

My contention is that "value" should not be the basis for legal protection unless (a) there's social as well as private value involved and (b) the legal protection is necessary for the generation of, or protection of, the social value.

For trademarks, once they're generated, they need legal protection against confusion to keep their social value (their value as communicators) from disintegrating. For ideas, writings, etc., they may or may not need legal protection to preserve and augment their social value once generated. That will depend on two things.

1. The first variable is the extent to which single-party control is advisable for exploitation (increasing the social value of) the resource. This in turn will depend on variables like whether the i/p good is capable of becoming congested, whether there's a great deal of R & D into applications which requires central ownership for efficient coordination, whether T costs will prevent single-party control from being effective, etc.
2. The second variable is the extent to which legal control is necessary to provide this single-party control. Note there's an argument that the second stage of the argument is surplusage: if single-party control is a good idea, then there's little harm done in providing it by law, and if it's provided without legal intervention then providing legal intervention will make little difference. This issue of whether legal control is "necessary" is probably better recast as: is legal control (the grant of rights) likely to do a better job of drawing the lines of where private control is a good idea than will nonlegal control (the interplay of privilege.) For this latter issue, my ruminations about the limitations of contract may be useful.

Since the protection of the social value in these sorts of things depends on empirical questions, the most we might say at the moment about them is that the case for legal protection isn't as clear for them as for trademarks, remembering we're now talking about post-creation exploitation.

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1. That is, we won't be concerned about protecting value where the private returns are outweighed by negative impacts on the rest of society.

2. This is Kitch's point.

When it comes to drawing out and generating resources of positive social value, then the potential case for protecting ideas etc is a bit stronger.

In any inquiry, separating out the incentive and prospect function will be important.

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For article, remember to explain why a simple "internalize the externalities" approach doesn't work.