

Competition policy in copyright

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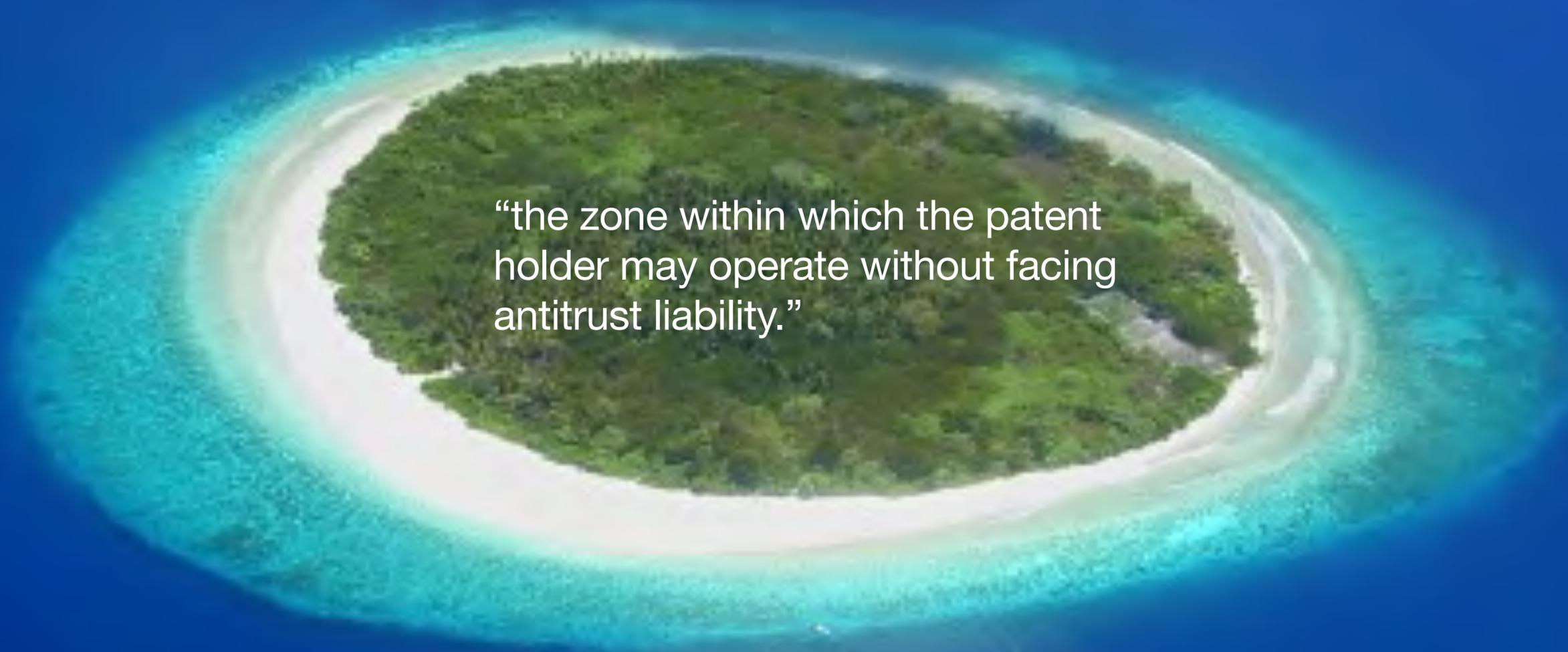
IP and competition law

- The point of antitrust law is to encourage competitive markets to promote consumer welfare. The point of patent law is to grant limited monopolies as a way of encouraging innovation. ...
- A patent ... provides an exception to antitrust law, and the scope of the patent — *i.e.*, the rights conferred by the patent — forms the zone within which the patent holder may operate without facing antitrust liability.



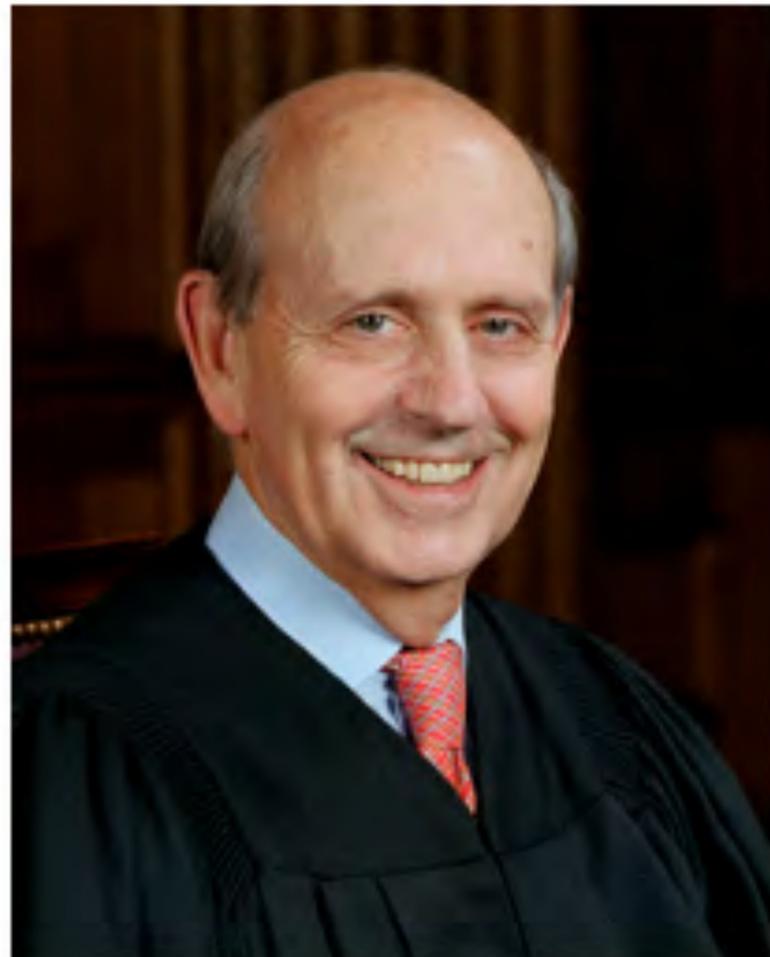
Roberts CJ, in *FTC v Actavis*, 133 S.Ct. 2223, 2238 (2013) (*dissenting*)

IP island in a competition sea



“the zone within which the patent holder may operate without facing antitrust liability.”

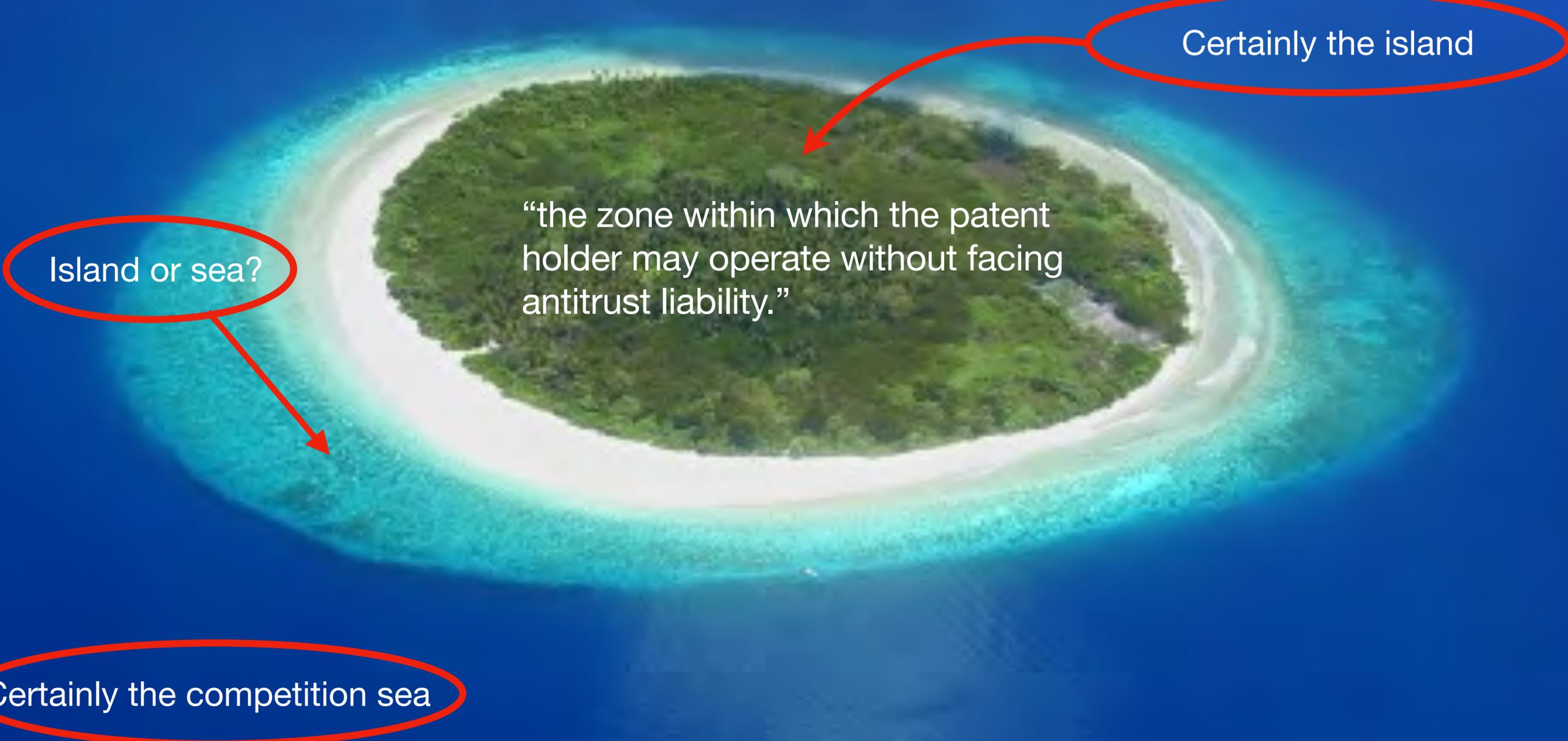
Yes, but...



[P]atent and antitrust policies are both relevant in determining the "scope of the patent monopoly" — and consequently antitrust law immunity — that is conferred by a patent.

Breyer J, in *FTC v Actavis*, 133 S.Ct. 2223, 2231 (2013)

IP island in a competition sea



Certainly the island

“the zone within which the patent holder may operate without facing antitrust liability.”

Island or sea?

Certainly the competition sea

IP and competition policies are both relevant in determining the scope of the IP

Competition policies: from outside of IP law and from within

Calibrating IP from within vs from outside

From within

- **How IP law itself allocates rights to *owners* and *users* (and affect the IP owner's market power), e.g.:**
 - What subject matter is subject to exclusivity
 - What constitutes infringement
 - Defences, exceptions, remedies
- Questions that arise in regular IP litigation

From outside

- **Other laws that limit the exercise of IP rights, e.g. competition law:**
 - Agreements between IP holders
 - Licensing restrictions
 - Abuse of dominance
- The IP rights exist, but their exercise is limited when used to *enhance* or *maintain* market power anticompetitively
- (sometimes, to *exploit* market power excessively).

Calibrating from within

Competition policies from within IP law: copyright law

The Statute of Anne (1709)

Competition policy at the cradle of copyright

- As much as first the copyright statute as legislation against the monopoly of the Stationers Company.
- Vesting first ownership with authors, not publishers
- Limited duration (14y+14y) (2nd term, only to author, if still alive)
- Control of excessive pricing
- Mandatory library deposit
- Remedy against Stationers' exclusionary practices



The Statute of Anne. From the University of Virginia Library Special Collections, photo by Brandon Butler

Calibrating from within

Examples of built-in competition policies within copyright law

- Copyright duration
- Subject matter: facts and ideas, vs expressions
- Fair use/dealing
- First sale doctrine/exhaustion

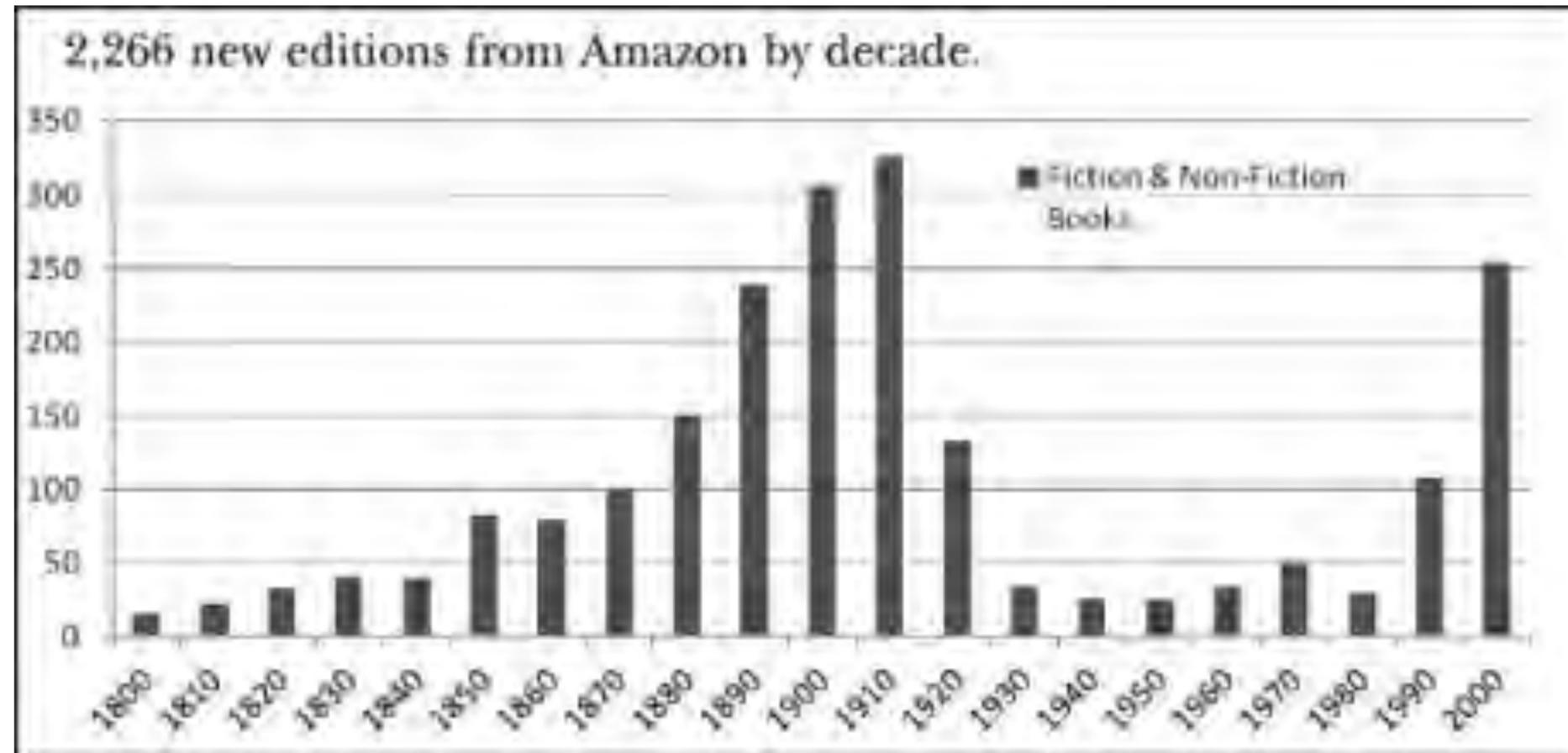
Limited duration

As a built-in competition policy lever

- When copyright expires, the work can be freely used, copied, and sold
- Public domain books compete with in-copyright book
- (Less effective with life+50 or life+70 terms)

Limited duration

Public domain works compete with new works



New Editions from Amazon by Original Decade of a Title's Publication, 1800-2000. Source: Paul J Heald, "How Copyright Keeps Works Disappeared" (2014) 11:4 J Empir Leg Stud 829-866, at 839

Allocating usage rights to “owners” and “users”

Three related criteria

1. Incentive sufficiency:

- Allocate uses that generate marginally high incentives to owners, and otherwise to users.

2. Utilizing capacity:

- Allocate usage rights to those better situated to utilize the work for socially desirable purposes, including innovative purposes.

3. Transaction costs:

- Consider how transaction costs, broadly understood, affect the likelihood of value-maximizing voluntary exchanges.
- Criteria 1 & 2 are important because transaction costs are often high.

Subject matter: facts, ideas

As a built-in competition policy lever

- Copying the expression may serve as direct substitute (and affect incentive)
 - Less so, or not at all, when copying facts or ideas for different expressions
- Author (or the publisher they choose) may have a comparative advantage in using the work for the purpose it was created
 - Comparative advantage can't be presumed when facts or ideas are used for other expressions
- Transaction cost impede efficient bargaining over facts or ideas

Fair use/dealing

As a built-in competition policy lever

[T]he fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

First-sale doctrine/exhaustion

As a built-in competition policy lever

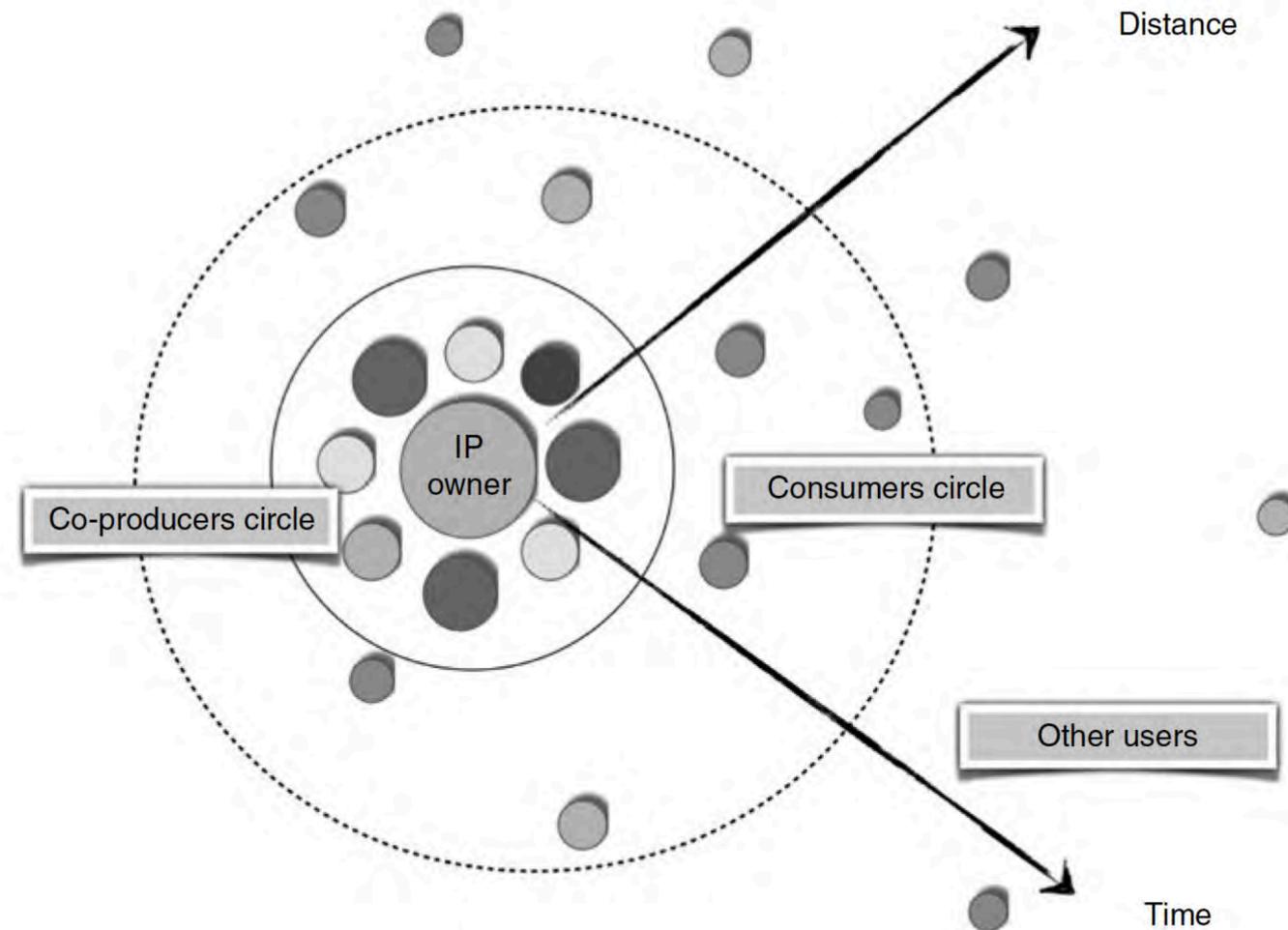


Figure 2.1 An IP owner, co-producers, and users

Source: Ariel Katz, [“The First Sale Doctrine and the Economics of Post-Sale Restraints”](#) (2014) 2014 BYU L Rev 55

Thank you!

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