269, 278–79 (2006) (discussing first-mover advantage). The phrase "lead time" is also used in this regard. See *id.* Intellectual property scholars have noted the sufficiency of first-mover advantage to encourage innovation in some contexts, such as with regard to business methods. See, e.g., Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 *COLUM. J.L. & ARTS* 317, 361–62 (2011) ("[A] sort of first mover advantage applies to business methods . . ."); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 *VA. L. REV.* 1575, 1618 (2003) (observing that firms have "ample incentives to develop business methods even without patent protection, because the competitive marketplace rewards companies that use more efficient business methods," and, notwithstanding copying, "first mover advantages and branding can provide rewards to the innovator"). Notably, Michael Abramowicz and John F. Duffy have discussed first-mover advantage in the context of arguing that it may not, as a general matter, be a sufficient incentive for market experimentation and that IP rights might be broadly desirable in the market-experimentation context. See Abramowicz & Duffy, *supra* note 53, at 342–43.

advantage is the most important mechanism for allowing firms to capture rewards for their innovations.⁶⁰

First-mover advantage springs from the time lag between the innovating firm and its rivals in getting to market and transacting with customers. It may, for instance, take substantial time before rivals even know of a competitor's success in a certain product line. Granted, the success of a superstar product may be obvious. Think Cabbage Patch Kids, Tickle Me Elmo, or Hatchimals; those products suddenly became the talk of the town and store shelves quickly went bare.⁶¹ But most new products are not such standouts. Products in the vein of niche-filling hanging toiletry bags, for instance, can expect to stay below the radar, quietly earning supracompetitive profits for the first movers who pioneered their place in the market. Yet even after the cat is out of the bag about a successful, imitation-worthy product, copying takes time. The first mover continues to capture supracompetitive profits during the time it takes for competitors to retool, retrain, and refocus in order to offer a competitive product. And in the brick-and-mortar pre-Amazon universe, the first-mover advantage tended to stick around even after a competitor entered the market—owing to several factors including consumer familiarity through brand advertisement and a reputation earned for quality.⁶²

Today, platform-providing firms that compete on their own platforms have the potential to erase much of the first-mover advantage that would otherwise exist for soft innovations. For instance, it appears that Amazon's brilliance with data and distribution provides the opportunity to match supply and demand with remarkable speed, and that may eliminate the time lag that creates first-mover advantage. Such quickness and competence no doubt makes for celebration-worthy efficiencies. But the downside is that a platform firm competing on its own platform can undo the natural market friction that has otherwise provided crucial incentives for soft innovation.

A more nuanced sketch of how this can play out shows how a platform firm's privileged position can make a decisive difference. Three things are key: First, a platform can have a nearly omniscient perspective—allowing

⁶⁰ See MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* 62 (2008) (reviewing research showing that R&D directors considered being first to the market as the most effective means for profiting from product innovation).

⁶¹ See, e.g., Lincoln Wright, *Toy Crazes Through the Years*, *SOUTH BEND TRIB.*, Dec. 7, 2016, at A7 (reviewing examples of Cabbage Patch Kids in 1983, Tickle Me Elmo in 1996, Zhu Zhu Pets in 2009, and Hatchimals in 2016).

⁶² See, e.g., Michael Abramowicz, *Perfecting Patent Prizes*, 56 *VAND. L. REV.* 115, 174 (2003) (discussing how first-mover advantage may be extended).

the instant collection of a myriad of data on consumer preferences.⁶³ Second, a dominant platform's size advantage and big data intelligence can allow it to focus its efforts on a new product market with great speed. Third, factors like consumer familiarity and reputation for quality—which made for stickiness in the brick-and-mortar world—can be rendered less important as the platform can lean on its own brand for signaling value and as page placement may push market originators to the bottom of the search results. Moreover, a big well-established platform firm will be able to underprice any particular product until it accumulates a large quantity of favorable reputation scores. And favorable reputation scores have, as a consumer-information mechanism, largely replaced the brand familiarity that was so important to the brick-and-mortar model.⁶⁴

Another way of seeing how the old-order balance has been upset is to see the problem as one of information asymmetries. When independent sellers introduce new products with unproven market potential, they take on the risk of acting with imperfect information. Does their product line up with consumer preferences? Are the prices, colors, and sizes the ones consumers want? Pioneering independent sellers can only close the information gap with consumers through trial and error. But when an established platform firm enters as a seller in a new market it hosts, it can free-ride off the information independent sellers have painstakingly discovered through trial and error. It is because of these contemporary twists in the market—information asymmetries arising through platform structures and a massive decrease in market friction—that first-mover advantage may be squelched.

But why doesn't the situation self-correct? One might think that a platform firm, in order to not discourage third-party retailers from participating on the platform and to protect the health of the platform against rival platforms, would refrain from competing with their third-party retail

⁶³ See, e.g., Zhu & Liu, *supra* note 22, at 2620 (“Our empirical evidence suggests that Amazon’s entry strategy is likely premised on acquiring new information after forming partnerships with third-party sellers.”); Khan, *Separation*, *supra* note 7, at 992–93 (discussing the use of data to inform Amazon’s decision-making with regard to retail offerings and contrasting this with data available in the brick-and-mortar context).

⁶⁴ The pro-innovation role played by trademarks understandably tends to take a back seat to the role played by patents, trade secrets, and copyright. Yet trademarks play a key role by lengthening first-mover advantage through branding/reputation. Cf. Johnson, *supra* note 59, at 279 (discussing earned reputation as means of extending first-mover advantage); Camilla A. Hrdy, *Intellectual Property and the End of Work*, 71 FLA. L. REV. 303, 332 (2019) (noting the contention of some commentators that “trademarks provide an incentive to innovate because trademarks help innovators prevent others from passing off their own offerings as those of the true innovator, and in this way retain a first-mover advantage for their innovations as against potential competitors”).

complementors.⁶⁵ Yet as Zhu and Liu explain, platform-based markets control third-party retailers' access to a certain base of customers, and because of network effects, platform markets may evolve toward one market-dominating firm,⁶⁶ leaving third-party retailers without much choice in whom they deal with. So long as a market platform offers access to additional customers the retailer could not otherwise reach, and so long as the platform-specific investment required of a participating retailer is low,⁶⁷ it can be worth it to do business on the platform—even if much of the value of innovative product offerings will be captured by the platform.

Zhu and Liu conclude that “although Amazon cares about its long-term growth, it still has incentives to appropriate value from third-party sellers selling successful products on its platform.”⁶⁸ This will impact incentives to innovate because innovating third-party retailers will not be able to appropriate a significant portion of the returns from their innovations.⁶⁹

While Zhu and Liu acknowledge their research “may paint a gloomy picture” for third-party sellers in platform markets, they suggest various strategic responses available for sellers.⁷⁰ One such strategic response is for sellers to “build their businesses around aggregating nonblockbuster products or services.”⁷¹ Even if this might be a partial silver lining from a complementor perspective, it is nonetheless gloomy from a societal perspective because it implies platform-participating firms should forgo particularly valuable innovation. Zhu and Liu also suggest a move to

⁶⁵ See, e.g., Zhu & Liu, *supra* note 22, at 2619 (discussing scholars' observations that platform firms should, for the good of their platform ecosystems, avoid competing with complementors and thus sending negative signals; collecting cites for the same).

⁶⁶ See *id.* at 2621 (“[B]ecause platform-based markets, owing to network effects, often evolve toward a single (or a few) dominant player(s) . . . complementors often do not have many potential partners from which to choose.”).

⁶⁷ See *id.* at 2636 (noting that “bringing a product already being sold on another site to Amazon involves a low platform-specific investment” and “[i]n practice, it is difficult to find products sold by third-party sellers on other e-commerce sites that are not available on Amazon”).

⁶⁸ See *id.* at 2637.

⁶⁹ Zhu and Liu agree that entry by Amazon “could reduce the number of innovative products consumers can find on [Amazon].” See *id.* at 2638. More to the point for purposes of this Essay, Amazon's entry threat will also reduce the number of innovative products available at all. And the bigger the base of customers to which Amazon controls access, the bigger the soft-innovation dampening effect will be. For a review of the theory of external incentives to innovate—and a critique of that theory in the general case—see generally Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623 (2012). Note that part of that critique regarding the need for intellectual property entitlements as incentives is the existence of naturally occurring means of value appropriation—such as first-mover advantage. See *id.* at 662. The erosion of that in the case of market-based platforms is precisely why an IP entitlement is a plausible solution.

⁷⁰ Zhu & Liu, *supra* note 22, at 2637.

⁷¹ *Id.*

“proprietary” products.⁷² This too is gloomy for society as a whole because it implies independent firms are incentivized to move away from soft innovation—which as discussed has its own important value—in favor of hard innovation for which IP law already offers protection. Zhu and Liu additionally offer that independent sellers may respond by strategically raising prices to create the appearance of lesser demand.⁷³ Yet this too is gloomy in the society-wide picture because it implies the threat of platform entry acts to incentivize retailers to price at a level that adds deadweight loss by pricing some consumers out of the market.

Given that market platform firms’ own self-interest will not assure adequate incentives for soft innovation, the question that remains is what, if anything, the law might do about it.

IV. CONSIDERING A RETAIL-DATA RIGHT

In this Part, I first discuss the historical precedent for an intellectual property response to innovation protection before diving into the details and challenges for this particular application.

A. IP as a Historical Response to “Too Easy”

In explaining why an intellectual property entitlement is a plausible solution to the lack of protection for soft innovations, it is helpful to have some historical perspective. Data-driven big-tech platforms are not the first transformative technology that has leapt a natural barrier that previously functioned to protect desirable economic activity.

Copyright, from its beginnings, can be understood as a reaction to the invention of the printing press—specifically the fact that the printing press made the copying of books too easy.⁷⁴ Copyright thus imposed a legal barrier to copying when the technological barrier had been eroded. Another technological revolution began in the 1990s with the proliferation of digital

⁷² *Id.* at 2637–38.

⁷³ *Id.*

⁷⁴ *See, e.g.,* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) (“From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection.” (footnotes omitted)). A note of caution, however, is in order, as the fuller history of copyright is more complex and political. *See, e.g.,* Johnson, *supra* note 69, at 637 (describing copyright’s origins in political dynamics of the English monarchy); Liam Séamus O’Melinn, *The Recording Industry v. James Madison, aka “Publius”: The Inversion of Culture and Copyright*, 35 SEATTLE U. L. REV. 75, 104 (2011) (“The historical past of copyright is unattractive to the modern audience, but common law copyright has a *philosophical* past that consists primarily of two items: (1) the immemorial right of the author (or performer) to prohibit unauthorized copying, and (2) the printing press.”).

technologies that permitted perfect, lossless copying of images and sound recordings.⁷⁵ The Digital Millennium Copyright Act was the reaction.⁷⁶

Today we are seeing a technological revolution of similar scope. The rise of online commerce, big data, and quick-reacting overseas manufacturing capacity has made it in some sense “too easy” for a dominant platform firm to copy soft innovation. Thus, there is precedent for exploring the imposition of a legal barrier that will ensure risk-taking independent firms continue to have the incentive to bring products to market.

B. A Retail-Data Right

Consider an intellectual property entitlement called a “retail-data right.” This entitlement, created by law, would give independent sellers on a dominant platform a right to exclude the platform from using their omniscient eye to cherry-pick product lines—at least for some period of time.⁷⁷ Compliance with the retail-data right would require a company like Amazon to wall portions of itself off from one another. For instance, a platform firm would have to segregate data generated on its market-platform side from being used on the firm’s manufacturer/direct-to-consumer side. If given the appropriately calibrated duration, such a right would protect the ability of independent retailers to earn supracompetitive profits sufficient to reward the risk-taking that brought their soft innovation to the marketplace.

In addition, a retail-data right could include an affirmative right for the independent retailer to receive and use the data that the platform collects

⁷⁵ See, e.g., H.R. REP. NO. 105-551, pt. 2, at 25 (1998) (“In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works—at virtually no cost at all to the pirate. As technology advances, so must our laws.”).

⁷⁶ See Steve P. Calandrillo & Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349, 400–01 (2008) (“The advent of digital technology resoundingly tipped the reward scales against authors. Whether engaged in by organized movie and software piracy rings or individuals using peer-to-peer file-sharing networks, the ability to quickly create and distribute innumerable, near-perfect copies of digitized works has become commonplace. Moreover, it is generally impossible on the Internet to determine whether material is being distributed lawfully. This change in the copyright landscape in fact created the impetus behind enactment of the DMCA.” (footnotes omitted)).

⁷⁷ An expiration date is appropriate because no legal barrier should outlive its usefulness. Regarding IP entitlements outliving their usefulness, see Johnson, *supra* note 59, at 310–14, for a discussion on incentive horizons in the context of theoretical biology. For a comprehensive treatment of duration of copyright terms, both in theoretical and practical terms, see Tyler T. Ochoa, *Limits on Duration of Copyright: Theories and Practice*, in TIME: LIMITS AND CONSTRAINTS 149, 149–77 (Jo Alyson Parker, Paul A. Harris & Christian Steineck, eds. 2010), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1803&context=facpubs> [<https://perma.cc/SC6E-MRBV>].

concerning the seller's products.⁷⁸ Such an affirmative right could allow retailers to make efficiency-enhancing deals that derive value from the data.

C. Contractual Bargaining?

One might wonder why, if a retail-data right is such a good idea, sellers don't just bargain for it contractually? That would obviate the need to write it into the law. There are, however, at least two good reasons why bargaining through contract will not provide such a solution. The first reason is market power. A successful platform accumulates sufficient market power such that the platform can refuse contractual terms that would require the walling off of data. We can expect that complementors will widely lack the leverage to walk away from a partnership with a platform like Amazon given its customer base and market power. A second reason bargaining through contract may not provide a solution is the difficulty of enforcement. Contractual rights are generally limited to expectation damages,⁷⁹ which could make enforcement uneconomical for aggrieved retailers.⁸⁰ A statutory right, however, could be accompanied by remedies such as injunctions, punitive damages, minimum statutory damages, attorneys' fees, and royalties set at the highest reasonable rate. A carefully calibrated offering of such remedies would allow for optimal enforcement. Moreover, a statutory

⁷⁸ Such an affirmative right would be somewhat outside the most traditional mold of intellectual property rights, which are rights to exclude others from certain conduct rather than affirmative rights to compel the turning over of information. Notably, however, proposed legislation in the European Union concerning the regulation of online markets would require this. *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, at 40–41, COM (2020) 842 final (Dec. 15, 2020) [hereinafter *Proposed Digital Markets Act*], <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN> [https://perma.cc/3GQQ-BH93].

⁷⁹ See, e.g., *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001) (“[T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*. This principle of expectation damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract.”).

⁸⁰ See, e.g., David Frisch, *The Compensation Myth and U.C.C. Section 2-713*, 80 BROOK. L. REV. 173, 190 (2014) (“Under an expectation damages regime, the cost of litigation can be a deterrent to pursuing any recovery, which could in turn incentivize breach and disincentivize market participation.”); Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards A Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2341 (2004) (“[M]ost public courts are very hesitant to incorporate lost profits into expectation damages because doing so involves speculation that extends beyond the qualifications of judges and juries. One consequence of this refusal is that expectation damages undercompensate the breached party and therefore underdeter breach.” (footnote omitted)); cf. Mark Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1251 (1994) (“The usual economic argument for treating certain breaches of contract as a tort with liability for emotional or exemplary damages is that a promisor otherwise would have too little incentive to perform because the contract would be underenforced. . . . [C]ourts may not hold promisors to a high enough standard of performance. Allowing emotional or exemplary damages may offset this disincentive by increasing the expected cost to a promisor found in breach.” (footnotes omitted)).

right could be made criminally enforceable, deterring defendants with potential criminal sanctions and allowing for the uncovering of wrongdoing through the investigatory power of grand juries.

Although contractual bargaining will not lead to the genesis of a soft-innovation-incentivizing retail-data right, contractual bargaining does have the potential—unless guarded against—to undo the effectiveness of such a right. A platform with enough market power could just require independent retailers to bargain away a retail-data right as one of the terms for doing business on the platform. Thus, there is a need for a legal mechanism to prevent such contractual short-circuiting. This problem could be tackled in an antitrust-type mode with a statutory direction to courts that such an exercise of market power would be unlawful, a prohibition that could be made enforceable by the Federal Trade Commission.⁸¹ Alternatively, such a problem could be tackled in an intellectual-property-type mode by providing for restraints on the alienability of the newly created intellectual property right. There is considerable precedent for this, as restraints on alienability can be found across a wide array of intellectual property doctrines.⁸²

There may remain an important role for contractual bargaining to play. If remedies are strong enough, and if bargaining power is accounted for, then a platform that anticipates potential liability has the incentive to strike a bargain with independent retailers. In such a bargain, the platform could pay the independent retailer for the value of the soft innovation—perhaps through a royalty. Preserving the legal ability for parties to enter into such bargains could ensure that independent retailers continue to have an incentive to produce soft innovations, but it would permit a transfer of that soft innovation to the platform in cases where the platform could implement the innovation more efficiently. To achieve this, the law could stipulate that a platform could not give independent sellers less favorable terms for the

⁸¹ This is potentially problematic for the sorts of reasons already mentioned—such behavior may not be classically anticompetitive under existing antitrust law. If the platform is leaning on retailers to give up contractual rights in such a way that causes lower prices for consumers downstream but does not help to maintain the platform's monopoly, then such behavior is unlikely to be understood to be monopolization conduct that runs afoul of current antitrust law. A statutory instruction from Congress could, however, bypass current judicial comprehension of how to define an antitrust harm and by fiat make such behavior an unlawful exercise of market power.

⁸² See, e.g., 15 U.S.C. § 1060(a)(1) (requiring trademark assignments to be accompanied with associated business goodwill); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 326 (1988) (noting the vitality of “the prohibition on assigning a trademark apart from its associated goodwill”); 17 U.S.C. § 203 (providing for terminations of post-1977 copyright transfers); 17 U.S.C. § 304(c) (providing for terminations of pre-1978 copyright transfers); *Stanfield v. Osborne Indus., Inc.* 52 F.3d 867, 873 (10th Cir. 1995) (rendering trademark invalid where owner licensed the mark without retaining control over the quality of goods marketed under the mark); cf. JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 184 (2018) (arguing that the right of publicity should not be alienable and that licensing of a person's right of publicity should be limited in scope and duration).

marketplace relationship on account of refusing to allow the platform use of its retail data. The relationship could optionally be policed by means of some kind of administrative tribunal. Or independent sellers could deal as a group with the platform in some form of quasi-legally constructed collective management or bargaining, as is the case with songwriter royalties collected through the medium of performing rights organizations.⁸³ A retail-data right thus could provide protection for independent retailers' ability to appropriate value from their innovations while still providing space for negotiation between the independent retailers and the platform to make the most of those innovations.

D. Direct Regulation as an Alternative

Besides an intellectual-property-type solution, another way to address salesjacking would be a straight regulatory prohibition, administratively enforceable with a fine. This, in fact, is the approach that Europe appears to be pursuing with its proposal for regulating digital markets.⁸⁴ What differentiates the proposed European regulation from the IP-type entitlement suggested here is that a retail-data right would be privately enforceable, would not require establishment of new administrative agency structure, could be made criminally enforceable, would involve some tailored means of alienation or licensing to enable efficient transactions, and would be limited in time so that the platform could eventually make productive use of the information it collected. All of those attributes could contribute to a more economically efficient solution.

V. REASONS FOR CAUTION

While a new retail-data right could be a promising potential legal response to the development of platform salesjacking, some caution is in order. History teaches us that intellectual property rights, once established, are difficult to undo. That is true even if they turn out to make little sense according to evolving theoretical and empirical understandings.

⁸³ For a discussion of performing rights organizations and their private/public character, see Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 *CARDOZO L. REV.* 173, 208–09 (2012).

⁸⁴ The proposed act would prohibit platforms (called “gatekeepers”) from using data generated by independent sellers (“business users”) to compete with them. See *Proposed Digital Markets Act*, *supra* note 78, at 40 (“In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall: (a) refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users . . .”).

For instance, patents appear to be economically pernicious, at least for most categories of invention. Research suggests they may generally do little to promote innovation.⁸⁵ And patents can substantially harm innovation.⁸⁶ Nevertheless, patents are a thoroughly entrenched feature of the law. Patent holders will fight hard to keep the patent regime in place.⁸⁷ Meanwhile, the harms of the patent system are suffered by a highly diffuse group of consumers, which weakens opposition to the expansion of patent rights.⁸⁸ As a result, the political currents seem to habitually run in the direction of protecting the patent regime and pushing for its expansion. Other intellectual property rights follow a similar pattern: once established, they tend to stick—with subsequent legal reforms only expanding them.⁸⁹

⁸⁵ See, e.g., Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT. SCI. 173, 180 (1986) (discussing lack of empirical evidence of the economic necessity of patents and finding no evidence that patent protection was necessary for bringing to market any invention in many industries studied); ALAN HUGHES & ANDREA MINA, CTR. FOR BUS. RSCH., THE IMPACT OF THE PATENT SYSTEM ON SMES 27 (2010), <https://web.archive.nationalarchives.gov.uk/20140603121503/http://www.ipo.gov.uk/ipresearch-impact-201011.pdf> [<https://perma.cc/B983-QGPC>] (“Despite the emphasis on patents in the economic literature[,] . . . secrecy and lead-time advantages seem to be much more important for firms . . . [T]he number of sectors where patents are necessary to generate and sustain firms’ competitive advantage are few and concentrated in high-tech and science-based markets.”).

⁸⁶ See, e.g., Robert E. Thomas, *Debugging Software Patents: Increasing Innovation and Reducing Uncertainty in the Judicial Reform of Software Patent Law*, 25 SANTA CLARA COMPUT. & HIGH TECH. L.J. 191, 207 (2008) (“Not only do patents not increase software innovation, they actually reduce innovation incentives.”); Mansfield, *supra* note 85, at 176 (presenting empirical research that in industries where patents were unnecessary to induce development or commercialization of inventions, patents were often obtained nonetheless because they could be used to delay potential competitors and to serve as bargaining chips).

⁸⁷ Cf. Eric E. Johnson, *The Case for Eliminating Patent Law’s Inequitable Conduct Defense*, 117 COLUM. L. REV. ONLINE 1, 19 (2017) (describing political opposition to eliminating the inequitable conduct defense during the consideration of a package of reforms of U.S. patent law).

⁸⁸ For a relevant discussion in the context of public choice theory and copyright, see Ochoa, *supra* note 77, at 153–54.

⁸⁹ See, e.g., Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property Shamans, Software, and Spleens: Law and the Construction of the Information Society*, 75 TEX. L. REV. 873, 886–87 (1997) (book review) (“Copyright law has gone through numerous statutory iterations over the past 210 years, almost always changing in the direction of expanded protection for copyright owners—increasing the number of things that are copyrightable, increasing the duration of copyright protection, making it easier to qualify for copyright protection, and increasing the rights copyright owners have to control uses of their works.” (footnotes omitted)); PETER DRAHOS, THE GLOBAL RATCHET FOR INTELLECTUAL PROPERTY RIGHTS: WHY IT FAILS AS POLICY AND WHAT SHOULD BE DONE ABOUT IT 1–2 (2003), <https://www.anu.edu.au/fellows/pdrahos/reports/pdfs/2003globalipratchet.pdf> [<https://perma.cc/KJX4-ETPG>] (discussing how the process of negotiating and entering into international trade agreements has caused a “ratcheting” upward of intellectual property rights and observing that “each subsequent bilateral or multilateral agreement can and usually does establish a higher standard of IP protection”); Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 TEX. REV. L. & POL. 103, 107–08 (1999) (“When people are, or are likely to be, on both sides of a class of transactions, they tend to support legislators who favor efficient rules. Not so when the rules can be made industry-specific. . . . Industry-specific rules are the playgrounds of interest groups, and once factions get to work it is predictable that at least some of the laws will favor concentrated groups at the expense of a broader public.”); cf. Peter K. Yu, *Ten Common*

Yet even taking these concerns into account, introducing a retail-data right would likely be a relatively low-risk reform because of the concentration of interest in opposing such a right and its expansion. Thousands of smaller companies stand to gain from a retail-data right. The big platform firms, which are few, stand to lose. Should retail-data rights eventually prove harmful to consumers and unhelpful to innovation, it seems probable that large platform firms have the resources and the incentive to make that argument persuasively.⁹⁰ At any rate, the risks of entrenching an economically adverse intellectual property entitlement can be guarded against by including a sunset provision in the legislation.⁹¹

At a more abstract level, caution is called for because we ought to be respectful of the power of an unregulated free market. Intellectual property rights are interventions in the free market, and we should be careful in presuming to know better than the market. Here, however, knowledge is exactly the dilemma: As the bulk of information about the market accumulates in the mind of one economic actor, the law then should, as the guardian of the market, stay vigilant to keep the market working for the prosperity of all of society.

CONCLUSION

The aim of this Essay has been to offer an intellectual property lens to a current controversy that has been understood to be a concern for antitrust law. In so doing, this Essay has sought to make a number of contributions to the conversation about the perceived problem of dominant platform firms

Questions About Intellectual Property and Human Rights, 23 GA. ST. U. L. REV. 709, 738 (2007) (arguing that a human rights conception of intellectual property issues “may result in what I have described elsewhere as the undesirable ‘human rights ratchet’ of intellectual property protection. Such development would exacerbate the already severe imbalance in the existing intellectual property system and would ultimately backfire on those who seek to use the human rights forum to enrich the public domain and to set maximum limits of intellectual property protection.”).

⁹⁰ It could be the case, for instance, that Amazon’s appropriation of profitable product lines, rather than discouraging soft innovation, actually encourages quicker soft innovation. This could be because, perhaps, third-party sellers who have lost their profitable SKUs to Amazon must devote more effort to finding untapped product ideas to take their place. Indeed, Zhu and Liu, in their empirical study of Amazon, offer practical advice along these lines for affected third-party retailers: “Complementors that choose to focus on popular products need to develop capabilities in new product discovery that enable them to continually bring innovative products to the platform.” See Zhu & Liu, *supra* note 22, at 2637. Whether third-party sellers can and do react in this way is an empirical question that appears to be unanswered as of now. *But cf.* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1722 (2006) (explaining that fashion design copying spurs faster innovation in fashion: “The fashion cycle is driven faster . . . by widespread design copying, because copying erodes the positional qualities of fashion goods. Designers in turn respond to this obsolescence with new designs. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales.”).

⁹¹ See Johnson, *supra* note 69, at 675–78.

entering into competition against the sellers hosted on their platform. The salesjacking behavior of platforms is worrying not because it is anticompetitive. To the contrary, this conduct may be generally procompetitive—at least in terms of first-order effects. Yet such conduct may still wreak substantial economic harm stemming from anti-innovative effects. These effects are important because they work against a form of soft innovation that is economically important yet is not protectable through patent or copyright. Previously, such soft innovation has been incentivized, in important part, by the lure of supracompetitive profits sustained by market friction, often referred to as “first-mover advantage.” A new intellectual property entitlement—a retail-data right—could protect independent retailers for a period of time, ensuring that their risk-taking can be sufficiently rewarded. Of course, any new intellectual property right, as a restraint on the free market, should be carefully calibrated to avoid doing more harm than good. But a retail-data right may be worth contemplating, as it would provide a means of ensuring that dominating platforms do not deter marketplace innovation.