

Against Utopia: Sharing Economies in Innovation Markets

Jonathan M. Barnett (USC School of Law)

Intellectual property rests on a simple incentive rationale: in the absence of a robust barrier against imitation, innovators will rationally contract or withdraw investment. But popular and scholarly commentary identifies multiple settings where innovative output proceeds vigorously without substantial recourse to intellectual-property protections and in the face of widespread imitation. Based on this important observation, it is sometimes concluded that intellectual property or some other imitation barrier sometimes, often or even usually is not a prerequisite for intellectual production. This “utopian” position oversimplifies the complex incentive structures and circumscribed conditions under which markets can induce substantial innovation without robust intellectual property or equivalent exclusionary barriers. A simple rational-choice model shows that “sharing regimes”—that is, innovation environments substantially unprotected by exclusionary barriers but meaningfully regulated by social norms—supply a viable but fragile habitat for innovation investment, which necessarily deteriorates outside of small-number settings populated by innovator populations with substantial endowment homogeneity. Empirics confirm theory: a novel industry survey shows that innovation markets that operate successfully without robust intellectual-property protections tend to be confined to low capital-intensity settings or make recourse to some other exclusionary barrier to generate rents that sustain innovation incentives. Even in economically significant markets, however, sharing practices widely persist in the form of restricted-access arrangements for the nominal-cost exchange of intangible goods that are otherwise protected by property rights. These sharing arrangements play a vital role not as a substitute for property but as a complementary mechanism that alleviates the transaction-cost burden of a formal property-rights regime. Close examination of three paradigm cases for the view that intellectual production can proceed without intellectual property or other exclusionary barriers—premodern craft production, academic research and open-source software—supports this position: in each case, sharing practices facilitate the low-cost circulation of knowledge assets but are always allied to some other exclusionary instrument that generates revenue streams to support innovation incentives.