

# LAW'S INFORMATION REVOLUTION

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*Lawyers traditionally have conveyed legal expertise in the form of advice tailored to individual clients' needs. This business model is reinforced by licensing and professional responsibility rules designed to ensure lawyers' competence and loyalty to clients' interests. An alternative model based on the sale of legal information in impersonal product and capital markets is challenging the traditional professional model. In this new world, legal information engineers would to some extent replace legal practitioners. This Article provides a theoretical intellectual property framework for the regulatory decisions that must be made as the two models collide. We show that traditional professional regulation inhibits full development of the new business model by prohibiting some of its practices and limiting intellectual property protection for legal information. We challenge this approach by showing how a fully developed legal information market could substitute for some of the protection that licensing and professional responsibility rules provide consumers without the current model's negative effects of restricting the supply and raising the costs of legal services. We apply our analysis to some actual and potential markets in legal information.*

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### INTRODUCTION

When people or firms need information about the law related to their transactions or litigation, they traditionally get it by going to a lawyer who gives them personalized legal advice or designs legal instruments tailored to their needs. The client must rely on the lawyer's honesty and care because the client is not an expert, and the value of the services may not be evident until long after the services are rendered.<sup>1</sup> Lawyer licensing and regulation facilitates this reliance by seeking to ensure that lawyers have a minimal level of competence and apply their independent judgment. This regulation is supplemented by professional norms and market devices such as large law firms, which serve as reputational intermediaries between clients and lawyers.<sup>2</sup>

This traditional market for legal services is breaking down as lawyers lose their monopoly over law-related services and must compete with alternative providers of similar services. One of us has shown how large law firms are being pressured by a variety of forces, including better-informed clients, new legal technologies, and sharper competition in the global market for legal services.<sup>3</sup> Increasing costs have encouraged large clients to search for alternatives to litigation, particularly arbitration. These developments threaten the already-fragile bonds in large firms, which depend on lawyers sacrificing present gain to build their firms' reputations.

At the low-cost end of the legal services market, legal software and other new technologies are squeezing small law firms and sole practitioners. Yet many middle-class consumers still cannot afford the legal advice that would enable them to cope with increasing regulatory complexity.<sup>4</sup>

These developments set the stage for the growth of new markets for law-related information and advice. One-to-one legal advice could yield to a legal information industry in which legal information factories replace the sole

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1. Legal advice, therefore, is an example of a "credence" good, as distinguished from "search" goods that consumers can evaluate before using them or "experience" goods they can evaluate after use. As to the nature of credence goods, see Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–69 (1973). As to "search" and "experience" goods, see Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312 (1970). As to the reliance aspect of credence goods, see Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 530–31 (1979).

2. See Larry E. Ribstein, *Ethical Rules, Agency Costs and Law Firm Structure*, 84 VA. L. REV. 1707 (1998).

3. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760–71.

4. See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

proprietors and worker cooperatives that traditionally have delivered legal services. Richard Susskind has described some features of this emerging industry.<sup>5</sup>

This Article goes beyond Susskind's descriptive treatment in two significant ways. First, we discuss the legal developments that could help this legal information market flourish. We complement previous analyses of regulatory constraints on innovation of legal services<sup>6</sup> by showing how increased intellectual property rights could motivate the creation of legal information products.<sup>7</sup> Second, we analyze this new market's potential effects on professional regulation. Open and transparent product markets could significantly reduce the need for the protections that professional regulation and law firms' reputational capital provide.

The challenges facing the legal information market include the incompleteness of formal intellectual property rights that confronts all intellectual property creators. But legal information faces additional problems, which we describe as "legal exceptionalism." First, sophisticated legal information products may contravene laws regulating the legal profession and forbidding nonlawyers from rendering legal advice. Second, intellectual property protection challenges due process and lawyer independence considerations that require creators of law and law-related information to let the public use their products.

The irony of legal exceptionalism is that development of the legal information market could reduce the need for the regulatory barriers that impede this market's evolution. Legal exceptionalism assumes that legal information is conveyed through one-to-one agency relationships in which a client depends on her lawyer's judgment and independence. This assumption supports attorney professional responsibility rules designed to promote lawyers' loyalty to clients and licensing laws to promote lawyer quality. These rules forbid some types of products and services. They also indirectly impede the development of products or information by barring private contractual arrangements such as noncompetition agreements and non-lawyer-owned firms that could protect property rights in this information. If legal information products traded in a broad and transparent market replaced one-to-one advice, market competition and market-based mechanisms could help ensure quality and thereby reduce the need for licensing and professional responsibility rules.

This Article is primarily a positive rather than normative analysis. We show that the legal information market has arrived and that policymakers will have to take it into account. We discuss the costs and benefits of regulating this market, including second-order effects of inhibiting market devices that could reduce the

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5. For an interesting description of these new technologies, see RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008).

6. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008); Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299 (2004).

7. This Article deals exclusively with civil litigation and commercial transactions. Although this Article's analysis has implications for criminal litigation, we also recognize that such litigation raises special constitutional and policy issues and therefore deserves special study.

need for regulation. Although we do not propose a particular regulatory framework, we suggest that any regulation should take account of the potential benefits of the new market and not just its threat to the existing order.

Part I of this Article briefly reviews the current state of the legal information market and surveys the intellectual property rights that could support its development. It shows that there are significant gaps in these rights, particularly as applied to legal information. Private contracts and firms theoretically could fill gaps in formal property rights with respect to legal information as they do for other types of property and information. However, regulation of legal services impedes these contracts.

Part II presents a theoretical model that demonstrates the relationship between protecting intellectual property rights in legal information and regulating the traditional market for one-to-one legal advice. This model illustrates how moving from a one-to-one advice model of legal services to a legal information market can both reduce the need for and increase the opportunity costs of regulating legal advice.

Part III applies the Article's theoretical analysis to specific new products in the legal information market. This Part shows how regulation of the legal profession and weak intellectual property rights in legal information products potentially constrain legal innovation. At the same time, this Part illustrates the extent to which the new market already exists despite legal barriers and how this market is poised to break through the barriers. This Part also identifies potential effects of regulatory changes on the development of this market.

Part IV concludes with some implications of the legal information market for the existing model of law practice.

## I. INTELLECTUAL PROPERTY LAW AND LEGAL PRODUCTS

Property rights in legal information are subject to the same general economic analysis that applies to the production of information generally.<sup>8</sup> Subpart A briefly reviews the legal information market to set the stage for the general policy analysis in the remainder of this Part and Part II. Subpart B discusses the general considerations underlying our property analysis of the legal information market. Subparts C and D apply these principles and rules to two key aspects of the legal information market—legal documents and legal ideas. This analysis reveals the gaps in existing protection of innovation in the legal information market. Subpart E shows how contracts and the market for legal innovation might help fill these gaps.

### A. *An Overview of the Legal Information Market*

We use “legal information market” to refer to the transmission of information about the law through sale in a general market rather than through advice to a specific person or government-promulgated laws. We contrast an advisee's reliance on the competence and integrity of a specific advisor with a

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8. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003).

buyer's reliance on market trading and testing of the information. In the latter context, the presence of multiple buyers, a standardized product, and expert consumers or market intermediaries can help protect naive consumers from overcharging and inferior goods.<sup>9</sup> Consumers can find analyses of virtually any kind of product, and this can affect pricing and terms of products and services.<sup>10</sup> Information markets have become particularly robust since the advent of the Internet and powerful search engines. Even if many consumers choose not to read product disclosures,<sup>11</sup> the information is at least readily available for those who are concerned about the quality of the products they buy. However, markets are much less transparent for recipients of professional advice that is customized for their needs.

As discussed in more detail below, we divide legal information products into three general categories. The first includes documents or products sold to users of the products, including contracts, software for rendering automated legal advice, and legal codes. In these situations, the specific expression provides important guidance to the parties and the court. Copyright law provides the main intellectual property rights in this situation.

The second main category of legal information consists of legal ideas. A classic example is the "poison pill" takeover defense. The idea was expressed in a variety of different ways, but the important innovation was the basic concept of piggybacking anti-dilution rights on warrants a corporation distributes to its shareholders, thereby enabling the board of directors, without shareholder approval, to prevent an outsider from acquiring control.<sup>12</sup> The relevant doctrine here is patent law. Although it is not clear that such an idea can be patented,<sup>13</sup> it may be difficult in principle to distinguish this idea from those that, for example, led to the cotton gin or electric light bulb.

The third category of legal information is that used to make money in capital markets. These information sellers are not creating a product or document but rather hope to use legal information by trading securities. The most important

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9. See Louis L. Wilde & Alan Schwartz, *Equilibrium Comparison Shopping*, 46 REV. ECON. STUD. 543 (1979).

10. See Nishanth V. Chari, *Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 N.Y.U. L. REV. 1618 (2010) (summarizing the literature and presenting evidence that favorable product ratings are positively correlated with pro-seller terms).

11. See Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* (N.Y. Univ. Law & Econ., Working Paper No. 09-40, 2009), available at <http://ssrn.com/abstract=1443256> (finding that vast majority of shoppers pay little attention to software licensing agreements); Florencia Marotta-Wurgler, *Does Disclosure Matter?* 8–10 (N.Y. Univ. Law & Econ., Working Paper No. 10-54, 2010), available at <http://ssrn.com/abstract=1713860> (showing evidence that consumers tend not to read these contracts even when the Internet makes them readily available and are no more likely to read the more accessible contracts or the ones with more one-sided terms).

12. See Dosoung Choi et al., *The Delaware Courts, Poison Pills, and Shareholder Wealth*, 5 J.L. ECON. & ORG. 375, 378 (1989).

13. See *infra* Part I.D.

current examples involve interests in litigation and patents. Legal information also may have value in trading many other types of assets. As with other types of legal information, markets substitute for one-to-one attorney–client relationships. In this case, no formal legal regime protects the owner's property rights in the information after disclosure, although the owner may have legal rights against another person who uses or discloses the information without permission.

### ***B. Intellectual Property Theory***

Property rights in information serve several useful functions. In general, these rights provide incentives for producing and disclosing information by enabling the inventor or author to appropriate returns from her creation of information. Clarifying intellectual property rights also minimizes the costs of determining who may use the property and of litigating property holders' rights.<sup>14</sup>

Balanced against these benefits are the costs associated with intellectual property rights in information. Information is a public good in the sense that an unlimited number of people can consume it nonrivalrously once it is produced. Intellectual property rights that raise the cost of acquiring valuable information therefore can reduce its dissemination, preventing some welfare-increasing uses. Policymakers must weigh this lost welfare from foregone use of the information against the need for incentives to generate creation of the information.<sup>15</sup> This is why patents and copyrights have limited terms; only novel, non-obvious inventions that can be described can be patented, and copyrights protect only original expression rather than underlying ideas or facts.

U.S. federal intellectual property laws are supplemented by state law mechanisms for protecting intellectual property. While federal law broadly preempts state intellectual property laws,<sup>16</sup> some state law, including trade secret law,<sup>17</sup> contract law, laws against misappropriation, confidentiality agreements, and covenants not to compete can be used to protect investments in information. For example, restrictive licenses can limit use of information contained in databases that is costly to produce but cannot be copyrighted.<sup>18</sup> Also, state law enables firms

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14. See Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 307 (1992); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007).

15. Producers' ability to price discriminate among buyers mitigates the use–creation tradeoff. See Jerry A. Hausman & Jeffrey K. MacKie-Mason, *Price Discrimination and Patent Policy*, 19 RAND J. ECON. 253 (1988).

16. See John Shepard Wiley, Jr., *Bonito Boats: Uninformed But Mandatory Innovation Policy*, 1989 SUP. CT. REV. 283 (discussing Supreme Court decisions on intellectual property and preemption).

17. See LANDES & POSNER, *supra* note 8, at 356–59 (discussing patent/trade secret election).

18. Michelle M. Burtis & Bruce H. Kobayashi, *Intellectual Property and Antitrust Limitations on Contract*, in DYNAMIC COMPETITION AND PUBLIC POLICY: TECHNOLOGY, INNOVATION, AND ANTITRUST ISSUES 229, 238 (J. Ellig ed., 2001).

to be structured to reduce information spillovers and thereby appropriate the returns from investments in information.<sup>19</sup>

This general intellectual property framework applies to legal information products, some of which are eligible for protection under patent or copyright law. However, as noted above and discussed in more detail below, the use–creation tradeoff raises special concerns in this context because of the need to preserve equal access to law and to protect lawyers’ independence.

### *C. Legal Documents*

The use–creation tradeoff regarding intellectual property rights in law-related materials is perhaps most evident regarding privately produced model codes and documents prepared in litigation. These documents involve substantial work and can increase social welfare by contributing to the creation of law. Granting creators intellectual property rights in this material can both encourage its creation and limit its usefulness by restricting dissemination.

These general intellectual property issues are complicated by legal exceptionalism. Private property rights in legal materials can interfere with the public’s access to the legal rules that govern their lives and transactions. Intellectual property rights also raise potential concerns for lawyers’ professional responsibilities by interfering with professional judgment and clients’ choice of lawyers, and for the creation of law by crowding out incentives to create public law. The following analysis separately covers basic intellectual property issues and legal exceptionalism concerns relating to these documents.

#### *1. Intellectual Property Issues*

Copyright law protects creators of original legal materials. This protection also applies to compilations of legal materials to the limited extent they involve unique and original selection, coordination, or arrangement of information.<sup>20</sup> Thus, copyright law does not protect against appropriation of “sweat of the brow” investments such as those in compiling facts<sup>21</sup> or noncopyrightable forms in a form book.<sup>22</sup>

#### *2. Access to Law*

Even if legal documents might be entitled to copyright protection under general intellectual property law, legal exceptionalism might limit this protection in order to ensure access to law and to ensure the availability and competence of legal services.

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19. See Dan L. Burk & Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights at the Boundary of the Firm*, 2007 U. ILL. L. REV. 575, 627–33.

20. See 17 U.S.C. § 101 (2006).

21. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351–61 (1991); Jane C. Ginsburg, *No “Sweat”? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 342–53 (1992).

22. See *Baker v. Selden*, 101 U.S. 99, 101–04 (1879).

Analysis of claims regarding litigation documents is relevant in addressing copyright protection for all privately produced law. Section 105 of the Copyright Act precludes protection “for any work of the United States Government,”<sup>23</sup> defined by § 101 as a work “prepared by an officer or employee of the United States Government as part of that person’s official duties.”<sup>24</sup> Under this definition, court opinions written by federal judges, congressional bills and statutes, and federal regulations are ineligible for copyright protection. Courts have applied similar rules to state legal materials, including state judicial opinions,<sup>25</sup> statutes,<sup>26</sup> and regulations.<sup>27</sup> These rules assume that the use costs of intellectual property protection outweigh gains from improved private incentives to produce laws.<sup>28</sup>

Rules protecting public laws do not necessarily apply to privately produced works that become laws. The social benefits of incentivizing privately produced works through copyright protection may exceed those of tax-subsidized government works. Consistent with this consideration, codes produced by the American Medical Association did not become unprotected government works when adopted by a federal administrative agency,<sup>29</sup> and valuation information for used vehicles did not lose copyright protection when referenced by state insurance

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23. 17 U.S.C. § 105 (2006).

24. *Id.* § 101.

25. *Banks v. Manchester*, 128 U.S. 244, 251–54 (1888).

26. *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898) (holding that copyright protection would interfere with the basic proposition that “any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book”); *Georgia ex rel. Gen. Assembly of Ga. v. Harrison Co.*, 548 F. Supp. 110, 115 (N.D. Ga. 1982) (holding that the basic texts of state laws were in the public domain), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983). *See generally* L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989).

27. *See* ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 247–48 (6th ed. 2001). *But see* *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179 (2d Cir. 2001) (holding that tax maps produced by local government were not unprotectable public documents).

28. For counter-arguments favoring intellectual property protection in public laws, see Michael Abramowicz, *Speeding Up the Crawl to the Top*, 20 YALE J. REG. 139 (2003); Stephen Clowney, *Property in Law: Government Rights in Legal Innovations*, 72 OHIO ST. L.J. 1 (2011). The United Kingdom protects government works through Crown Copyrights. There is anecdotal evidence that licensing and protection of legal information under copyright law may be more accepted in these countries than in the United States. *See* Nate Anderson, *Antipiracy Lawyers Pirate from Other Antipiracy Lawyers*, ARS TECHNICA (Sept. 30, 2010, 5:05 PM), <http://arstechnica.com/tech-policy/news/2010/09/antipiracy-lawyers-pirate-from-other-antipiracy-lawyers.ars> (noting UK firm’s claims of intellectual property protection for its “range of precedent letters, paragraphs and responses,” criticism of the copying firm’s choice to use “a lazy short cut to ape my business model by [utilizing] my firm’s carefully prepared and bespoke precedents,” and choice not to “grant to you any [license] to use my firm’s precedents”).

29. *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 518–21 (9th Cir. 1997).

statutes or regulations.<sup>30</sup> These holdings recognize that the costs of eliminating the economic incentive for private creation of rules can outweigh the benefits of protecting the public's access to the law.<sup>31</sup>

On the other hand, some courts examining copyright protection for privately produced laws have given less weight to creation incentives for the production of model codes subsequently adopted as law. Thus, *Building Officials & Code Administrators v. Code Technology, Inc.* (“BOCA”) reversed a preliminary injunction granted in favor of a copyright holder whose privately developed model building code was included in official state regulations.<sup>32</sup> Although the court recognized private groups' importance in “seeing that complex yet essential regulations are drafted, kept up to date and made available,”<sup>33</sup> it held that legislative adoption of the code undercut the plaintiff's copyright.<sup>34</sup> In *Veeck v. Southern Building Code Congress International, Inc.*, the court applied BOCA in rejecting copyright protection for a privately produced model building code that the plaintiff posted on a website as the building codes of two municipalities in violation of a license agreement that prohibited copying or distributing the work.<sup>35</sup> The court held that the copyrighted code text entered the public domain when adopted as law, thereby elevating due process concerns with public access to the law over providing economic incentives to produce model codes.<sup>36</sup> The court distinguished cases such as those discussed in the previous paragraph as involving works that were merely referenced by, rather than constituting the body of, the statute, and noted that these works were created for reasons other than incorporation into law.<sup>37</sup>

Similar considerations may apply to pleadings. This issue has arisen in the context of class-action lawyers competing for lead counsel appointments against lawyers filing copycat complaints. Attorney William Lerach attempted to copyright his complaints and sought protection under “misappropriation, trade secret, unfair competition, and other applicable laws.”<sup>38</sup> A lawyer also has argued that copyright should protect the original expression of his amicus briefs from copying, including by the California Supreme Court.<sup>39</sup> The problem with these

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30. *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994).

31. *See Practice Mgmt.*, 121 F.3d at 518 (“To vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity,’ a matter of particular significance in this context because of ‘the increasing trend toward state and federal adoptions of model codes.’” (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.06[C], at 5-92 (1996))); *see also CCC Info. Servs.*, 44 F.3d at 74.

32. 628 F.2d 730 (1st Cir. 1980).

33. *Id.* at 736.

34. *Id.* at 735–36.

35. 293 F.3d 791 (5th Cir. 2002) (en banc).

36. *Id.* at 793, 798–800.

37. *Id.* at 804–05.

38. Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers as Lawmakers*, 46 ARIZ. L. REV. 733, 737 (2004).

39. *See* Letter from Edmond M. Connor to Justice Ronald M. George, Chief Justice of the Cal. Supreme Court and William C. Vickrey, Admin. Dir. of Courts (July 16,

claims is that, under the reasoning of *BOCA* and *Veeck*, copyright may not protect the original expression in litigation documents to the extent that courts adopt their language.<sup>40</sup> General copyright doctrines, such as merger or fair use, also may apply in this situation.<sup>41</sup>

Due process concerns do not require evisceration of copyright protection for privately produced works adopted as law. Broad fair use privileges could address these concerns while protecting model codes from appropriation by competing commercial interests and other jurisdictions.<sup>42</sup> Restrictive licenses like those in *Veeck* also can appropriately balance the use-creation tradeoff by clarifying parties' expectations regarding permitted uses and pricing. Jurisdictions that adopt privately produced and copyrighted model codes could alleviate due process concerns by authorizing use by citizens bound by the law while preventing reproduction for other purposes. Courts could require similar licenses to be granted by those wishing to file briefs and other potentially copyrightable documents. Parties filing litigation documents could be deemed to license use of case law incorporating the complaint while retaining copyright protection against the competing-lawyer free-riding that concerned *Lerach*.<sup>43</sup> The court's holding in *Veeck* limits the utility of these mechanisms by effectively eliminating copyright protection rather than retaining the protection and permitting limited public use.

### 3. Lawyer Independence

A second legal exceptionalism problem with copyrighting legal documents is that it could restrict lawyer independence and clients' choice of counsel. The argument is that a property right in legal materials undermines a client's right to choose her lawyer by forcing the chosen lawyer into an obligation to a third-party property owner.<sup>44</sup> A lawyer also might have to qualify her advice or refuse cases where a competing lawyer withholds a license in relevant law in order to capture the client.

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2009), available at <http://www.scribd.com/doc/17621257/Ltr-to-Supreme-Court-Admin-Office-071609>.

40. See also Stanley F. Birch, Jr., *Copyright Protection for Attorney Work Product: Practical and Ethical Considerations*, 10 J. INTELL. PROP. L. 255 (2003); Emir Aly Crowne-Mohammed, *The Copyright Issues Associated with Judicial Decision-Making (Or, Hold on to Your Briefs: Are Judges Required to Cite Material Written by Lawyers?)*, 22 INTELL. PROP. & TECH. L.J. 15 (2010); Kobayashi & Ribstein, *supra* note 38; Lisa P. Wang, *The Copyrightability of Legal Complaints*, 45 B.C. L. REV. 705 (2004).

41. See Kobayashi & Ribstein, *supra* note 38, at 754-55.

42. See *id.* at 751; Bruce H. Kobayashi & Larry E. Ribstein, *Law as a ByProduct: Theories of Private Law Production* (Ill. Program in Law, Behavior and Soc. Sci., Working Paper No. LBSS11-27, 2011), available at <http://ssrn.com/abstract=1884985> (proposing a framework for balancing intellectual property rights in and access to law). But see Davida H. Isaacs, *The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents*, 71 MO. L. REV. 391 (2006) (arguing for broad application of the fair use doctrine that would include use by competing lawyers).

43. Kobayashi & Ribstein, *supra* note 38, at 753-55.

44. The same policy underlies ABA Model Rule 5.6 restricting noncompetition agreements. See *infra* note 77 and accompanying text.

### D. Legal Ideas

Business methods patents have been sought and obtained for some legal methods, including jury selection,<sup>45</sup> insuring against professional liability claims,<sup>46</sup> and tax-avoidance.<sup>47</sup> There is, however, much uncertainty regarding both the scope of patent protection for legal methods and issues regarding access to law. This Subpart begins by discussing the general intellectual property issues and then discusses legal exceptionalism-based rules that further restrict intellectual property rights in the legal information market.

#### 1. Intellectual Property Issues

There are several problems with applying patent law to legal methods. The first relates to patentable subject matter. Nontax legal method patents have been granted under the “useful, concrete, and tangible result” test.<sup>48</sup> The Federal Circuit adopted a narrower “machine or transformation” test in *In re Bilski*.<sup>49</sup> The Supreme Court affirmed the Federal Circuit’s rejection of the patent in *Bilski*, unanimously holding that *Bilski*’s method of hedging risk was “an unpatentable abstract idea.”<sup>50</sup> The Court, however, rejected the Federal Circuit’s use of the narrow machine or transformation test as the sole or primary test to judge whether business methods were patentable subject matter.<sup>51</sup> This rejection left unclear the

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45. U.S. Patent No. 7,284,985 (filed June 19, 2003); U.S. Patent No. 6,607,389 (filed Dec. 3, 2001).

46. U.S. Patent No. 7,158,949 (filed Dec. 17, 2004); U.S. Patent No. 6,272,471 (filed Aug. 2, 1999).

47. See Stephanie L. Varela, *Damned If You Do, Doomed If You Don't: Patenting Legal Methods and Its Effect on Lawyers' Professional Responsibilities*, 60 FLA. L. REV. 1145, 1152 (2008) (noting at least 70 patents covering tax strategies, and an additional 117 published applications for covering specific tax strategies); see also Dan L. Burk & Brett H. McDonnell, *Patents, Tax Shelters, and the Firm*, 26 VA. TAX REV. 981, 981–86 (2007). But see *In re Comiskey*, 499 F.3d 1365, 1378 (Fed. Cir. 2007) (rejecting as unpatentable subject matter a method of mandatory arbitration resolution regarding unilateral and contractual documents). Allowing patenting of tax shelters raises a general issue about legal ideas that arguably interfere with the public law. A legislature’s enactment of a public law represents society’s judgment that the law should be obeyed. It arguably follows that the same society would not condone a parallel private system that seeks to undermine the public law by granting property rights in devices that subvert it. However, this inconsistency argument assumes more legal certainty than actually exists. Regulatory and tax arbitrage is not illegal solely by virtue of the fact that its intent is to find a gap in the public law. Private law may even play a salutary role in helping to define and rationalize the law.

48. See *State St. Bank & Trust Co. v. Signature Fin. Grp., Inc.*, 149 F.3d 1368, 1373 (Fed. Cir. 1998), *abrogated by In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008) (en banc), *aff'd sub nom. Bilski v. Kappos*, 130 S. Ct. 3218 (2010). But see *In re Comiskey*, 499 F.3d 1365.

49. 545 F.3d 943, 961–66 (Fed. Cir. 2008) (en banc), *aff'd sub nom. Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

50. *Bilski v. Kappos*, 130 S. Ct. 3218, 3231 (2010).

51. See *id.* (“[N]othing in today’s opinion should be read as endorsing interpretations of § 101 that the Court of Appeals for the Federal Circuit has used in the past.”).

permissible type and scope of business methods patents, and how to differentiate unpatentable abstract ideas from patentable inventions.<sup>52</sup>

The second problem with patenting legal methods concerns obviousness. In *KSR International Co. v. Teleflex Inc.*, the Supreme Court rejected the Federal Circuit's narrow rule that there must be some teaching, suggestion, or motivation in the prior art to establish obviousness.<sup>53</sup> Thus, under *KSR*, the jury-selection patent referenced above may be obvious based on published literature extensively discussing empirical mock-trial research even without a specific teaching or suggestion.<sup>54</sup> Similarly, the longstanding academic literature on credible commitments<sup>55</sup> arguably makes an insurance contract method of deterring frivolous claims obvious, although the prior literature does not contain a specific teaching or suggestion.

Some legal methods may be patentable under the above standards. For example, the "poison pill" antitakeover device that Martin Lipton created in 1982 was arguably a novel and non-obvious innovation in corporation law.<sup>56</sup> There is an argument that intellectual property law should encourage innovation by supporting "meta methods," such as new legal forms or devices, rather than exclusively focusing on artifacts.<sup>57</sup>

One commentator suggests that legal innovations do not require the same economic incentives as inventions generally because "legal innovators . . . are generally paid by their clients for every hour they spend conceiving and implementing legal methods" and "are paid on a continuous basis regardless of their success."<sup>58</sup> He says this explains why lawyers have developed such innovations as "*res ipsa loquitur*, the reverse triangular merger, and, of course, the poison pill, without the extra incentive provided by the prospect of patent protection."<sup>59</sup>

There are several problems with this incentive-based objection to patenting legal methods. First, even if the pay-for-service model has motivated

52. This holding raises the general issue of the roles of broad standards and more administrable rules. See Tun-Jen Chiang, *The Rules and Standards of Patentable Subject Matter*, 2010 WIS. L. REV. 1353, 1403 (discussing tradeoffs between rules and standards); Mark A. Lemley et al., *Life After Bilski*, 63 STAN. L. REV. 1315, 1317 (2011) (rationalizing exclusion of abstract ideas from patentable subject matter as a mechanism to clarify the scope of patent protection).

53. 550 U.S. 398, 419–22 (2007).

54. See, e.g., Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703 (1991).

55. See generally AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: A COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* (1991); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960).

56. See Andrew A. Schwartz, *The Patent Office Meets the Poison Pill: Why Legal Methods Cannot Be Patented*, 20 HARV. J.L. & TECH. 333, 350 (2007).

57. See Sean M. O'Connor, *The Central Role of Law as a Meta Method in Creativity and Entrepreneurship*, in *CREATIVITY, LAW, AND ENTREPRENEURSHIP* 87 (Shubha Ghosh & Robin Paul Malloy eds., 2011).

58. Schwartz, *supra* note 56, at 368–69.

59. *Id.* at 370 (footnotes omitted).

sufficient legal innovation in the past, the precariousness of the current big law firm model might leave less incentive for future innovation. Second, the existence of some innovation does not prove that patents are unnecessary. Even if inventors and authors can capture some return on their investments through contracts, technology, and secrecy even without statutory intellectual property rights protection,<sup>60</sup> providing this protection still may increase valuable inventions and, therefore, social welfare. Third, and most importantly for present purposes, the incentive-based objection would not apply to much of the emerging legal information market discussed in this Article in which the creators are not necessarily practicing lawyers.

Although patents on legal methods may have value, they also may be socially costly apart from legal exceptionalism concerns. Like other patents, they can increase the costs of future innovation, including by forcing potential innovators to determine whether a patent protects a particular legal method.<sup>61</sup> Excessive or ill-defined rights may even lead to an “anticommons” in which property rights defeat incentives to innovate.<sup>62</sup>

## 2. Access to Law

Patents on legal methods may raise due process concerns similar to those arising in the copyright context if citizens cannot comply with laws without infringing on patents. For example, the California Air Resources Board required the use of a reformulated gasoline formula covered by a Unocal patent, thereby forcing gasoline companies selling in California to obtain a license from Unocal.<sup>63</sup>

Compliance costs that patents impose may not be large enough to support a per se rule against patenting legal methods. For example, under patent law, Unocal was able to enforce its patent in the case discussed immediately above.<sup>64</sup> Unlike the copyright cases discussed above,<sup>65</sup> this result subordinates due process concerns to protecting incentives for investment in information. Patents are more accurately described as property rights than monopolies. The availability of noninfringing substitutes limits the price the owner of the patented legal method can charge for a license, and therefore limits the potential social costs of legal

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60. See Burtis & Kobayashi, *supra* note 18, at 232–38 (discussing these mechanisms).

61. See LANDES & POSNER, *supra* note 8, at 73.

62. See generally MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* (2008). *But see* Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 ARIZ. L. REV. 165 (2011) (showing that potential costs of creating intellectual property rights do not necessarily imply that the absence of property rights is optimal).

63. This episode spawned patent litigation in which the patents were held valid and willfully infringed. See *Union Oil Co. of Cal. v. Atl. Richfield Co.*, 208 F.3d 989 (Fed. Cir. 2000).

64. *Id.*

65. See *supra* text accompanying notes 32–37 (discussing *Veeck* and *BOCA*).

methods patents.<sup>66</sup> Moreover, the costs of patents must be balanced against their benefits in promoting legal innovations that increase the available methods of complying with the law and thereby reduce compliance costs.

It is also important to recognize that any social costs resulting from Unocal's intellectual property rights may be attributable to the lawmaking process rather than to the patent itself. The costs that California imposed on reformulated gasoline sellers and consumers are analogous to those of other legislative efforts to create monopoly rents at the behest of influential interest groups.<sup>67</sup> The California legislature could have spared its citizens from paying monopoly prices by allowing alternative gasoline formulas or securing a license from the patentee when it adopted the standard.<sup>68</sup>

### 3. Lawyer Independence

An additional argument against patenting legal methods is that intellectual property rights would interfere with central tenets of the legal profession intended to ensure that lawyers exercise independent professional judgment and to protect clients' right to choose their lawyers.<sup>69</sup> This argument is similar to that regarding copyright discussed above.<sup>70</sup>

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66. One concern with business method patents in general, and legal method patents in particular, is the risk of erroneously allowing patents on widely used but previously unpatented business methods. Thus, rather than fostering new innovative business methods, patents simply allow extraction of rents from those who previously used, but did not patent, an invention. *See generally* Rochelle Cooper Dreyfuss, *Are Business Method Patents Bad for Business?*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 263 (2000); Robert P. Merges, *As Many as Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKELEY TECH. L.J. 577 (1999); Leo J. Raskind, *The State Street Bank Decision: The Bad Business of Unlimited Patent Protection for Methods of Doing Business*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 61 (1999); John R. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L. REV. 1139 (1999). Congress responded to such concerns by allowing a prior user defense to those accused of infringing a patent on "a method of doing or conducting business." 35 U.S.C. § 273 (2006).

67. This activity is generally permitted and is protected from antitrust scrutiny under the *Noerr-Pennington* doctrine. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers v. Pennington, 381 U.S. 657 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

68. Similar issues arise in the context of private standard-setting. *See generally* Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMPETITION L. & ECON. 469 (2009). In the Unocal case, the FTC argued that Unocal intentionally concealed its intent to enforce the patents during the adoption of the RFG standard. *See In re Union Oil Co. of Cal.*, 138 F.T.C. 1, 43-44 (2004) (holding that the *Noerr-Pennington* doctrine did not protect Unocal from antitrust claims).

69. *See* Varela, *supra* note 47, at 1172-74.

70. *See supra* Part I.C.3.

### *E. Contractual Protection*

Because legal methods and materials have only incomplete formal intellectual property protection, inventors must develop contracts and firms that enable them to capture the benefits of creating and selling legal information. This includes locking ownership of property rights in firms<sup>71</sup> and protecting these rights through strong confidentiality agreements and covenants not to compete.<sup>72</sup>

Tax services illustrate how these contracts operate in an industry closely related to law. Although numerous business method patents on tax strategies have been issued,<sup>73</sup> this protection is limited for the reasons discussed in Subpart D. In the absence of robust intellectual property protection, the industry relies on nondisclosure and noncompetition agreements. Expanding the firm rather than relying on inter-firm transactions can be an alternative mechanism for capturing the returns from investments in information.<sup>74</sup> Thus, lawyers can work for consulting firms,<sup>75</sup> and law firms have hired accountants and economists.<sup>76</sup>

In the legal services industry, market responses to limited intellectual property rights confront professional regulation. Professional responsibility rules generally prevent firms from achieving the full benefits of contracts and vertical integration by restricting lawyers' use of noncompetition agreements<sup>77</sup> and profit-

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71. Intellectual property protection is one of the transaction-cost considerations relevant to the decision whether to organize a firm rather than enter into some other type of contract. See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 403–05 (1937).

72. For discussions of the relationship between intellectual property rights and the nature of the firm, see Ashish Arora & Robert P. Merges, *Specialized Supply Firms, Property Rights, and Firm Boundaries*, 13 *INDUS. & CORP. CHANGE* 451 (2004); Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology-Intensive Firms*, 157 *U. PA. L. REV.* 1649 (2009); Dan L. Burk, *Intellectual Property and the Firm*, 71 *U. CHI. L. REV.* 3 (2004); Burk & McDonnell, *supra* note 19; Paul J. Heald, *A Transactions Costs Theory of Patent Law*, 66 *OHIO ST. L.J.* 473 (2005); Robert P. Merges, *A Transactional View of Property Rights*, 20 *BERKELEY TECH. L.J.* 1477 (2005); Robert P. Merges, *Intellectual Property Rights and the New Institutional Economics*, 53 *VAND. L. REV.* 1857 (2000).

73. See *supra* note 47 and accompanying text.

74. See Arora & Merges, *supra* note 72; Bar-Gill & Parchomovsky, *supra* note 72. See generally OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 52–56 (1985); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 *J.L. & ECON.* 297 (1978).

75. See Ribstein, *supra* note 3, at 798–99; Tanina Rostain, *The Emergence of “Law Consultants,”* 75 *FORDHAM L. REV.* 1397, 1398–99 (2006).

76. See Robert W. Denney, *Law Firm Diversification*, in *MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS* § 8.01 (Stephen J. McGarry ed., 2002); Robert Eli Rosen, “We’re All Consultants Now”: *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 *ARIZ. L. REV.* 637, 649–50 (2002).

77. See MODEL RULES OF PROF’L CONDUCT R. 5.6 (2009); Ribstein, *supra* note 2, at 1730–38; Ribstein, *supra* note 3, at 804–06; Sela Stroud, *Non-Compete Agreements: Weighing the Interests of Profession and Firm*, 53 *ALA. L. REV.* 1023, 1027–30 (2002). For general discussions of the economic effects of contractual noncompetition clauses, see Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon*

sharing between lawyers and nonlawyers.<sup>78</sup> As discussed next, a full understanding of intellectual property rights in the legal information market entails an examination of the interaction of these rights with professional regulation.

## II. THE INTERACTION OF LEGAL INFORMATION AND PROFESSIONAL REGULATION

Part I shows how intellectual property rights shape legal information markets. The basic problem is that the current model of legal services entails creating an agency relationship between lawyers and clients, which in turn creates a need for mechanisms that control agency costs by ensuring that lawyers act in clients' interests.<sup>79</sup> Lawyer-licensing laws subject everyone who conveys legal information to these rules.

The sale of legal information products can reduce the need for professional regulation by cutting consumers' reliance on an attorney-client agency relationship and substituting market discipline for regulation of attorney behavior. Consumers shopping in a robust market for legal information products can rely on other expert consumers<sup>80</sup> as well as the seller's reputation based on public information and numerous transactions.<sup>81</sup> Thus, rather than assuming that the legal information industry inherently requires ethical duties, it is more sensible to ask whether intellectual property rights could encourage the development of a market that would make these laws less necessary.

This Part shows the close and reciprocal relationship between regulation and intellectual property rights. Specifically, we show how the market for legal information is both affected by professional regulation and affects the need for such regulation. Subpart A examines the effect of regulation on the price and quality of legal services. Subparts B and C then discuss the impact on this analysis of a broader market for legal information and increased property rights in legal information.

### A. *The Effect of Professional Regulation*

Figure 1 employs standard price theory to illustrate the effect of professional regulation on the supply and demand for legal services, which we

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*Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999); Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683 (1980); Bruce H. Kobayashi & Larry E. Ribstein, *Privacy and Firms*, 79 DENV. U. L. REV. 526 (2002); Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93 (1981).

78. See MODEL RULES OF PROF'L CONDUCT R. 5.4 (2009); Ribstein, *supra* note 2, at 1721-25; Ribstein, *supra* note 3 at 803-04; Rostain, *supra* note 75, at 1409, 1419. Although integrated accounting firms may employ lawyers, these lawyers may not advise clients because this would be unauthorized practice of law by a non-law firm.

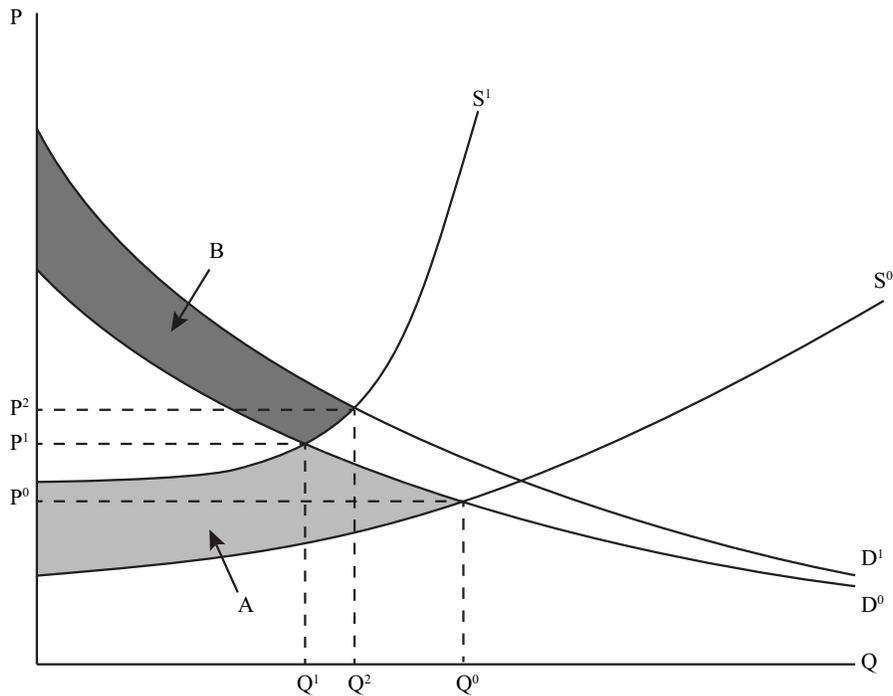
79. See Ribstein, *supra* note 2.

80. See *supra* note 9 and accompanying text.

81. See generally Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981); Carl Shapiro, *Consumer Information, Product Quality, and Seller Reputation*, 13 BELL J. ECON. 20 (1983).

define to include the creation and communication of legal information.  $S^0$  represents a plausible supply curve of legal services in a regime in which unlicensed practitioners can give legal advice and are not bound by professional responsibility rules. We refer to this as the “unregulated” regime, contrasting it with the regulation of traditional legal advice.<sup>82</sup>  $D^0$  illustrates the demand for legal services in this market. The intersection of the unregulated demand and supply curves determines the equilibrium market price  $P^0$  and market quantity  $Q^0$  of legal services in the unregulated market.

**Figure 1 – Equilibrium in the Legal Services Market**



Professional regulation can both protect consumers of legal services from low-quality providers and adversely affect consumers by reducing the supply of legal services.<sup>83</sup> Specifically, mandatory lawyer licensing can limit the number of lawyers by raising the costs of being a lawyer compared to those in an unregulated market. This may inhibit competition to supply lower-cost legal services. It also

82. This regulation should be distinguished from the limitations on intellectual property protection of legal information. Subpart C and Figure 3 discuss the implications of relaxing this category of regulation.

83. With respect to the effect of lawyer licensing on the supply and nature of legal services, see CLIFFORD WINSTON ET AL., *FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS* (2011); Hadfield, *supra* note 6; Ribstein, *supra* note 6. For a more general analysis of licensing regulation, see 2 ALFRED KAHN, *THE ECONOMICS OF REGULATION* 5 (1990).

may lower the average quality of those seeking licenses by driving away people with high opportunity costs and thereby restricting the supply of services consumers desire at any given price.<sup>84</sup> These regulations accordingly cause a shift in the supply curve up and to the left, to  $S^1$  in Figure 1. In other words, at a given level of demand, the regulations' effect on supply will raise the market price and reduce the market quantity of legal services.

The effects of regulation on the supply and price of legal services can be significant because professional regulations are not always enforced so as to advance consumer welfare. Industry capture of regulatory boards and professional groups can cause these regulators to promulgate and enforce regulations so as to serve the private interests of the regulated industry.<sup>85</sup> In particular, regulators can design and enforce the rules so as to restrict supply and raise prices, even if this restriction does not increase the quality of the services consistent with the public interest rationale of the regulation. These circumstances have led to antitrust challenges of professional regulation.<sup>86</sup>

We illustrate these effects by showing an increase of the market price of legal services to  $P^1$  and a decrease in the quantity of services supplied to  $Q^1$ . Because consumers would now be purchasing less services (that is, fewer would be hiring lawyers when they need them), welfare would decrease by area A in Figure 1.

If professional regulation accomplishes its stated goal of increasing the quality of legal services relative to that in an unregulated market, the demand for legal services would shift up and to the right as buyers value each unit of legal services available at a given price more for its increased quality.<sup>87</sup> This higher quality would increase social welfare, which would offset any welfare loss resulting from the fact that fewer consumers could buy the services they want. If

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84. See John R. Lott, *Licensing and Non-Transferable Rents*, 77 AM. ECON. REV. 453, 453–54 (1987).

85. See Lee Benham & Alexandra Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & ECON. 421 (1975); Dean Lueck et al., *Market and Regulatory Forces in the Pricing of Legal Services*, 7 J. REG. ECON. 63 (1995); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. 22, 22–29, 41–45 (1971); George S. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3, 4–6 (1971).

86. See Kenneth W. Clarkson & Timothy J. Muris, *Constraining the Federal Trade Commission: The Case of Occupational Regulation*, 35 U. MIAMI L. REV. 77, 81–82 (1980); Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 48–49 (1985).

87. The effect would be similar to the effect of advertising that increases consumers' valuation of a product. See generally RICHARD SCHMALENSEE, *THE ECONOMICS OF ADVERTISING* (1972); Phillip Nelson, *The Economic Consequences of Advertising*, 48 J. BUS. 213 (1975). For discussions of the potential benefits of advertising of legal services, see Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761 (1988); Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983); Fred S. McChesney & Timothy J. Muris, *The Effect of Advertising on the Quality of Legal Services*, 65 A.B.A. J. 1503 (1979).

regulation ensured that every lawyer was as good as David Boies, many fewer people could afford lawyers, but satisfaction amongst these people would be very high.<sup>88</sup> Area B in Figure 1 shows the increase in welfare resulting from regulation that ensured the provision of higher quality legal services. If area B is greater than area A, professional regulations will increase total welfare.

The preceding paragraph shows that even if regulation increases the quality of legal services, this does not necessarily increase social welfare. Social welfare could decline if regulation not only increases price but fails to increase or even reduces quality. This is particularly likely to happen if the current system produces systematic disparities between types of litigants regarding quality of representation.<sup>89</sup> There is, in fact, evidence of such disparities,<sup>90</sup> which could result in part from regulatory restrictions on competition for legal services and the availability of legal information.<sup>91</sup>

### ***B. The Shift From Individualized Advice to Legal Information***

We have seen that the legal information market alters the costs and benefits of lawyer regulation. Deregulation of legal services could facilitate the market's evolution away from individualized advice and toward legal information. A main effect of such an evolution would be to reduce the benefits of rules designed to deal with lawyer-agency costs associated with client-specific advice. In terms of the model presented in Subpart A, deregulation reduces the difference between the market demand curves with and without regulation.

To clarify this dynamic, assume the legal information market makes available more legal information such as new legal forms or web-based services that are comparable in quality to what clients used to get with one-to-one advice. Compared to the pre-information market with unregulated demand, this would cause consumers to demand more legal information at any given price even without regulation. Because this increased value is what current professional regulation seeks to achieve, the difference between the regulated and unregulated demand curves would shrink. The legal information market also affects the supply of legal services by decreasing their cost. This can increase consumption of legal services at a lower market price. While these additional consumers may not be getting David Boies, they are better off than when they had to forgo legal advice because of the high price.

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88. See Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 130–33 (2010).

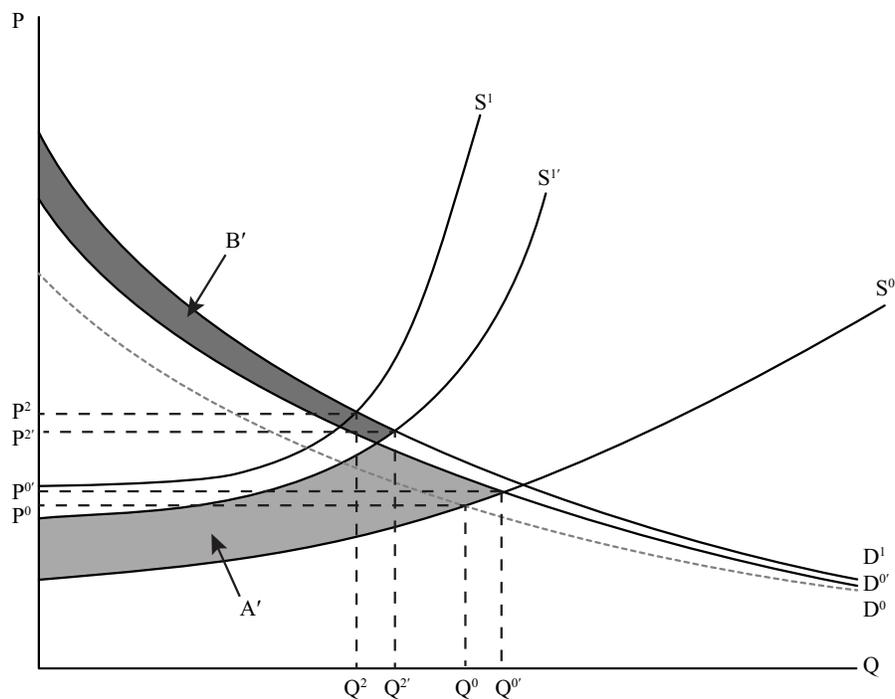
89. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 97–103 (1974) (hypothesizing that repeat players in litigation have an advantage over their opponents in terms of expertise and resources).

90. See Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 *STAN. L. REV.* 317, 325–34 (2011).

91. One of the judges in Posner and Yoon's survey suggests addressing the quality disparity problem by giving parties more information regarding the quality of legal representation. See *id.* at 348. This supports development of the legal information market discussed in this Article.

Figure 2 illustrates the effects of introducing a legal information market. If introducing legal information products increases demand at a given price, the unregulated demand curve  $D^0$  would move closer to the regulated demand curve  $D^1$ . Reducing the cost of providing legal services shifts the regulated supply curve from  $S^1$  to  $S^{1'}$ .  $S^{1'}$  still lies above the unregulated supply curve  $S^0$  because Figure 2 assumes professional regulation would continue to prevent use of some legal information products. These effects produce a price and quantity of legal services of  $P^2$  and  $Q^2$  in the regulated market and  $P^{0'}$  and  $Q^{0'}$  in the unregulated market, respectively.

**Figure 2 – Shift from Individualized Advice to a Legal Information Market**



The legal information market potentially alters the net social gains from professional regulation. The gains from professional regulation fall because the legal information market produces an effect in the unregulated market similar to that of regulation. This makes the welfare gain depicted as area  $B'$  in Figure 2 smaller than area  $B$  in Figure 1. The legal information market also may reduce the welfare loss from the supply restrictions associated with professional regulation from  $A$  in Figure 1 to  $A'$  in Figure 2 because introducing the legal information market also improves the regulated market.<sup>92</sup> As Figure 2 suggests, the resulting

92. Consumers arguably need protection from defective legal information just as they do from all kinds of shoddy products. But it is not clear why consumers need special protection in this market as distinguished from markets for other complex products, such as

decrease in the gain from regulation can be larger than the decrease in loss from restricting supply, which can result in the net gains from regulation becoming negative.

The bottom line illustrated by Figure 2 is that *given* the legal information market, professional regulation and restrictions on the unauthorized practice of law can decrease social welfare relative to the unregulated market. A viable legal information market therefore weakens the case for regulation. Policymakers should take this possible effect into account when considering whether and to what extent to regulate the legal information market.

### *C. The Effect of Intellectual Property Protection*

This Subpart analyzes the effect on the legal information market of increasing property rights in legal information. Part I shows that statutory intellectual property rights may not be available for many types of legal information. Legal exceptionalism imposes additional restrictions on both formal intellectual property rights and contractual devices such as noncompete clauses that normally fill gaps that formal intellectual property law may leave. These restrictions could be relaxed to increase incentives to produce and distribute legal information products without significantly inhibiting public access to legal information. For example, authors could get intellectual property rights against other jurisdictions or competing suppliers, such as Veeck,<sup>93</sup> while protecting the public's access through a fair use rule or a royalty-free license. The anticommons costs associated with patenting business methods<sup>94</sup> could be minimized by protecting the appropriation of currently used legal methods.<sup>95</sup>

Whether to strengthen intellectual property and contract rights involves a policy choice between two competing considerations.<sup>96</sup> Specifically, policymakers should set the strength of intellectual property and contractual protection for legal information so as to balance the benefits from increased incentives for making legal information products against any use and mobility costs of this protection. The arguments against legal exceptionalism suggest that increasing property rights in legal information from their current, weak levels will increase social welfare by

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automobiles. In any event, our point here is only that the legal information market may improve on the market for traditional one-to-one legal services and, if so, regulators should take this potential effect into account in determining whether to regulate this market. This point holds even if there are defects in the legal information market, particularly if these problems can be cured by cost-effective regulation. Indeed, professional regulation may actually have impeded the application of consumer regulation to legal advice under the current regulatory regime. *See* BENJAMIN H. BARTON, *THE LAWYER–JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 222–29 (2011). Our point does not hold only if legal information uniquely requires delivery exclusively by one-to-one advice. We are not aware of an argument that might justify this conclusion.

93. *See supra* text accompanying note 42.

94. *See supra* note 62 and accompanying text.

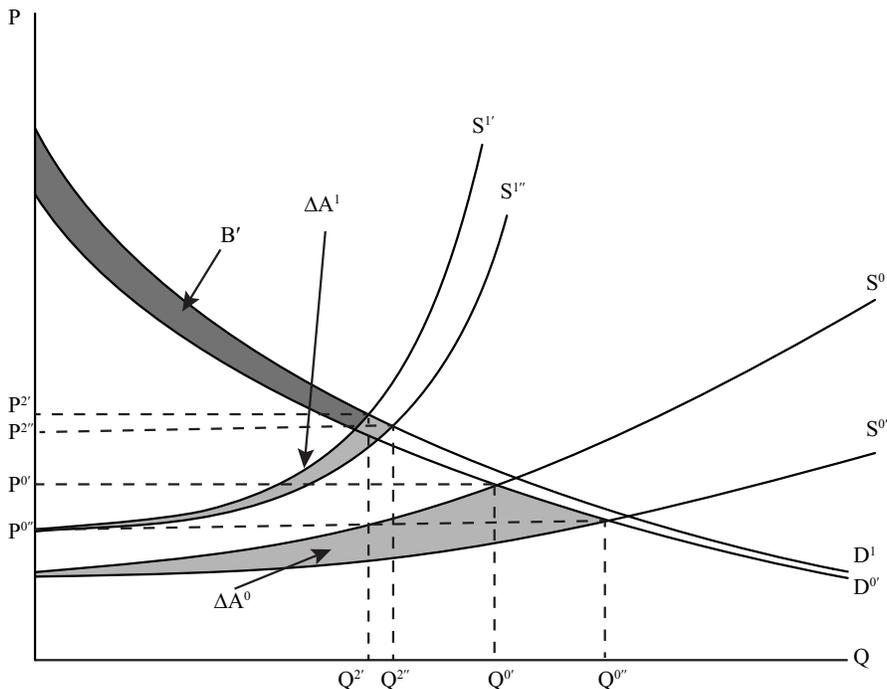
95. This could be done through, for example, standards of patentability, *see* Chiang, *supra* note 52, prior user rights, or appropriate notice provisions.

96. For an explicit model of this two-dimensional policy choice, *see* Burtis & Kobayashi, *supra* note 18, at 232–38.

encouraging the production of legal devices or methods that could reduce the cost of legal services.

Figure 3 illustrates the potential cost-reducing effect of eliminating legal exceptionalism and increasing intellectual property protection for legal information to the level available to intellectual property generally. The supply curve in the unregulated market, in which legal advisors need not be licensed or comply with professional responsibility rules, would shift from  $S^0$  to  $S^{0''}$ . As intellectual property rights motivate the production of additional legal information, there will be more such information available at any given price. The supply curve in the existing regulated market for legal services would shift from  $S^1$  to  $S^{1''}$ .<sup>97</sup> The increase in intellectual property protection would cause the price of legal services to fall to  $P^{0''}$  and output to expand to  $Q^{0''}$  in the unregulated market, and to  $P^{2''}$  and  $Q^{2''}$  in the regulated market.

**Figure 3 – The Effect of Property Rights and Legal Innovation**



Compared to Figure 2, eliminating intellectual property exceptionalism increases the gain in welfare from deregulation by the difference between the two shaded areas in Figure 3,  $\Delta A^0 - \Delta A^1$ . This analysis also enables an overall bottom-

97. The shift in the regulated supply curve resulting from the growth of the legal information market will be smaller than the shift in the unregulated supply curve. That is because the regulated regime restricts not only general intellectual property rights in legal information, but contractual protections such as noncompetition agreements. The production of legal information therefore would remain restricted in the regulated market even after the increase in intellectual property rights.

line comparison between (1) the current regime in which legal services are regulated and there are legal exceptionalism restrictions on intellectual property rights in legal information; and (2) a regime in which legal services are not regulated and there are no such legal exceptionalism restrictions. Because of reduced price and increased supply, moving from (1) to (2) would increase social welfare given the above assumptions by  $A' - B' + \Delta A^0$ .

The next Part notes various specific ways these property rights might be increased, particularly through enforcement of contracts and institutional mechanisms designed to internalize information spillovers.

### III. THE LEGAL INFORMATION REVOLUTION IN ACTION

This Part applies the theoretical analysis in Parts I and II to examples of new legal information products. This discussion illustrates how these products: (1) are impeded by regulation and imperfect property rights resulting from legal exceptionalism; (2) could help make these impediments unnecessary by replacing the agency model of legal advice; and (3) are being structured to reflect the different types of legal information and the regulatory challenges they currently face.<sup>98</sup> Subpart A discusses some products that characterize the legal information market. Subpart B identifies types of firms and organizations that can create these products despite the limited property rights currently available—that is, serve as the “factories” for the legal information market. Subpart C discusses alternative approaches to profiting on legal information through the capital markets.

#### A. Legal Products

Like other mass-produced products, legal information or software products can reduce the costs of legal information compared to one-to-one legal advice of comparable quality by systemizing procedures and aggregating information. If legal information firms could obtain intellectual property protection through a copyright or patent, their products and structures would resemble those of other information technology firms. However, legal information firms face at least three types of legal problems in creating these products:

(1) As discussed in Part I, the firm may have problems protecting its investments in the product through standard intellectual property law. Where the firm cannot obtain patent or copyright protection, it must protect the information as a trade secret or through noncompetition agreements. Yet these contracts may not be available with regard to legal information because of what we have referred to as “legal exceptionalism.”

(2) The products discussed in this Subpart may present problems under attorney professional responsibility rules and unauthorized practice laws. For example, sophisticated artificial-intelligence programs that purport to render

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98. Burk and McDonnell, *supra* note 19, argue that an optimal intellectual property regime would precisely calibrate the applicable intellectual property regime to ensure the proper balance of transaction costs between and within firms. By contrast, our approach generally takes the nature of property rights as given and examines how firms are likely to adapt to this regime and other challenges firms may face.

individualized advice based on the user's personal information could constitute legal advice that may be given only by a licensed attorney. Some products may breach professional responsibility rules by compromising lawyers' independent judgment.

(3) Where the product is embodied in a statute or becomes the basis of case law, due process considerations and professional responsibility concerns might compel enabling all lawyers and the general public to access the product at low or no cost. This may introduce a legal exceptionalism barrier to intellectual property protection that would not exist for other types of products.

The following Subsections discuss how to deal with these problems in connection with several types of actual or potential legal information products. Each section refers to the relevant problems identified immediately above.

### *I. Contracts*

Firms might sell specific contracts to be used as forms or templates in creating customized contracts. The original expression (although not the underlying ideas) in contracts may be protectable under copyright law.<sup>99</sup> The lawyers, the law firm preparing the contract, or the client who requested and paid for the drafting might own the copyright.<sup>100</sup> Intellectual property law also protects original mechanisms for accessing repositories of agreements available from the Securities and Exchange Commission's ("SEC") Electronic Data Gathering and Retrieval ("EDGAR") database,<sup>101</sup> such as those maintained by Bloomberg Law, the Contracting and Organizations Research Institute,<sup>102</sup> and other services.

Making available copyrighted contracts can lead to a market for off-the-rack legal information that reduces clients' need to rely on a lawyer's custom-tailored advice. Clients may be able to access information from the Internet or other sources about problems that have arisen with certain contract products that

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99. See *Am. Family Life Ins. Co. of Columbus v. Assurant, Inc.*, No. 1:05-CV-1462-BBM, 2006 WL 4017651, at \*8 (N.D. Ga. Jan. 11, 2006) (holding that plaintiff's "narrative" style insurance policy may be protectable under copyright law); NIMMER & NIMMER, *supra* note 31, § 2.18[E] ("There appear to be no valid grounds why legal forms such as contracts, insurance policies, pleadings and other legal documents should not be protected under the law of copyright."); Kenneth A. Adams, *Copyright and the Contract Drafter*, N.Y. L.J., Aug. 23, 2006, at 4.

100. See 17 U.S.C. § 101 (2006) (defining "work made for hire"); *id.* § 201(b) (providing that the person for whom a work for hire was prepared is considered the author and owns the copyright unless the parties have contracted otherwise); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (denying employer ownership of sculpture under work for hire doctrine where employer lacked sufficient control over the work). Firms might adopt "copyright protection programs" that include a copyright notice in a clause in the body of each copy of the contract and periodic Internet or other electronic searches for violations. See Adams, *supra* note 99, at 5 (discussing implications of work for hire for ownership of contracts).

101. See *Important Information About EDGAR*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/edgar/aboutedgar.htm> (last modified Feb. 16, 2010).

102. *The CORI K-Base*, CONTRACTING & ORGS. RESEARCH INST., <http://cori.missouri.edu/pages/ksearch.htm> (last modified Apr. 11, 2011).

they could then check against their lawyers' advice. As lawyers become contract sellers or brokers, some of their work is subjected to a market test. This transparency reduces the need for licensing and other regulation designed to ensure the integrity and competence of lawyers' advice.

Granting a copyright in the contract raises potential due process and professional responsibility issues (Problem 3). The contract's value as intellectual property rises when a court interprets and enforces it. At the same time, these terms arguably become part of the holding of the case and therefore law to which the public should have free access. Also, copyrighting contracts could restrict clients' choice of lawyers and lawyers' independent advice regarding which contracts clients choose.<sup>103</sup>

The costs of granting intellectual property protection must be balanced against the benefits of restricting use. Fair use or duties to license the document's use for a reasonable fee may reduce the costs of copyright restrictions. On the benefit side, intellectual property rights encourage investments in developing valid contracts beyond those that would be made if lawyers could be compensated only by rendering advice to individual clients. Thus, although copyright protection might restrict clients' access to contract products by attaching a cost to this access, it also might encourage the creation of new types of contracts that clients can use. Copyright protection also can reduce producers' need to protect legal information through costly customized contracts.

## 2. Automated Advice

Some types of legal advice might be standardized and provided through marketable software or printed routines that reduce or eliminate the need for customized advice. For example, LegalZoom, a legal software company, can construct legal materials such as wills, real estate transactions, powers of attorney, antenuptial agreements, and formation documents for simple businesses from templates and information provided by consumers.<sup>104</sup> More sophisticated software can assist larger firms in constructing complex corporate contracts. For example, ContractExpress DealBuilder enables organizations to automate contract construction using web-based templates, questionnaires, and other materials.<sup>105</sup> ContractExpress has partnered with Koncision Contract Automation, LLC to incorporate that firm's techniques for increasing the clarity and reducing the length of business agreements.<sup>106</sup> Weagree.com also provides an online drafting wizard, model contracts and clauses, a drafting manual, and customized contract drafting services.<sup>107</sup> Programs also can employ spreadsheet-type processes to develop

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103. See *supra* Part I.C.2-3.

104. See LEGALZOOM, <http://www.legalzoom.com> (last visited Sept. 12, 2011).

105. See *ContractExpress DealBuilder*, BUSINESSINTEGRITY, <http://www.business-integrity.com/products/contractexpressdealbuilder/default.html> (last visited Sept. 12, 2011).

106. See *The Document-Assembly System*, KONCISION, <http://www.koncision.com/how-it-works/system/> (last visited July 14, 2011).

107. See WEAGREE, <http://www.weagree.com> (last visited Sept. 12, 2011).

contracts whose terms can be altered to account for the changes in other provisions.<sup>108</sup>

Products in this category involve software that is generally protectable under the copyright laws. They can be covered by the sort of licensing restrictions that are common in software sales and database licensing (Problem 1),<sup>109</sup> subject to possible due process and professional responsibility issues if the provisions are adopted by courts (Problem 3).

The main wrinkle with automated advice is that it may involve the unauthorized practice of law (Problem 2). Indeed, users have sued LegalZoom on this ground.<sup>110</sup> The problem is most acute when the software renders the advice to ordinary consumers without the intervention of an in-house or outside lawyer. Form providers might address this problem by providing a “trap door” from the program to online or telephone help to assist users in completing the forms.<sup>111</sup> Under current law, this might require establishing an attorney–client relationship with a lawyer licensed in the user’s state.<sup>112</sup> The advice also would be subject to

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108. See *Evolvable Contract Spreadsheet*, LAWLAB, <http://lawlab.org/tools/evolvable-contract-spreadsheet> (last visited Sept. 12, 2011) (“The Evolvable Contract Spreadsheet allows all parties . . . to explore what-if scenarios for the implications of not only different business scenarios and funding options, but also how provisions impact different funding and ownership structures.”).

109. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454–55 (7th Cir. 1996); Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law and Software Sales*, 8 GEO. MASON L. REV. 261 (1999). For example, Koncision Contract Automation’s license agreement provides for various types of subscriptions and states: “You’ll be allowed to use just once any contract you create during your subscription. Copying any part of it for purposes of any other contracts you create, during your subscription and afterwards, would constitute breach of Koncision’s copyright.” *Pricing*, KONCISION, <http://www.koncision.com/how-it-works/pricing/> (last visited July 14, 2011).

110. See *Janson v. LegalZoom.com, Inc.*, No. 2:10-CV-04018-NKL, 2011 WL 3320500 (W.D. Mo. Aug. 2, 2011) (denying summary judgment for defendant on class action claims for damages arising out of LegalZoom’s unauthorized practice of law in Missouri). LegalZoom and the plaintiffs reached an agreement in principle to settle the case under which LegalZoom could continue doing business in Missouri with certain business modifications. See Press Release, LegalZoom, *LegalZoom Reaches Agreement in Principle for Proposed Settlement of Missouri Class Action* (Aug. 22, 2011), available at <http://www.globenewswire.com/newsroom/news.html?d=230108>. For discussions of unauthorized practice claims against LegalZoom, see Catherine J. Lancot, *Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law* (Villanova Law/Pub. Policy, Working Paper No. 2011-07, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1874986](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1874986); Roger Parloff, *Can Software Practice Law?*, CNN MONEY (June 30, 2011, 8:30 AM), <http://features.blogs.fortune.cnn.com/2011/06/30/can-software-practice-law>.

111. See Hadfield, *supra* note 88, at 131–33.

112. See Press Release, Wash. Attorney Gen., *Washington Attorney General Zoons In On LegalZoom’s Claims* (Sept. 16, 2010), available at <http://www.atg.wa.gov/pressrelease.aspx?id=26466> (announcing settlement with LegalZoom in which the firm promises not to compare its costs to attorneys’ fees unless it discloses that its service is not a substitute for a law firm and prohibits LegalZoom from, among other things, engaging in the unauthorized practice of law); see also, e.g., *Incorporation Services*, LEGALZOOM, <http://www.legalzoom.com/legal-incorporation/incorporation-overview.html> (last visited

general malpractice standards, effectively requiring the lawyer to obtain full information about the user's business.

A potential response to concerns about unauthorized practice and the need to protect consumers is that, as discussed in Part II and illustrated in Figure 2, the legal product market can provide discipline comparable to or better than a licensing regime. Rather than having to rely on imperfect information and reputations, consumers could choose from products that many consumers have tested and about which information is widely available on the Internet and elsewhere. To be sure, this product information is likely to be imperfect, and the products may not be suitable for all consumers and uses. On the other hand, current rules effectively mandate a minimum level of service that may not be worth its cost in smaller transactions, thereby forcing potential customers to rely on self-help or inferior legal advice. As illustrated by Figure 2, a market for information could benefit consumers who otherwise would forego any assistance or buy inferior products or services.

### 3. *Bundling Products with Legal Advice*

Legal information products that are not protectable under intellectual property laws or outlawed by professional responsibility rules might be feasible if bundled with legal services and if contracts or firm structures protect them. Bundling not only responds to consumer protection concerns, but also could provide some incentives for creation that otherwise would not exist under intellectual property law.

An example of the bundling approach is law firms offering forms or checklists in order to sell their services. For example, the Wilson Sonsini Goodrich & Rosati ("WSGR") "term sheet generator" provides an online questionnaire to enable users to create a venture financing term sheet.<sup>113</sup> The generator sells legal services by producing documents that mesh with the types of deals WSGR specializes in.

Law firms applying this bundling approach would have to contractually protect their intellectual property in the bundled product from appropriation by departing employees and partners or former clients. However, as discussed above, noncompetition agreements generally are unenforceable in law firms.<sup>114</sup> This reflects the professional client-based model where it is important to preserve lawyer fidelity to individual clients. Nonenforcement of agreements is

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Oct. 8, 2011) (providing the disclaimer that "LegalZoom is not a law firm, does not act as your attorney and is not a substitute for the advice of an attorney. Rather, it helps you represent yourself in your own legal matters. If you seek representation, are involved in litigation or have complex legal issues that cannot be resolved on your own, we recommend that you hire an attorney.").

113. See *WSGR Term Sheet Generator*, WILSON SONSINI GOODRICH & ROSATI, <http://www.wsgr.com/wsgr/Display.aspx?SectionName=practice/termsheet.htm> (last visited Sept. 12, 2011).

114. See *supra* note 77 and accompanying text.

questionable even within the traditional model.<sup>115</sup> More importantly for present purposes, as discussed throughout this Article, selling legal products in a broad market could make information about product quality readily available to consumers and reduce the need for legal rules to deal with the agency costs inherent in one-to-one professional relationships.

Firms might be able to avoid restrictions on noncompetition agreements by claiming copyright in their partners', associates', or employees' work product under the work-for-hire provisions of the Copyright Act.<sup>116</sup> However, the firm's ownership of such documents could make it costlier for clients to follow departing partners to their new firms.<sup>117</sup> This suggests that gaps in intellectual property protection that force firms into a bundling approach could hurt rather than help clients.

#### 4. *Selling and Pricing Legal Services*

Even in situations demanding one-to-one legal services, legal information products help address consumers' difficulty connecting with lawyers, as well as pricing and evaluating the quality of their services. These products potentially bridge the gap between conventional legal services and legal information products.

There are several examples of such products in this emerging market. Shpoonkle<sup>118</sup> enables an auction-type market in which clients post a legal issue for which they need a lawyer, and lawyers bid to perform the service. LawyerUp<sup>119</sup> enables subscribers, for a monthly fee, to quickly hire pre-screened lawyers for spot emergency services. Prefix<sup>120</sup> helps clients and lawyers price legal services in advance rather than relying on hourly billing.

Although these products are based on lawyers continuing to perform conventional legal services, they raise issues similar to those with legal information products. Products like Shpoonkle and Lawyerup may present regulatory problems if they compromise lawyer independence by making the attorney beholden to the firm that connects her to the client (Problem 2). At the same time, such products could be valuable in developing a market for legal services and thereby reducing information asymmetry between laymen and lawyers. In other words, as with legal information products generally, regulation

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115. See Ribstein, *supra* note 2. Apart from the need to regulate professional relationships, firms' enforcement of property rights under noncompetition agreements or other contracts might stifle innovation by reducing interchange of ideas between firms. Gilson, *supra* note 77, at 603, 628; Thomas F. Hellman & Enrico C. Perotti, *The Circulation of Ideas in Firms and Markets* (Fondazione Eni Enrico Mattei, Working Paper No. 47.2010, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1601977](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601977).

116. See Birch, *supra* note 40, at 259–61 (suggesting firm ownership of documents for such purposes under the work-for-hire provisions of the copyright law).

117. *Id.* at 261.

118. SHPOONKLE, <http://www.shpoonkle.com> (last visited Sept. 12, 2011); see also Patrick G. Lee, *Pricing Tactic Spooks Lawyers: Companies' Use of Reverse Auctions to Negotiate Legal Services Is Accelerating*, WALL ST. J., Aug. 2, 2011, at B5 (discussing this and other mechanisms for auctioning legal services).

119. LAWYERUP, <https://lawyerupnow.com> (last visited Sept. 12, 2011).

120. PREFIX, LLC, <http://prefixllc.com> (last visited Sept. 12, 2011).

could decrease rather than increase the value of legal services available to clients. A service such as Prefix may be significant as a bridge to the kind of legal information products discussed below. Advance pricing mechanisms encourage breaking legal tasks into discrete units. This could provide a basis for developing formerly customized legal services into products with standardized pricing.

##### 5. *Complaints and Other Litigation Products*

The high cost of modern litigation has spurred the creation of products intended to reduce those costs. These include litigation kits consisting of information culled from previous cases<sup>121</sup> and software designed to find particular types of information in digitized, discovered documents.<sup>122</sup> Producers can get copyright protection comparable to that covering the transactional products discussed above.

Access-to-law and professional responsibility issues (Problem 3) can arise for litigation products. A prominent example is when class action lawyers claim intellectual property rights in their complaints against lawyers filing similar claims.<sup>123</sup> The complaint can become a basis of law when it is the subject of a judicial opinion. Property rights in complaints also can have effects similar to those of copyrighted contracts on the independence and availability of counsel (Problem 2). The law might balance creation incentives against public access and professional responsibility concerns by letting lawyers copyright complaints but requiring them to license the complaint to other litigants for a reasonable fee or adjusting the fees awarded to successful claimants to compensate complaint drafters.<sup>124</sup> Also, as with contracts, if intellectual property protection increases the supply of complaints, this could offset concerns about decreased public access.

Producing and prosecuting complaints and other litigation materials theoretically could be commoditized, again assuming the existence of adequate intellectual property rights. The developers of these products could take advantage of similarity of information across claims arising from the same or similar products or incidents, such as product defects, plane crashes, and oil spills. Even claims that cannot be aggregated into class actions might be similar enough that form complaints could be useful with modest adaptations.

A market for complaints and other litigation documents could offset access-to-law and professional responsibility concerns by providing a low-cost mechanism for vindicating rights without the lawyer–client agency costs inherent

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121. See Lawyers for Civil Justice Task Force on Protective Orders, *Court-Approved Confidentiality Orders: Why They Are Needed*, 57 DEF. COUNS. J. 89, 89–90 (1990); Victor E. Schwartz & Leah Lorber, *A Letter to the Trial Judges of America: Help the True Victims of Silica Injuries and Avoid Another Litigation Crisis*, 28 AM. J. TRIAL ADVOC. 295, 296 (2004).

122. See Lon A. Berk, *Some Logical Limits of E-Discovery*, 12 SMU SCI. & TECH. L. REV. 1, 3 (2008); Nathan Koppel, *Using Software to Sift Digital Records: Looking to Pare Litigation Costs, Firms Use Technology to Find Relevant Electronic Documents in Legal Discovery Process*, WALL ST. J., Nov. 23, 2010, at B6.

123. See *supra* text accompanying note 38.

124. See Kobayashi & Ribstein, *supra* note 38, at 753–55.

in class actions. Some class actions may be characterized as low-value “strike” suits, seeking payments from companies for avoided discovery and trial costs in return for substantial fees to the plaintiffs’ lawyer.<sup>125</sup> Products that reduce the cost of filing and prosecuting litigation could make it cost-justified for some individual claimants to litigate outside the class. Instead of lawyers using complaints to compete for lead counsel fees, they would craft complaints and sell them to potential clients or their lawyers on an open market. As with the other legal information products discussed above, this would substitute an open and transparent market for a closed-agency relationship.

Marketing complaints also could address issues concerning class action waivers in arbitration clauses. The Supreme Court has upheld such waivers despite concerns about whether they leave consumers with adequate means to vindicate their rights.<sup>126</sup> Mass production and sale of litigation or arbitration kits, perhaps supplemented by low-cost assistance as to how to use the kits, might allay these concerns by better enabling consumers to arbitrate individual claims. This would provide a compromise between the duplication of effort involved in thousands of individual claims and the agency costs inherent in class actions.

#### 6. Data Processing and Prediction Markets

Law practice essentially involves the processing of information, including statutes, administrative rules, and judicial opinions, to produce predictions about the legal implications of certain sets of facts and legal instruments. These tasks might be handled by using computer algorithms to plow through large computer databases, especially as computer processing speeds increase. These programs and databases, like other legal software, could be protected as intellectual property. The main limitation is when the answers cross the boundary into legal advice and therefore must be rendered by a licensed attorney (Problem 2).

The main existing legal application of computer information processing is computerized legal research. Legal research services Westlaw and LexisNexis sell access to non-copyrightable content such as legal decisions, statutes, and regulations through a copyrighted search program and a proprietary database structure, such as the West Key Number system.<sup>127</sup>

Competition and technology could erode these services’ value. Public sources, such as courts and legislatures, put much of this information on the Web

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125. For example, there was evidence prior to the enactment of the Private Securities Litigation Reform Act (“PSLRA”) that this was a particular problem with securities class actions. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 514–15 (1991) (showing that settlement amounts did not depend on the merits of the claims); Joseph A. Grundfest, *Why Disimply?*, 108 HARV. L. REV. 727, 742–43 (1995) (showing evidence that 23% of settlements in a sample were for less than \$2 million).

126. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

127. See *Matthew Bender & Co. v. W. Publ’g Co.*, 158 F.3d 674, 676–77 (2d Cir. 1998); *W. Publ’g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1221–22 (8th Cir. 1986).

where users can access it using Google-type search algorithms.<sup>128</sup> This isolates much of Westlaw's and LexisNexis's value in their proprietary information and database structure. The value of the structure will diminish as search algorithms and computers get more powerful. Although there are significant barriers to entry in creating very large databases, firms may be able to internalize this cost, particularly if they can bundle legal research with other products. For example, Google can connect legal research with the rest of its search business and sell advertising. Bloomberg Law bundles legal research with financial content.<sup>129</sup>

A potential alternative to the standard Westlaw and LexisNexis model is a "crowd-sourcing" approach that relies on voluntary contributors. Spindle Law, which describes itself as "a dynamic online legal community," has pioneered this approach.<sup>130</sup> Spindle is basically a platform for the voluntary creation of content by users. However, as of this writing, it offers much less data than Westlaw and LexisNexis. Contributors may get some reputational benefits, but it is not clear that Spindle will be able to attract enough material to become a viable alternative to existing services.

A second legal research alternative is law firms offering research reports as a byproduct of their work for clients, analogous to the term sheets discussed above in Section 3. Many law firms already distribute such reports to the public for free to advertise their services. For example, Richards, Layton & Finger, P.A. distributes free reports on Delaware law,<sup>131</sup> and a Davis Polk & Wardwell LLP report on Dodd-Frank<sup>132</sup> became a main way to access materials relating to this long and complex law. The firms hope to use these materials to generate business. Law firms might also sell subscriptions to more sophisticated materials or offer them for free only to clients in order to bind the clients to the firm.

So far, this Section has discussed mechanisms for finding existing law in judicial opinions and other sources. Computers offer new opportunities for predicting the future direction of the law. For example, instead of the conventional method of relying on courts' holdings categorized in treatises or "tagged" via West Key Numbers, lawyers might analyze facts in extensive databases of cases<sup>133</sup> or

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128. See Paul Ohm, *Computer Programming and the Law: A New Research Agenda*, 54 VILL. L. REV. 117, 140 (2009) (discussing development of free web-based search engine for searching case law).

129. See BLOOMBERG LAW, <http://www.bloomberglaw.com> (last visited Oct. 8, 2011); see also Robert Ambrogi, *Bloomberg Law: Can it Be a Contender?*, LAW SITES (Feb. 27, 2010), <http://www.lawsitesblog.com/2010/02/bloomberg-law-can-it-be-contender.html>.

130. About, SPINDLE LAW, <http://spindlelaw.com/about> (last visited July 5, 2011).

131. See *E-Alerts / Newsletters*, RICHARDS, LAYTON & FINGER, <http://www.rlf.com/KnowledgeCenter/EAlertsNewsletters> (last visited Oct. 6, 2011).

132. See Press Release, Davis Polk & Wardwell LLP, Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010 (July 21, 2010), available at [http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910\\_Financial\\_Reform\\_Summary.pdf](http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf).

133. See George S. Geis, *Automating Contract Law*, 83 N.Y.U. L. REV. 450, 478-79 (2008) (discussing "supercharged doctrinal analysis" of contracts cases that would involve using computers to analyze large databases of cases); John H. Matheson, *Why*

court records available through Public Access to Court Electronic Records (“PACER”)<sup>134</sup> to predict case results. These predictions might be based on economic analysis, psychology, sociology, decision theory, and political science to determine relevant variables.<sup>135</sup> Lawyers might collaborate with computer scientists to develop new computer prediction algorithms.<sup>136</sup> This would be analogous to the techniques already used to predict consumers’ tastes in films<sup>137</sup> and music.<sup>138</sup> Computers can already provide the correct Jeopardy question “Who is Eddie Albert Camus?” for the answer “A ‘Green Acres’ star goes existential (& French) as the author of ‘The Fall.’”<sup>139</sup> They ought to be able to answer a question like: “Can a lawyer copyright a complaint?”

Markets also offer opportunities for predicting legal outcomes. For example, crowd-sourcing has been used to predict the results of Supreme Court cases.<sup>140</sup> Scholars also have discussed the use of markets to predict or substitute for

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*Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKELEY BUS. L.J. 1, 29–36 (2010) (analyzing factors that actually influence the results of veil-piercing cases); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1047–70 (1991) (same).

134. PACER, <http://www.pacer.gov> (last visited Sept. 12, 2011); see also, e.g., Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 853, 890–906 (2010) (analyzing factors relevant to resolving veil-piercing claims).

135. See Miriam A. Cherry & Robert L. Rogers, *Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decisions*, 100 NW. U. L. REV. 1141, 1152–58 (2006) (discussing attitudinal, strategic, and behaviorist models of judicial decisionmaking).

136. See Michael J. Bommarito II et al., *Distance Measures For Dynamic Citation Networks*, 389 PHYSICA A 4201 (2010) (discussing construction and use of dynamic citation networks to show the development of precedent in common law systems, focusing on U.S. Supreme Court decisions); Fred S. McChesney, *Tortious Interference with Contract Versus “Efficient” Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131 (1999) (presenting regression analysis of tortious interference cases to show which factors actually influence case results).

137. See prizemaster, *Grand Prize Awarded to Team BellKor’s Pragmatic Chaos*, NETFLIX PRIZE (Sept. 18, 2009, 9:58 AM), <http://www.netflixprize.com/community/viewtopic.php?id=1537> (discussing outcome of contest to develop mechanism for predicting consumers’ tastes in films).

138. See *The Music Genome Project*, PANDORA RADIO, <http://www.pandora.com/mgp.shtml> (last visited Sept. 12, 2011) (describing project to identify songs’ musical attributes).

139. Clive Thompson, *What is I.B.M.’s Watson?*, N.Y. TIMES, June 20, 2010, § MM (Magazine), at 30; see also STEPHEN BAKER, *FINAL JEOPARDY: MAN VS. MACHINE AND THE QUEST TO KNOW EVERYTHING* (2011). For discussions of the implications of advances in data processing for legal work and the study of law, see Ohm, *supra* note 128; John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 5, 2011, at A1; Daniel Martin Katz et al., *Big Data: The Next Frontier for Innovation, Competition and Productivity*, COMPUTATIONAL LEGAL STUD. (May 22, 2011), <http://computationallegalstudies.com/2011/05/22/big-data-the-next-frontier-for-innovation-competition-and-productivity-via-mckinsey-global-institute>.

140. See Josh Blackman et al., *FantasySCOTUS: Crowdsourcing a Prediction Market for the Supreme Court* (June 22, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1804940](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1804940) (discussing *FantasySCOTUS*

judicial decisions or trials.<sup>141</sup> The real advances might come when this work advances beyond scholarship to testing in markets. Because of many questions concerning the design of these markets,<sup>142</sup> the best approach may be a “market for markets.” There are opportunities to make money by using legal prediction technology for such purposes as designing transaction and litigation documents, settlement, and investing in litigation.<sup>143</sup>

The important question for present purposes is whether privately developed prediction mechanisms or markets might be inhibited by the unavailability of intellectual property rights.<sup>144</sup> The main legal exceptionalism issue would arise if the prediction itself becomes the basis of law, as where predictions become reliable enough that courts cite them (Problem 3).<sup>145</sup> Similar principles should apply here as to the case and statutory law discussed below in this Part: intellectual property rights should balance the need for public access to law against the benefits of encouraging the creation of more and better law.

### 7. Legal Risk Management

Products may be designed to identify and head off legal problems before they mature into litigation. Firms could use various devices, including the prediction and data technologies discussed in Subsection 6, to identify factors that reduce or increase legal risk. Scholars, for example, have identified ways to predict which investment managers will commit fraud.<sup>146</sup> Firms could use computers to apply such techniques to large datasets to determine when to employ extra monitoring to minimize the risk of misconduct.<sup>147</sup> They also could use this information to design training and monitoring programs to enable firms to reduce

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*Prediction Tracker*, FANTASYSCOTUS, <http://www.fantasyscotus.net/prediction-tracker.php> (last visited Oct. 8, 2011)).

141. See MICHAEL ABRAMOWICZ, PREDICTOCRACY: MARKET MECHANISMS FOR PUBLIC AND PRIVATE DECISION MAKING 227–54 (2007); Cherry & Rogers, *supra* note 135. For general discussions of prediction markets, see ABRAMOWICZ, *supra*; Saul Levmore, *Simply Efficient Markets and the Role of Regulation: Lessons from the Iowa Electronic Markets and the Hollywood Stock Exchange*, 28 J. CORP. L. 589 (2003); Justin Wolfers & Eric Zitzewitz, *Prediction Markets*, 18 J. ECON. PERSP. 107 (2004).

142. See generally ABRAMOWICZ, *supra* note 141; Cherry & Rogers, *supra* note 135, at 1160–78.

143. With respect to litigation financing and related capital market activities, see *infra* Part III.C.

144. See ABRAMOWICZ, *supra* note 141, at 284–87 (discussing the problem of capturing the benefits from use of prediction markets in government).

145. See Cherry & Rogers, *supra* note 135, at 1183–85 (discussing courts’ possible uses of prediction markets).

146. See William Christopher Gerken & Stephen G. Dimmock, *Predicting Fraud by Investment Managers* (Networks Fin. Inst., Working Paper No. 2011-WP-09, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1832770](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832770).

147. See Ron Friedmann, *Automating the Law Factory—UK May Lead the Way*, STRATEGIC LEGAL TECH. (June 28, 2011, 5:45 AM), <http://www.prismlegal.com/wordpress/index.php?p=1152> (suggesting that a large retailer might use computers to data-mine its employment records to ensure its stores were adhering to the firm’s antidiscrimination policy).

their litigation risk.<sup>148</sup> Firms could use internal prediction markets to determine when they need to address particular risks of fraud or misconduct.<sup>149</sup> Richard Susskind notes that lawyers so far have paid little attention to “proactive [legal] services,” but suggests that this might be “a wonderful investment opportunity.”<sup>150</sup>

One approach to designing and selling risk-avoidance products would be bundling risk management with legal risk insurance. Legal risk insurers would bond their advice and thereby increase its value by having to pay off when risks mature. Insurance firms employing lawyers and business experts might be able to identify and evaluate a firm’s legal risks and suggest cost-effective remediation consistent with the firm’s business plan. As employees of insurance companies rather than law firms, these lawyers would be compensated based on their ability to minimize conventional legal work. These firms would perform legal audits that spot problems before they give rise to legal action. Insurance also could reduce firms’ litigation costs not only by helping them spot and measure risks, but also by serving notice to others that the company has purchased insurance that will fund the defense.<sup>151</sup>

These products may raise unauthorized practice of law issues to the extent that they resemble legal advice (Problem 2). As with some of the products discussed above in Subsections 2 and 6, there is a question of whether the product is sufficiently tailored to the individual client to cross into the personalized advice category. Also, lawyers’ and other experts’ involvement in legal risk-avoidance products might raise issues under legal professional responsibility rules as to financial relationships between lawyers and nonlawyers and the nature of the firm creating the product or rendering the advice (Problem 2). As discussed throughout this Article, policymakers should balance the potential costs of permitting these practices against the benefits of giving firms alternative methods of reducing the cost and increasing the value of legal information.

#### 8. Law Ideas

The products discussed so far are protected, if at all, by copyright law, which covers a particular expression of an idea rather than the idea itself. This protection would not extend to such legal concepts as novel claims and defenses, contractual mechanisms, and legal and tax arbitrage devices.

Intellectual property protection may be particularly important to encouraging the development of these ideas. The traditional client-advice model of

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148. See Ron Friedmann, *Data, Data, Everywhere . . . Someday in Legal Too*, STRATEGIC LEGAL TECH. (May 17, 2011, 4:09 PM), <http://www.prismlegal.com/wordpress/index.php?p=1143> (suggesting litigation based on decision trees using “automated culling and assessing facts in public and proprietary databases,” and “statistical profiles of how prior deal terms related to market conditions and party financials at the time of each prior deal” to better “tailor terms to the current situation”).

149. For a discussion of firms’ use of prediction markets, see ABRAMOWICZ, *supra* note 141, at 88–93, 97–99, 194–226.

150. SUSSKIND, *supra* note 5, at 226–27.

151. See *supra* note 46 (citing a patent application for medical malpractice insurance).

law practice forces lawyers to rely on fees from individual clients. Fully analyzing a problem or developing a solution may involve significant positive spillovers that lawyers cannot capture by billing a single client. For example, a recent analysis of lawyers' attitudes regarding sovereign bond terms revealed less lawyer attention to the creation of original terms than one might expect for such high-value contracts.<sup>152</sup> A business transaction may require an elaborate new statute or administrative rule that entails thousands of hours of work that lawyers cannot bill to any specific client. This suggests that there is a need for research and development on legal work that benefits multiple clients and transactions.<sup>153</sup>

The challenge is finding a way to enforce property rights in general legal ideas. Patents might extend to some legal inventions,<sup>154</sup> but basic restrictions on patent law make it a tight fit. It is also necessary to add to these restrictions legal exceptionalism concerns limiting public access to law and compromising the independence of lawyer advice on patented products (Problem 3). On the other hand, as we have seen in other contexts, the benefits of a transparent market in legal ideas could outweigh the negative effects of property rights that encourage the development of these ideas. This is an area that particularly could benefit from the legal idea factories described below in Subpart B.

#### 9. Statutory Standard Forms

Legal information products could go beyond the forms and software discussed so far in this Subpart—all of which provide ways of dealing with existing law—to the creation of law itself. This Subsection discusses statutory law, while the next Subsection discusses the private creation of the common law.

The production of some types of statutes is closely related to the forms discussed above in Section III.A.1. An example is business-association-type default rules for particularly complex contracts suitable for long-term relationships. These rules resemble standard form contracts, particularly given the parties' ability to opt for any statute simply by filing papers in a particular state.<sup>155</sup> However, statutes may assist contracting in ways that purely private forms cannot. Embodying standard terms in a statute may make them a focal point, encouraging more judicial interpretations that could clarify the terms.<sup>156</sup> Most importantly, the state's involvement also clarifies whether the terms will be enforced, thus reducing legal uncertainty and the costs of reorganizing when terms are not enforced.<sup>157</sup>

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152. See Mitu Gulati & Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* 65–68 (Oct. 3, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1937900](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937900).

153. See Larry E. Ribstein, *Sticky Forms, Property Rights and Law*, 40 HOFSTRA L. REV. (forthcoming 2012) (analyzing Gulati & Scott, *supra* note 152, in light of the property rights analysis in this Article).

154. See *supra* text accompanying notes 45–47.

155. See LARRY E. RIBSTEIN, *THE RISE OF THE UNINCORPORATION* 15–31 (2010).

156. See Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U. L. Q. 369, 376–78 (1995).

157. See Kobayashi & Ribstein, *supra* note 42, at 7–11.

Although state legislatures compete to attract formations by offering efficient menus of forms,<sup>158</sup> the market for standard forms might benefit from additional experimentation that private forms could provide. Because public legislators get little benefit from innovating, private lawmakers may produce more socially valuable legal heterogeneity.<sup>159</sup> Private lawmakers could, among other things, provide creative new substantive laws and alternative legal systems that appropriately trade off the costs and benefits of legal certainty and accuracy.<sup>160</sup> Although the nonprofit National Conference of Commissioners on Uniform State Laws and the American Law Institute already produce statutes that complement the work of state legislators, these quasi-official organizations have a limited scope and must carefully select their projects.<sup>161</sup> Moreover, these organizations and their members often have objectives and incentives that interfere with efficient lawmaking.<sup>162</sup> There may be room for law production by firms that sell their products in the open market rather than using them for political lobbying.<sup>163</sup>

For-profit firms' willingness to develop statutory standard forms depends on the availability of intellectual property rights for these forms.<sup>164</sup> This returns to the legal exceptionalism problems concerning access to law and lawyer independence (Problem 3).<sup>165</sup> We have seen that courts have refused to permit copyrights even in model codes produced pursuant to private contract that were enacted into law.<sup>166</sup> The policy problems that impede property rights in that situation would apply with even greater force to privately produced statutes that were originally intended for public adoption. The counter-argument, as with other products discussed in this Subpart, is that a more robust market for statutes diminishes these concerns. Consumers restricted from accessing new private forms could continue to access public forms and therefore would be left no worse off by the new regime.

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158. See ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 107–32 (2009).

159. See Gillian K. Hadfield & Eric Talley, *On Public Versus Private Provision of Law*, 22 J.L. ECON. & ORG. 414 (2006) (discussing some tradeoffs of public and private lawmaking).

160. See Gillian K. Hadfield, *Privatizing Commercial Law*, 24 REGULATION 40, 41 (2001).

161. See generally Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

162. See Kobayashi & Ribstein, *supra* note 42, at 28; Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 328–29 (2009); Schwartz & Scott, *supra* note 161; Alan Schwartz, *The Still Questionable Role of Private Legislatures*, 62 LA. L. REV. 1147, 1151 (2002); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1814–15 (1994); David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

163. As to the nature of these firms, see Kevin E. Davis, *Privatizing the Adjudication of International Commercial Disputes: The Relevance of Organizational Form* (N.Y. Univ. Law & Econ., Working Paper No. 11-01, 2010), available at <http://ssrn.com/abstract=1739828>.

164. See Kobayashi & Ribstein, *supra* note 38, at 748–52.

165. See *supra* Part I.C.2–3.

166. See *supra* text accompanying note 32.

*10. Common Law*

A significant part of lawyers' traditional work is participating in creating the common law rules in judicial opinions that form a key part of our legal system. Therefore, it is important to consider whether the common law might be one of the products in the new legal information market and how this might affect the regulation of lawyer conduct. Here, the main question is the extent to which creators of case law get intellectual property protection.

Access-to-law concerns preclude private parties from having private property rights in judges' decisions (Problem 3).<sup>167</sup> Government-operated courts also have resisted litigants' efforts to use confidentiality agreements and protective orders.<sup>168</sup> Courts have held that litigation documents are part of the public's right of access to the courts and thus are presumptively open to the public without a compelling justification for privacy.<sup>169</sup> For example, in *Wilson v. American Motors Corp.*, the Eleventh Circuit Court of Appeals refused to close the trial record based only on the litigants' desire to prevent the use of pleadings, docket entries, orders, affidavits, depositions, and transcripts for collateral estoppel purposes.<sup>170</sup> State regulation restricts the use of protective orders.<sup>171</sup>

Policymakers should evaluate these restrictions on private rights in the common law in light of the legal information market. While the government can resist parties' claims to confidentiality in government-supported litigation, it cannot force the parties to resort to such litigation. Parties already extensively use private tools, such as arbitration, that do not produce public records or bodies of case law.<sup>172</sup> Settlement has similar effects.<sup>173</sup> Arbitration could offer case law and

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167. See Crowne-Mohammed, *supra* note 40 (discussing whether judges hold copyright in their judgments). For arguments favoring creation of such rights, see *supra* note 28.

168. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991).

169. See *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1014 (11th Cir. 1992) (vacating district court's order sealing court record, including pleadings and motions); *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1569 (11th Cir. 1985) (same); cf. *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1304 (7th Cir. 1984) (finding newspapers entitled to special litigation committee report prepared under attorney-client privilege when report admitted into evidence).

170. 759 F.2d at 1571.

171. See Sunshine in Litigation Act, FLA. STAT. § 69.081 (2011) (prohibiting orders that conceal information relating to "public hazards"); TEX. R. CIV. P. 76a (creating a presumption that court records, including unfiled discovery materials and settlement agreements, are open to the public); Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991); Miller, *supra* note 168, at 442-45 (listing enacted and proposed state statutes and rules).

172. For a general discussion of the costs and benefits of arbitration, see O'HARA & RIBSTEIN, *supra* note 158, at 85-106.

173. See Bruce H. Kobayashi, *An Economic Analysis of Relitigation Rules in Intellectual Property Litigation* (Apr. 21, 2010) (unpublished manuscript), available at [http://www.law.northwestern.edu/searlecenter/papers/Kobayashi\\_Relitigation\\_Final.pdf](http://www.law.northwestern.edu/searlecenter/papers/Kobayashi_Relitigation_Final.pdf) (examining use of settlement to avoid the effects of collateral estoppel). See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Ezra Friedman & Abraham L.

other litigation materials in addition to adjudication. However, private parties have little incentive to create private law that will mainly benefit future litigants unless they have property rights in this law. Public lawmaking systems overcome this problem to some extent by subsidizing litigation out of general tax revenues.

Privatizing the common law may require enabling somebody to own the opinions. To be sure, private-law systems have developed in relatively small, closed systems with repeat players, where the parties can internalize costs and benefits of developing private law.<sup>174</sup> But formal property rights may be necessary to sustain common law creation in larger, more open systems. Alternative common law systems could incorporate some of the new products discussed above. For example, the parties might use markets and data processing as alternative mechanisms for predicting legal outcomes based on decided cases.<sup>175</sup> This could reduce legal costs as compared to relying on costly case-by-case judgments by highly trained professionals.<sup>176</sup> Creating these systems, as with conventional common law systems, may require overcoming barriers to obtaining property rights in law. As with the other products discussed in this Article, these property rights entail balancing potential restrictions on access (as by enforcing a particular jurisdiction's rights as against other government entities) against the benefits of encouraging the development of potentially welfare-enhancing alternative legal systems.

### **B. Law Factories**

This Subpart discusses the types of firms that may be needed to manufacture new legal information products like those discussed in Subpart A. The basic problem is that the traditional client-advice model of contemporary law practice may result in the underproduction of such products because their costs and benefits cut across multiple clients. At the same time, we have seen that intellectual property law may not provide sufficient property rights to support research and development of products for the legal information market beyond

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Wickelgren, *Chilling, Settlement, and the Accuracy of the Legal Process*, 26 J.L. ECON. & ORG. 144 (2010); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221 (1999).

174. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (discussing the informal legal system existing in the closed system of diamond merchants); Hadfield, *supra* note 160, at 42–43; Scott E. Masten & Jens Prufer, *On the Evolution of Collective Enforcement Institutions: Communities and Courts* (TILEC Discussion Paper Series, Paper No. 2011-017, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1773486](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773486) (explaining the move from the law merchant to common law courts as a result of the development of trade). This is similar to the creation of law by standard-setting organizations. See *infra* Part III.B.3.

175. See *supra* Part III.A.6.

176. See Hadfield, *supra* note 4 (discussing the high costs resulting from the current system's reliance on lawyers).

individual clients.<sup>177</sup> The following are some private contractual devices that might fill this gap in the absence of formal property rights.

### *1. Specialist Law Firms*

One possible approach to creating intellectual property in legal ideas is for law firms to specialize in particular types of cases so that they can make better use of research and development of certain legal issues across their portfolio of cases. This may lead to the creation of large firms that are specialized rather than diversified like traditional large one-stop-shop firms. A prominent example is the development of the “poison pill” at a highly successful boutique law firm specializing in takeover defense work.<sup>178</sup> This approach addresses the problem that law firms not only lack formal intellectual property rights in law but also may not enter into enforceable noncompetition agreements that might protect the information and business from walking out with employees.<sup>179</sup> A large specialty firm might handle enough of the cases and transactions using the device to be able to capture rents from its research even without enforceable contracts covering the firm’s intellectual property.

### *2. Research Parks*

Organizations could employ or fund lawyers and other researchers to study general issues with the objective of making discoveries that could turn into legal products or new types of law-related advice. These organizations could be modeled on Alcatel-Lucent’s Bell Labs and Xerox’s PARC, organizations created to encourage product innovation. They could specialize in research that is both very costly and has benefits that extend beyond existing client-specific and litigation-specific legal work. This could include statutes,<sup>180</sup> new common law systems,<sup>181</sup> and computational devices for predicting results from cases.<sup>182</sup>

Again, these firms face the problem of the lack of property rights in their inventions. Because they are not law firms, they are not subject to legal profession rules restricting noncompetition agreements and nonlawyer ownership. However, unlike the devices produced by Bell Labs and Xerox PARC, new legal methods may not be entitled to patent protection under general patent law or because of legal exceptionalism concerns such as access to law and lawyer independence.<sup>183</sup> The absence of property rights may mean that these firms would have to be run as grant-supported nonprofits.

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177. Others who have discussed the need for legal innovation have not recognized this challenge, including SUSSKIND, *supra* note 5, and Hadfield, *supra* note 6.

178. See Schwartz, *supra* note 56.

179. See *supra* note 77 and accompanying text.

180. See *supra* Part III.A.9.

181. See *supra* Part III.A.10.

182. See *supra* Part III.A.6.

183. See *supra* Part I.D.

### 3. Industry Groups

An alternative potential structure for coping with the absence of property rights in laws is for industry groups to sponsor research on laws, codes, or standards whose costs and benefits the groups could internalize. For example, venture capital or private equity groups could fund the development of standardized terms, forms, and contracts that are appropriate for those industries. Such a group also could partner with a legal software firm to turn that firm's products into industry standards.<sup>184</sup> This role of industry groups is analogous to the private commercial lawmaking done by such organizations as merchant guilds, trade associations, and securities exchanges.<sup>185</sup>

A specific illustration of this approach are standard-setting organizations ("SSOs"), which have been established to set technical standards that define minimum performance standards or promote interoperability.<sup>186</sup> The organizations have agreements covering membership and the production, disclosure, and use of the member firms' intellectual property rights.<sup>187</sup> An example is the American Society of Sanitary Engineering ("ASSE").<sup>188</sup> The ASSE is comprised of members of the plumbing industry who help develop and sell plumbing product standards and seals of approval. Many states and local jurisdictions use ASSE standards instead of regulatory official evaluations to determine what products may be sold in their jurisdictions. Indeed, many jurisdictions rely so heavily on the ASSE that they have adopted the organization's standards as their building codes. Even in jurisdictions where the law does not require ASSE standards, compliance with these standards is viewed as an important competitive advantage.

Governments might go further and explicitly authorize standard-setting bodies as a way to internalize rulemaking costs and benefits in relevant industries. For example, the United Kingdom has explicitly authorized its new Legal Services Board to approve entities as regulators of legal services providers.<sup>189</sup> A similar

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184. See Kenneth A. Adams, *Could You Be a Koncision Content Partner? (Including a Proposal to the National Venture Capital Association)*, KONCISION (Apr. 11, 2011), <http://www.koncision.com/could-you-be-a-koncision-content-partner>.

185. See Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); Bernstein, *supra* note 174; Hadfield, *supra* note 160, at 42–43; Jonathan R. Macey & Maureen O'Hara, *Regulating Exchanges and Alternative Trading Systems: A Law and Economics Perspective*, 18 J. LEGAL STUD. 17 (1999).

186. See Kobayashi & Wright, *supra* note 68; Bruce H. Kobayashi & Joshua D. Wright, *Intellectual Property and Standard Setting*, in AM. BAR ASSOC., *HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARDS SETTING* (2010) [hereinafter Kobayashi & Wright, *Intellectual Property and Standard Setting*].

187. For a discussion of intellectual property rights and SSOs, see Kobayashi & Wright, *Intellectual Property and Standard Setting*, *supra* note 186; Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889 (2002); Mark R. Patterson, *Inventions, Industry Standards, and Intellectual Property*, 17 BERKELEY TECH. L.J. 1043 (2002).

188. See Kobayashi & Wright, *Intellectual Property and Standard Setting*, *supra* note 186.

189. See Legal Services Act, 2007, c. 29, § 73 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2007/29/section/73>.

approach could be envisioned for enacting rules under the Dodd–Frank financial reform law,<sup>190</sup> thereby breaking through the gridlock resulting from the massive amount of administrative agency work that law created. An advantage of this government creation is that the government might also clarify the property rights these organizations have in their legal creations, thereby resolving the issues concerning these rights discussed throughout this Article.

A specific structural problem with SSOs apart from the issues regarding property rights concerns patent hold-up. An SSO member may fail to disclose the ownership of intellectual property rights that cover a standard the SSO is considering and then enforce these rights to capture the gains from the adopted standard or an essential component.<sup>191</sup> SSOs avoid ex post hold-up problems through such mechanisms as creating private contractual provisions mandating disclosure and providing for pricing and allocation of royalties.<sup>192</sup> These devices could be used to create appropriate incentives for the production, dissemination, and internalization of legal information.

### *C. Capitalizing Legal Information*

The value and supply of legal information can be increased not only by turning it into products, but also by using it to invest in capital assets. Like drilling an oil well, litigation involves exploration, production, financing, and valuation. This model for using legal expertise would depart from the current advice model because it would dispense with clients, even in their modified form as customers of legal information products. Legal capitalists would find their profits in the capital markets rather than in selling advice or information to those engaging in transactions or litigation. The following Subsections discuss some examples of this general approach to the legal information business.

#### *1. Litigation Finance*

Under the current law practice model lawyers self-finance the purchase and exploitation of litigation assets. Their compensation reflects both the value of their services and the return on their capital investments. As with firms generally, human capitalists are not necessarily the best source of financing because they cannot fully diversify risk. Accordingly, it may make more sense for the financing to come from investors with diversified portfolios. In other words, in a fully

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190. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

191. See Kobayashi & Wright, *Intellectual Property and Standard Setting*, *supra* note 186; see also Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007).

192. For discussions of these mechanisms in the holdup context, see Damien Geradin & Miguel Rato, *Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND*, 3 EUR. COMPETITION J. 101 (2007); Anne Layne-Farrar et al., *Pricing Patents for Licensing in Standard Setting Organizations: Making Sense of FRAND Commitments*, 74 ANTITRUST L.J. 671 (2007); Lemley, *supra* note 187; Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1 (2005).

competitive market, lower-risk diversified investors can be expected to outbid self-financed lawyers for investments in litigation assets.

The market for litigation finance is developing. Several firms specialize in investing in pending litigation.<sup>193</sup> These investments might take the form of loans to law firms<sup>194</sup> or litigants<sup>195</sup> that the litigation secures. Litigation also might be financed in part by selling short the defendant's stock in advance of the suit.<sup>196</sup> Litigation financiers draw on legal specialists to evaluate potential litigation outcomes.<sup>197</sup> Financing litigation thus provides opportunities for market use of legal information.

A related business model for litigation finance is intellectual property trolling, a particularly important outlet for legal expertise on intellectual property laws given large law firms' potential conflicts in representing patent holders against corporate clients. For example, a leading Kirkland & Ellis patent defense litigator moved to what is essentially a sole practice based on looking for

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193. These include Allianz ProzessFinanz, Ardec, Counsel Financial, LawFinance Group, Harbour Litigation Funding, IM Litigation Funding, and Juridica Capital Management. Litigation financiers have a trade association, the American Legal Finance Association. See AM. LEGAL FIN. ASS'N, <http://www.americanlegalfin.com> (last visited Oct. 8, 2011); see also Binyamin Appelbaum, *Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES, Nov. 15, 2010, at A1; Jonathan D. Glater, *Investing in Lawsuits, for a Share of the Awards*, N.Y. TIMES, June 3, 2009, at B1 (discussing Juridica); Peter Lattman & Diana B. Henriques, *Speculators Are Eager to Bet on Madoff Claims*, N.Y. TIMES DEALBOOK (Dec. 13, 2010, 9:21 PM), <http://dealbook.nytimes.com/2010/12/13/speculators-are-eager-to-bet-on-madoff-claims>. For general discussions of litigation financing, see Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 55–56 (2004). For a general policy discussion of selling legal claims, see Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005).

194. See Alison Frankel, *Helping Underfunded Plaintiffs Lawyers—at a Price*, LAW.COM (Feb. 13, 2006), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1139565913200>; see also David Abrams & Daniel L. Chen, *A Market for Justice: The Effect of Litigation Funding on Legal Outcomes* (July 2011) (unpublished manuscript), available at <http://www.duke.edu/~dlc28/papers/MktJustice.pdf> (discussing empirical evidence showing an increase in litigation in Australia resulting from expanded use of third-party financing).

195. See Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES, Jan. 17, 2011, at A1.

196. See Bruce H. Kobayashi & Larry E. Ribstein, *Outsider Trading as an Incentive Device*, 40 U.C. DAVIS L. REV. 21 (2006); Benjamin M. Blau & Philip L. Tew, *Short Sales, Class-Action Lawsuits, and Potential Information Leakages* (Jan. 6, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1736060](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736060) (discussing evidence showing significant increases in shorting activity immediately prior to and after the filing of lawsuits).

197. See Appelbaum, *supra* note 193 (“Lenders employ experienced lawyers to judge the strength of cases.”); Glater, *supra* note 193 (noting that a litigation hedge fund seeks “analysis from outside specialists, usually experienced lawyers,” and that “[r]elationships with lawyers at big firms are critical”); Frankel, *supra* note 194 (noting that one law firm lender has “a team of legal professionals and financial professionals” review cases, while others have “developed proprietary underwriting materials based on their litigation knowledge” and have hired a judge and lawyers to evaluate litigation).

infringers of patents owned by his patent-holding company.<sup>198</sup> Similar practices exist to enforce copyrights.<sup>199</sup>

Because litigation finance firms essentially invest in assets, they might be run basically like other investment firms, including hedge, venture capital, or private equity funds. The firms control the information, ensure that it is used only for the investing firm's purposes, and compensate the lawyers and others who provide the information the firm uses for investing. In other words, as with other legal information, the firms would bundle litigation expertise with investments, thus exploiting this expertise. This is consistent with a market model of legal information rather than the traditional model of lawyer-client relationships.

Litigation finance firms can appropriate the benefits of information even without patent or copyright protection by trading on the information prior to disclosure.<sup>200</sup> Because firms cannot preserve exclusive rights in their information after disclosing it, they need contracts and mechanisms such as noncompetition and confidentiality agreements to bind the legal experts who create the information to the trading firm. Unlike in law firms, these strategies would not raise concerns under professional responsibility rules because they would not involve the practice of law. Contracts allocating control and payoffs could address potential conflicts of interest and opportunism among the various participants. Financiers who have invested in research may be vulnerable to hold-up by claim holders.<sup>201</sup> Lawyers, plaintiffs, and defendants will want contracts protecting their claims to the residual reward after the investors have been paid.

Although litigation financing does not raise the general intellectual property, contracting, or legal exceptionalism issues discussed in this Article, it does raise issues specific to litigation—that is, whether litigation finance encourages socially wasteful litigation.<sup>202</sup> This relates to the general risk of strike

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198. Carlyn Kolker, *Billion-Dollar Lawyer Desmarais Quits Firm to Troll for Patents*, BLOOMBERG (May 31, 2010, 9:01 PM), <http://www.bloomberg.com/news/2010-06-01/billion-dollar-lawyer-quits-firm-buys-patents-to-troll-for-license-fees.html>.

199. See Nate Anderson, *The RIAA? Amateurs. Here's How You Sue 14,000+ P2P Users*, ARS TECHNICA (June 1, 2010, 7:38 PM), <http://arstechnica.com/tech-policy/news/2010/06/the-riaa-amateurs-heres-how-you-sue-p2p-users.ars>.

200. See generally Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561, 570–72 (1971) (noting the use of stock-trading profits as an alternative to statutory intellectual property rights such as patents).

201. See Bar-Gill & Parchomovsky, *supra* note 72 (discussing these issues). For a discussion of a specific contract, see Daniel Fisher, *Litigation-Finance Contract Reveals How Investors Back Lawsuits*, FORBES.COM (June 7, 2011, 7:12 AM), <http://www.forbes.com/sites/danielfisher/2011/06/07/litigation-finance-contract-reveals-how-investors-back-lawsuits/>.

202. See JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, *SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES* (2009); Jeremy Kidd & Todd Zywicki, *Does Increased Litigation Increase Justice in a Second-Best World?*, in *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW* (Frank Buckley ed., forthcoming 2012). For discussions of this issue in connection with a specific environmental lawsuit, see Roger Parloff, *Have You Got a Piece of this Lawsuit?*, FORTUNE,

litigation, in which a plaintiff crafts a complaint designed to withstand a motion to dismiss seeking a payoff from the defendant to avoid higher discovery costs.<sup>203</sup> This strategy can work as long as pleading standards are low, plaintiffs do not bear the full costs of using the government-provided court system, and discovery costs between plaintiffs and defendants are asymmetric (as in most securities cases). Even if this litigation is socially wasteful, the litigation assets it produces may be privately valuable. Litigation financing could leverage this value, thereby encouraging social waste.<sup>204</sup>

This analysis helps explain laws against champerty, maintenance, and barratry, which restrict outside funding of litigation.<sup>205</sup> The government also controls access to the courts by licensing lawyers and regulating them as officers of the court. If litigants want legal assistance, they must obtain it from somebody who is properly regulated and subject to professional norms concerning conduct of litigation.

Although litigation finance carries risks, as discussed throughout this Article, it is also important to take account of potentially positive aspects of the legal information market. In general, like other legal information markets, litigation finance substitutes open markets for closed-agency relationships. This has benefits as well as costs. In particular, outside financing of litigation could reduce the problems of excessive and wasteful litigation that provide some of the motivation for regulating or prohibiting this practice. These benefits illustrate the general tradeoffs involved in regulating the legal information market.

First, it is important to keep in mind that litigation financing is potentially available to defendants as well as plaintiffs. Defendants' access to the financial markets would better enable them to resist settling weak claims with high upfront discovery costs, and thereby reduce the asymmetry that helps produce strike suits.<sup>206</sup>

Second, trading litigation information in capital markets enables lawyers to diversify risks, which can reduce lawyer-client agency costs. Without this opportunity to diversify through the capital markets, lawyers have an incentive to reduce their risk by maintaining a portfolio of underfunded "strike"-type suits.<sup>207</sup>

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June 13, 2011, at 68, 68–75 (discussing issues arising in outside-financed environmental lawsuit); Fisher, *supra* note 201.

203. See *supra* note 125 and accompanying text.

204. Even if litigation finance increases litigation costs, there remains a basic question whether the law should bar mechanisms for profiting from lawful conduct. See *supra* note 47. If the law wants to restrict some litigation as wasteful, it arguably should address this problem directly rather than indirectly by restricting the financing of legally permissible activities.

205. Stephen B. Presser, *A Tale of Two Models: Third Party Litigation in Historical and Ideological Perspective* 10–12 (Nw. Law Searle Ctr. on Law, Regulation, and Econ. Growth, Discussion Paper, 2009), available at [http://www.law.northwestern.edu/searlecenter/papers/Presser\\_A\\_Tale\\_of\\_Two\\_Models.pdf](http://www.law.northwestern.edu/searlecenter/papers/Presser_A_Tale_of_Two_Models.pdf).

206. Litigation insurance can have a similar deterrent effect. See *supra* text accompanying note 151.

207. See Larry E. Ribstein, *Financing Lawsuits*, IDEOBLOG (Feb. 14, 2006, 8:06 AM), [http://busmovie.typepad.com/ideoblog/2006/02/financing\\_lawsu.html](http://busmovie.typepad.com/ideoblog/2006/02/financing_lawsu.html).

Diversified litigation financiers, on the other hand, have an incentive to pursue high-value litigation to successful outcomes.

Third, litigation finance, like legal information products, can increase transparency and thereby reduce the need for professional regulation. Capital markets can price the risks and expected value of litigation investments. This could help sharpen existing constraints on wasteful litigation provided by pleading, discovery, and other rules by accurately pricing them.

Fourth, increasing access to court litigation finance could indirectly facilitate procedural reforms that otherwise would be inefficient. There is evidence that judicial and legislative efforts to increase pleading standards<sup>208</sup> have deterred meritorious cases.<sup>209</sup> The law could address the problem of asymmetric discovery costs by forcing parties to bear the cost of their discovery requests.<sup>210</sup> However, this could effectively bar access to courts for wealth-constrained parties with meritorious claims.<sup>211</sup> Litigation finance can reduce the extent to which stricter procedural rules deter socially efficient litigation, helping plaintiffs finance meritorious suits.

Fifth, litigation finance is itself a potential door to the legal information market. It could promote investment in legal information products that enable more accurate prediction of litigation results, particularly including the sophisticated computational mechanisms discussed above.<sup>212</sup> Litigation financiers may have stronger incentives than academic researchers to discover and experiment with new ways of analyzing the law in order to make faster and more accurate predictions. These incentives could be sharpened by high-powered compensation devices typically used in hedge funds, giving managers a share in profits exceeding a specified hurdle rate.<sup>213</sup> The pursuit of these profits could spur

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208. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (requiring complaint to allege facts that enable court to reasonably infer more than a “sheer possibility that a defendant has acted unlawfully”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (requiring complaint in antitrust case to allege facts sufficient to “raise a right to relief above the speculative level”); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (interpreting heightened pleading standard contained in the Private Securities Litigation Reform Act).

209. See Alexander Reinert, *The Cost of Heightened Pleading*, 86 IND. L.J. 119 (2010) (applying *Twombly* standard to pre-*Twombly* cases, and showing significant deterrence of cases that resulted in subsequent settlements or stipulated dismissals). For evidence consistent with deterrence of meritorious claims resulting from the PSLRA heightened pleading standard, see Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35 (2009).

210. See Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435 (1994); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773 (2011).

211. See e.g., Cooter & Rubinfeld, *supra* note 210; Redish & McNamara, *supra* note 210 (discussing these issues).

212. See *supra* Part III.A.6.

213. See Robert C. Illig, *The Promise of Hedge Fund Governance: How Incentive Compensation Can Enhance Institutional Investor Monitoring*, 60 ALA. L. REV. 41, 58–98

new types of collaborations between legal and other types of experts in finance and computing.

### 2. *Trading Litigation-Affected Assets*

Law-related matters generate many types of information that can have significant market value because of the potentially high stakes of legal outcomes. In particular, litigation significantly affects asset values.<sup>214</sup> All firms have some litigation risk, and some have a substantial portion of their net worth riding on actual or potential tort or intellectual property litigation. Apart from actual or threatened litigation, much of the information that determines the price of securities is based on the market's understanding of provisions in contracts, such as those relating to the circumstances and consequences of loan default. This suggests a market demand for legal analysis in connection with firm valuation. The capital markets could, therefore, become an important outlet for legal expertise. Because appropriating returns from information involves trading strategies rather than statutory intellectual property rights,<sup>215</sup> legal exceptionalism arguments against intellectual property in law do not significantly affect this business model.

One business model for using legal information to trade assets is consulting firms that sell information to the capital markets. For example, at least one firm specializes in analyzing loan covenants.<sup>216</sup> Also, as with litigation finance, hedge-fund-type firms employing legal experts as well as financial analysts and forensic accountants could bundle legal information with trading.<sup>217</sup> Such firms might, for example, spot and sell securities of companies whose accounting is suspicious, just as finance professors have developed ways to predict which investment managers will commit fraud<sup>218</sup> and exposed options backdating.<sup>219</sup> This approach would institutionalize the discovery of information, rather than leaving it to the chance participation of whistleblowers. Individual lawyers also could use their expertise and knowledge to invest in lawsuits, at least where they are not representing clients.<sup>220</sup> However, lawyers likely would increase

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(2008); Houman B. Shadab, *The Law and Economics of Hedge Funds: Financial Innovation and Investor Protection*, 6 BERKELEY BUS. L.J. 240, 250–51 (2009).

214. See Kathleen Engelmann & Bradford Cornell, *Measuring the Costs of Corporate Litigation: Five Case Studies*, 17 J. LEGAL STUD. 377 (1988).

215. See *supra* note 200 and accompanying text.

216. See COVENANT REV., <http://www.covenantreview.com/> (last visited Mar. 11, 2010) (describing firm that “creatively analyzes the indentures, credit agreements, and other contracts that determine creditor rights”).

217. For a general analysis of capitalizing on information by market participants, see Kobayashi & Ribstein, *supra* note 196.

218. See Gerken & Dimmock, *supra* note 146.

219. Randall A. Heron & Erik Lie, *Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?*, 83 J. FIN. ECON. 271 (2007).

220. See Ted Frank, *Investment Disclosure*, POINTOFLAW (June 5, 2011, 11:03 AM), <http://www.pointoflaw.com/archives/2011/06/investment-disc.php> (discussing a lawyer's speculation on a Supreme Court class action decision).

their expected returns if they combined their knowledge with the market expertise and resources of a hedge fund or other investment firm.<sup>221</sup>

### 3. *Prospecting for Claims*

In the legal information industry's current client-centered model, lawyers generally encounter litigation only when it walks through the door as a potential plaintiff or defendant. Even ambulance-chasing lawyers proactively searching for litigation may do no more than scour *The Wall Street Journal*. The client-centered model of legal services offers little incentive to invest more in uncovering possible causes of action, because lawyers who discover the information would have no assurance of being able to handle the resulting case without engaging in possibly unethical conduct to secure the client. This might cause neglect or delay of some socially beneficial litigation, particularly where claims arise from employee conduct deep within large corporations.

Lawyers theoretically could buy claim information from the injured parties, perhaps through an auction process,<sup>222</sup> and prosecute the claims themselves. They might also operate or participate in a market for claims. However, the rules governing our adversary system currently prohibit these practices. Accordingly, lawyers would have to find some other way to gain from prospecting for claims.

An alternative to the present system that is potentially ripe for innovation would be some mechanism for rewarding those who discover claims. One possibility is a *qui tam* or similar claim. The Dodd–Frank Act provides significant rewards for people who alert the SEC to cases that end in recovering substantial fines.<sup>223</sup> However, offering rewards to whistleblowers has potential problems, including encouraging too many false positives in the form of badly motivated or ill-informed claims.

Another alternative is to permit trading on negative material inside information. In contrast to the complex legal restrictions on statutory whistleblowers, the risk that the market will disagree with their assessments of the information disciplines insider traders.<sup>224</sup> Unleashing an army of traders inside corporations could uncover enough fraud to significantly deter it. Employees might capitalize on their information by selling it to the hedge funds discussed

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221. See Larry Ribstein, *Betting Against the Market on Lawsuits*, TRUTH ON THE MARKET (June 5, 2011), <http://truthonthemarket.com/2011/06/05/betting-against-the-market-on-lawsuits> (discussing Ted Frank's Supreme Court bet noted *supra* note 220).

222. See Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650 (2002); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

223. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49 (2010); Securities Whistleblower Incentives and Protections, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249).

224. See Kobayashi & Ribstein, *supra* note 196; Larry E. Ribstein, *Let the Whistleblowers Trade*, FORBES.COM (July 28, 2010, 2:53 PM), <http://www.forbes.com/2010/07/28/whistleblower-insider-trading-fraud-opinions-columnists-larry-ribstein.html>.

above. The funds' lawyers would be able to analyze the information to determine whether it could support productive litigation.

Lawyers also might police fraud through their role in handling fraud litigation. In a previous article, we suggested modifying the PSLRA to allow some award for first filers in securities class actions.<sup>225</sup> This might encourage some law firms to specialize in complaints while others specialize in litigating the suits. Complaint specialists could capitalize on information about fraud by bundling it with their legal expertise and fashioning it into complaints. The lawyers could not only help disclose fraud, but also fashion remedies, formulate legal theories, and identify potential defendants.

Litigators theoretically could provide bounties to plaintiffs and witnesses in order to encourage them to come forward with information and testimony. These kinds of direct payments are currently illegal, and indeed led to the prosecution of prominent class action lawyer William Lerach and his colleagues. However, the real harm from these payments may lie in their not being disclosed, which prevents the court from accurately evaluating the testimony.<sup>226</sup> Legalizing the payments and requiring disclosure would enable class action lawyers to capitalize on their expertise by serving as intermediaries in eliciting information about corporate fraud.<sup>227</sup>

A market for whistleblowing could not only make class action litigation more efficient, but also could reduce the need for such litigation. Information intermediaries need not sue on the basis of the information they receive from firms. They could simply trade on the information, with the result that stock price effects help induce firms to take action, or bring the information to the attention of government authorities in return for payments of bounties to whistleblowers.

In general, as with the rest of the legal information market, a market for whistleblowing potentially both encourages opportunistic conduct and opens up a more transparent market that reduces the agency costs inherent in closed relationships. Policymakers need to evaluate these competing considerations in deciding whether and how to regulate these markets.

## CONCLUSION

Lawyers, so far, have produced legal information mainly by advising clients in one-to-one relationships. This has given rise to an elaborate system of

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225. See Kobayashi & Ribstein, *supra* note 38, at 771–75.

226. See Lonny Hoffman & Alan F. Steinberg, *The Ongoing Milberg Weiss Controversy*, 30 REV. LITIG. 183 (2011); Bruce H. Kobayashi & Larry E. Ribstein, *The Hypocrisy of the Milberg Indictment: The Need for a Coherent Framework on Paying for Cooperation in Litigation* 2 J. BUS. & TECH. L. 369 (2007); Michael A. Perino, *The Milberg Weiss Prosecution: No Harm, No Foul?* (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://ssrn.com/abstract=1133995>.

227. See Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303 (2006) (presenting evidence that court awards to class action lead plaintiffs are consistent with efficiency); see also Ezra Friedman & Eugene Kontorovich, *An Economic Analysis of Fact Witness Payment*, 3 J. LEGAL ANALYSIS 139 (2011).

regulation to ensure lawyers' integrity and competence. However, the old business model for law practice is breaking down and lawyers need a new model. This new model's future lies in property rights in the creation of legal information—from the transactions and litigation that are the grist of legal rules to the production of legal rules themselves. In general, the key to creating a robust legal information market is to start analyzing legal information with the tools that have been applied to innovations generally. This Article has surveyed the problems with creating formal legal rights and potential contractual solutions to these problems, particularly including the structuring of firms and agreements.

This Article's main purpose has been to invite consideration of how the legal information market might bear on the regulation of the legal profession. Although many commentators have noted the potential negative effects of this market on the traditional model of law practice, this Article seeks to focus attention on the new market's potentially positive effects. Again, as stated in the Introduction, our goal is to place ideas on the table rather than to reach conclusions.

This analysis gives rise to three general normative implications. First, the legal information market bears on the need for rules that ensure free public access to law-related information. As discussed throughout the Article, access must be balanced with creation incentives through such mechanisms as fair use and mandatory licensing rules.

Second, this Article raises additional questions concerning our current system of licensing and regulating lawyers. This system has always provided questionable benefits at high cost. This Article's summary of many potential legal information innovations that are constrained by licensing laws shows how the rise of the legal information market intensifies arguments for reexamining lawyer licensing laws.

Third, this Article's analysis supports reevaluating constraints on contracts and firm structures that can provide informal property rights in legal information and thereby fill gaps in formal intellectual property law. This would specifically include noncompetition agreements that enable firms to own and control use of legal information, as well as nonlawyer ownership of law-related firms, which enable firms to allocate profits from the creation of legal information and thereby create appropriate innovation incentives.

Although this Article has focused on theoretical considerations regarding the creation of a legal information market, its analysis implies *predictions* about how this market might develop. First, the opportunities evident in advances in information technology will make more visible the costs of maintaining the current system of relying on the one-to-one delivery of legal advice and the benefits of moving to a legal information market. Corporations' and consumers' need to cope with an increasingly regulated economy creates pressure to facilitate innovations that can help reduce these costs. Corporations face mounting legal costs in both litigation and transactional work. Many middle-class consumers bear increasing burdens from their inability to afford lawyers to help them deal with the most basic problems of living in a complex regulatory environment. These costs reach across

political divides and could facilitate the formation of political coalitions to change existing regulation.

Second, this Article has discussed real-world contexts where legal property already is being created. Innovators of legal information products comprise interest groups that can be expected to push against existing restrictions. The movement of law-trained people from traditional law firm jobs into firms using and creating legal information will add to the pressure to change existing regulation that restricts these activities.

Third, the creation of legal information markets could contribute to the dysfunction of the current system by altering the market for legal expertise. For example, we have seen that the capital markets offer very profitable opportunities for legal experts, which may not face the regulatory burdens of the rest of the legal information market because they do not involve the creation of attorney-client relationships. This could channel legal information and expertise into the capital markets from traditional legal services and the creation of welfare-increasing legal information products. Although legal expertise can create value in capital markets, policymakers may come to see that there is little justification for favoring finance over the creation of legal products.

Fourth, even if the above developments alone do not create an impetus for change in the United States or any other individual jurisdiction, they are likely to change the equilibrium elsewhere in the world. It will be impossible to cabin value-increasing changes within separate jurisdictions in an increasingly globalized world. In particular, the Legal Services Act in the United Kingdom<sup>228</sup> is likely to exert competitive pressure on the United States, which has many law firms already affiliated with British firms. U.S. consumers and potential beneficiaries of innovations in a deregulated market will be closely watching the effect of deregulation on their British counterparts.

Fifth, the developments discussed in this Article will certainly affect legal education. One of us hypothesizes in a separate paper that law schools will increasingly focus on areas of knowledge that are relevant to the legal information market, such as computer science, while de-emphasizing theory, which does not help train students for this market.<sup>229</sup>

Sixth, the already-shrinking world of the large law firm probably will get even smaller. A market for information significantly reduces the need for the reputational capital that helps ensure the integrity of advice rendered in one-to-one relationships, and thereby undermines an important rationale for large law firms.<sup>230</sup> The legal information market's growth also enables clients to unbundle the services that big law firms currently offer and buy a variety of products and

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228. See *supra* note 189 and accompanying text.

229. See Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1672–73 (2011).

230. See Ribstein, *supra* note 2.

services from many different firms.<sup>231</sup> This unbundling is likely to increase as corporations' in-house counsel become increasingly sophisticated about the products and services available on the legal information market.

In short, the developments discussed in this Article are likely to significantly reshape the market for legal services into one in which lawyers create and own the law rather than merely practice it. A legal information revolution that will fundamentally change the market for legal skills is underway. The pressures for change ultimately will erode regulatory barriers based on the existing model. Policymakers need to prepare to cope with these changes rather than expect to be able to resist them forever.

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231. See Gina Passarella, *Law Firms Feel Pressure from New Breed of Competitors*, LAW.COM (Oct. 26, 2010), <http://www.law.com/jsp/article.jsp?id=1202473909000> (discussing the “fracturing” of the market for legal services).