

# Competition policy in copyright

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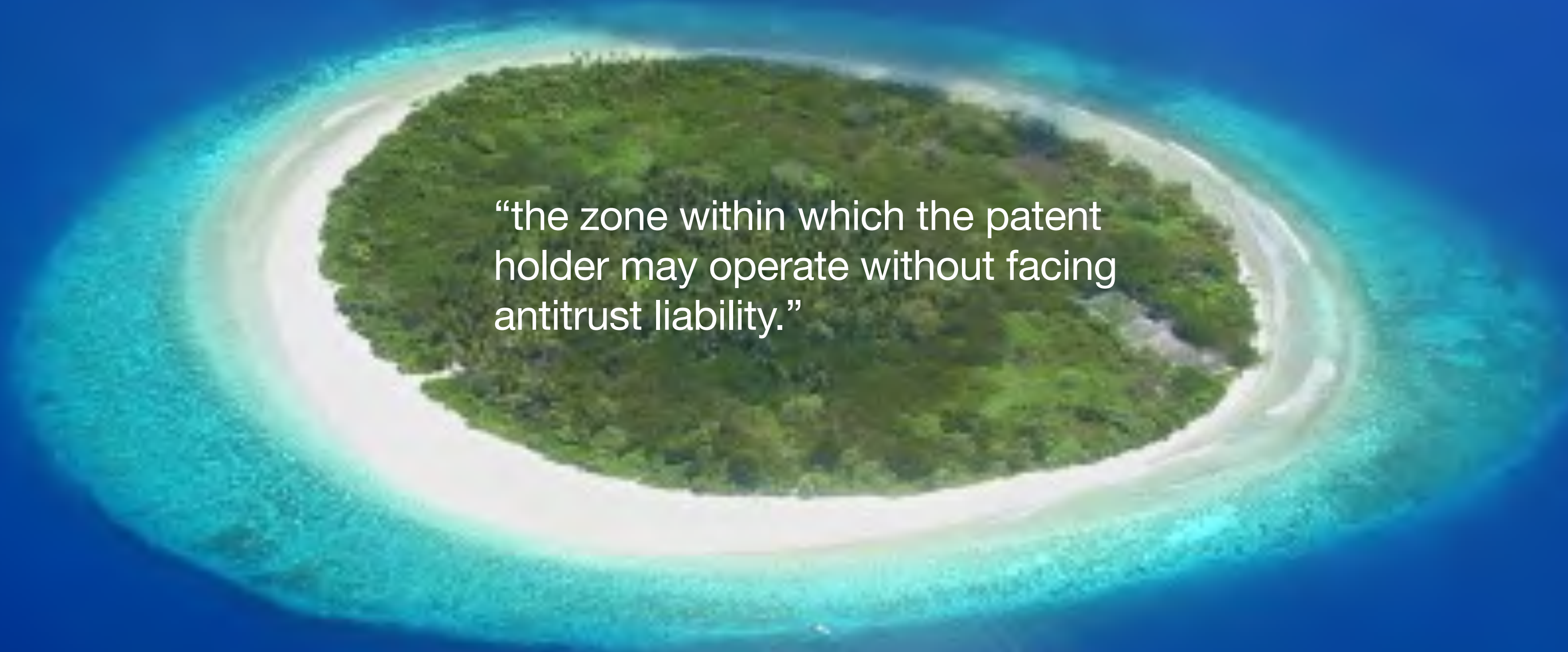
# IP and competition law

- 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

Island or sea?

Certainly the island

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

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



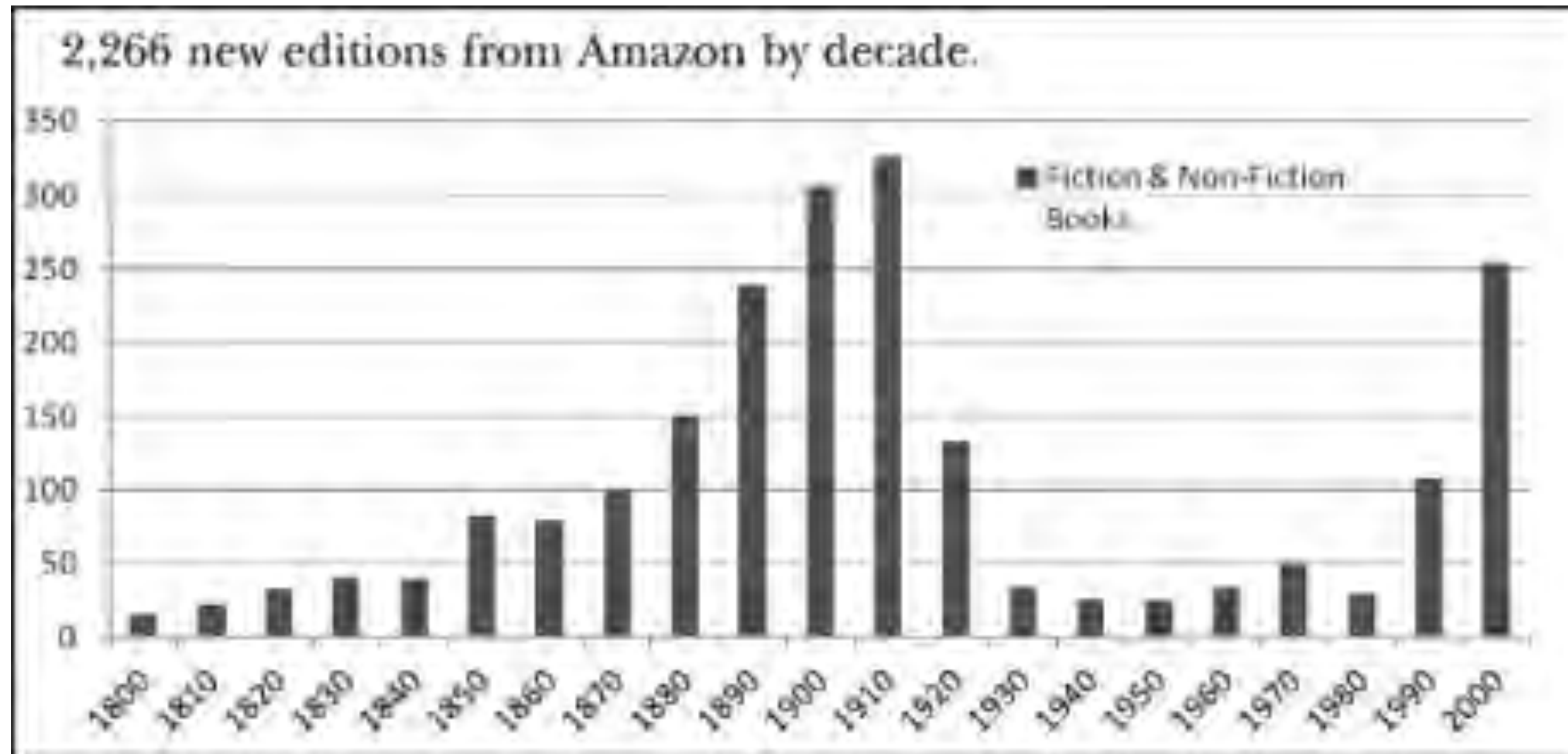
# Limited duration

## 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

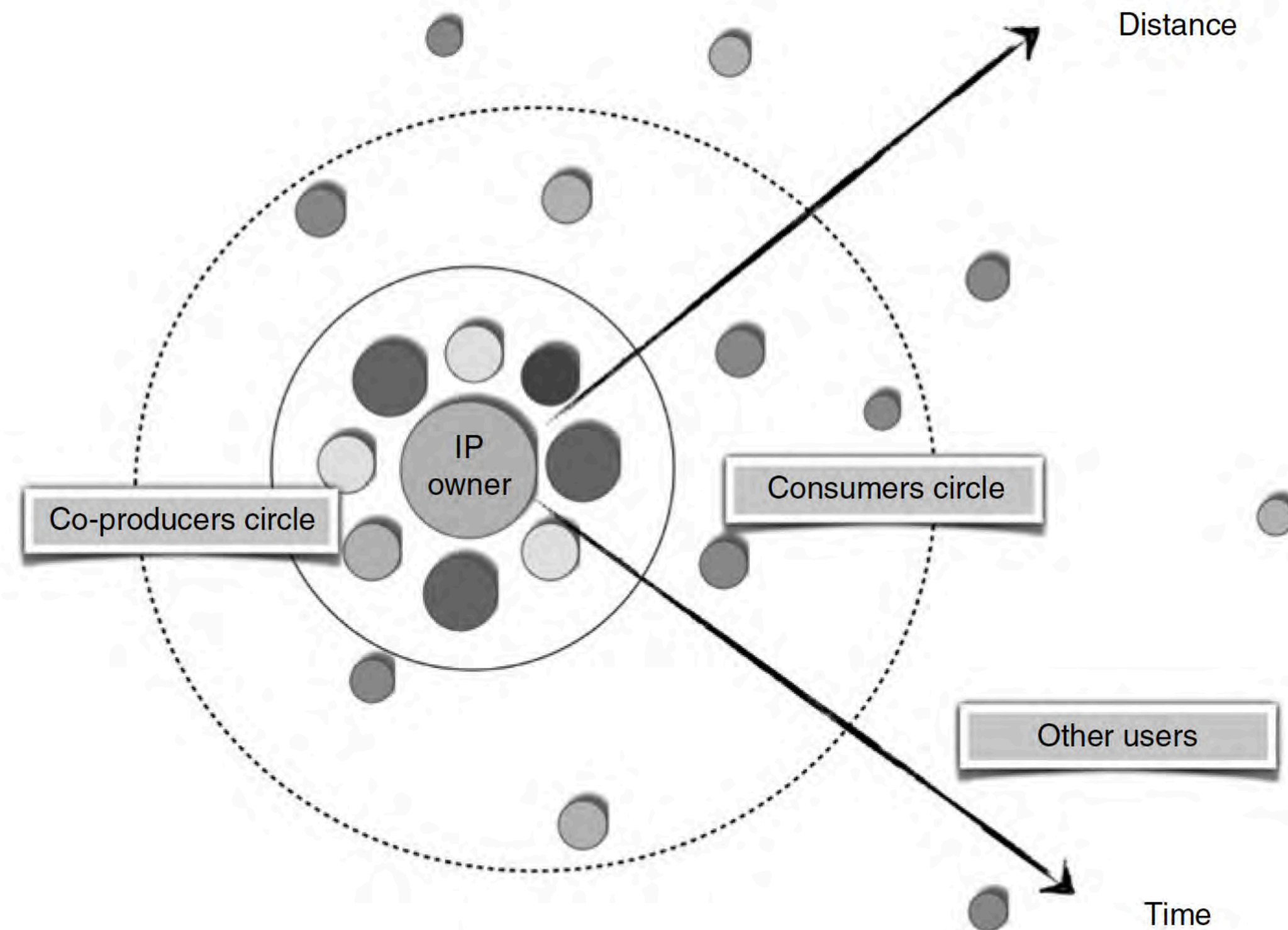


Figure 2.1 An IP owner, co-producers, and users

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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