The Patent Ecosystem in IT:

Business Practice and Arbitrage

"The Evolving IP Marketplace"
Federal Trade Commission
December 5, 2008

Brian Kahin
Senior Fellow
Computer & Communications Industry Association

Patents are not Nobel or Pulitzer prizes! They are not for exceptional inventors but for average inventors and should not be made hard to get…. Why must an invention be a commercially hot number to be patentable? If it is a total dud, how is the public injured by a patent on it? A monopoly on something nobody wants is pretty much of a nullity. That is one of the beauties of the patent system. The reward is measured automatically by the popularity of the contribution.

Giles S. Rich, *The Principles of Patentability*, 28 Geo. Wash. L. Rev. 393, 407 (1960), *reprinted in* John Witherspoon, ed., *Non-Obviousness: The Ultimate Condition of Patentability*, at 2:1, 8 (BNA 1980).

To Promote Innovation (FTC 2003)

Recommendation 10:

Expand Consideration of Economic Learning and Competition Policy Concerns in Patent Law Decisionmaking.

levels of analysis

1 -- micro	individual patent	law
2 -- meso	**portfolios, (cross-) licensing, pools, markets, trolls**	**business practice**
3 -- macro	System-level effects, aggregate private benefits vs private costs	economics
4 -- meta	relationship to other innovation models, means of appropriating returns	innovation economics

levels within business practice

- (legal) tactics
- context-dependent strategy
- position-dependent strategy
- business models
- market vision
- policy vision (not common!)

Patent uses in Carnegie-Mellon survey (1994-95)

measure performance 8%
licensing revenue 29.5%
for use in negotiations 55%
prevent suits 72%
prevent copying 99%
patent blocking 80% [two senses]
enhance reputation 37%

asked of manufacturers' R&D managers

some creative uses

inhibit market entry with portfolios
hold up complex products
ambush standards
exploit imbalance in litigation resources
portfolio evergreening
instill uncertainty in competitors' customers
collusive settlements (suppress prior art, transfer patents)
use of portfolios to defeat exclusive rights
use of RAND licensing to extract cross-licenses
temporary assignments (both offensive and defensive)
assignments out of portfolios for surrogate attacks
situational assertions (IPOs, product launches)
track and capture standards

sources of information failure/ opacity

- indeterminacy of claims construction (esp for abstract subject matter)
- secrecy about contemplated and filed applications before publication
- amending scope after publication, especially in continuations
- tension between enabling information and disabling information
- high cost of validity and infringement opinions
- practical impossibility of clearance searching
- disincentives to invalidating low-quality patents
- limited enabling disclosure in software and business method patents
- liability for willful infringement inhibits reading patents
- “thickets” and thicket strategies
- lack of information on assignments and licenses
- settlements leave dubious patents standing and legal issues unresolved
- ambiguity surrounding obviousness

“TI has something like 8000 patents in the United States that are active patents, and for us to know what's in that portfolio, we think, is just a mind-boggling, budget-busting exercise to try to figure that out with any degree of accuracy at all.”

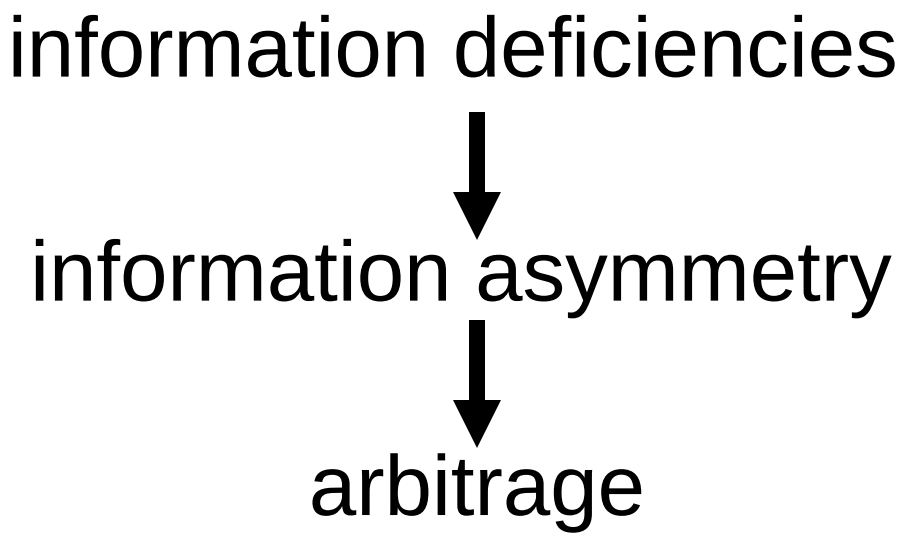
Frederick J. Telecky, Jr., Senior Vice President and General Patent Counsel, Texas Instruments, FTC/DOJ hearings Feb 2002

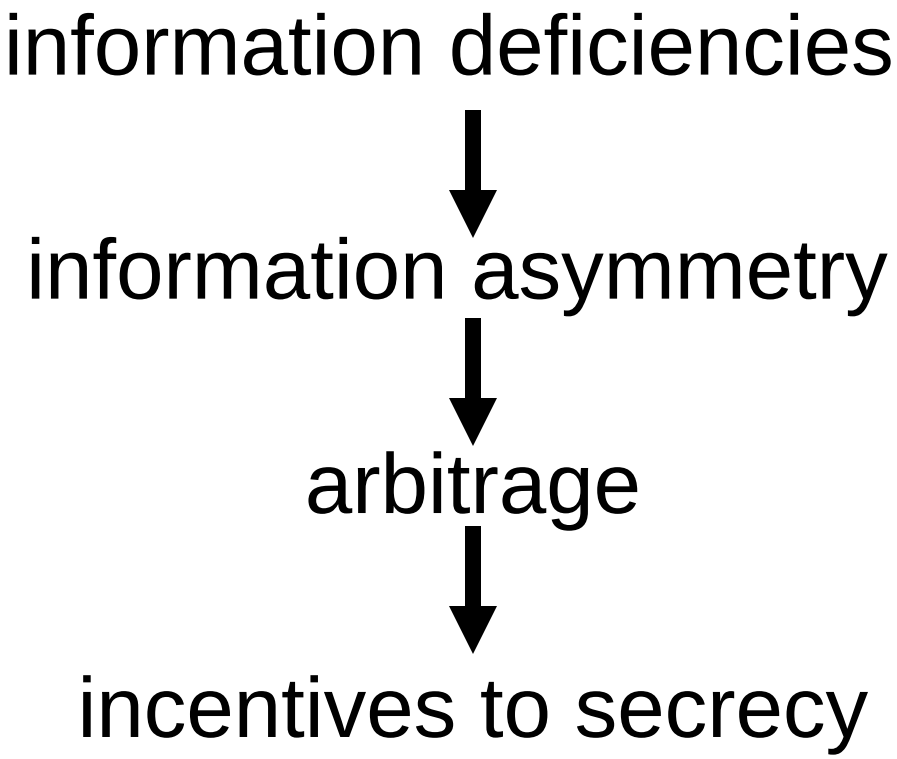
“[B]oth researchers and companies in component industries simply ignore patents. Virtually everyone does it. They do it at all stages of endeavor. From the perspective of an outsider to the patent system, this is a remarkable fact. And yet it may be what prevents the patent system from crushing innovation in component industries like IT.”

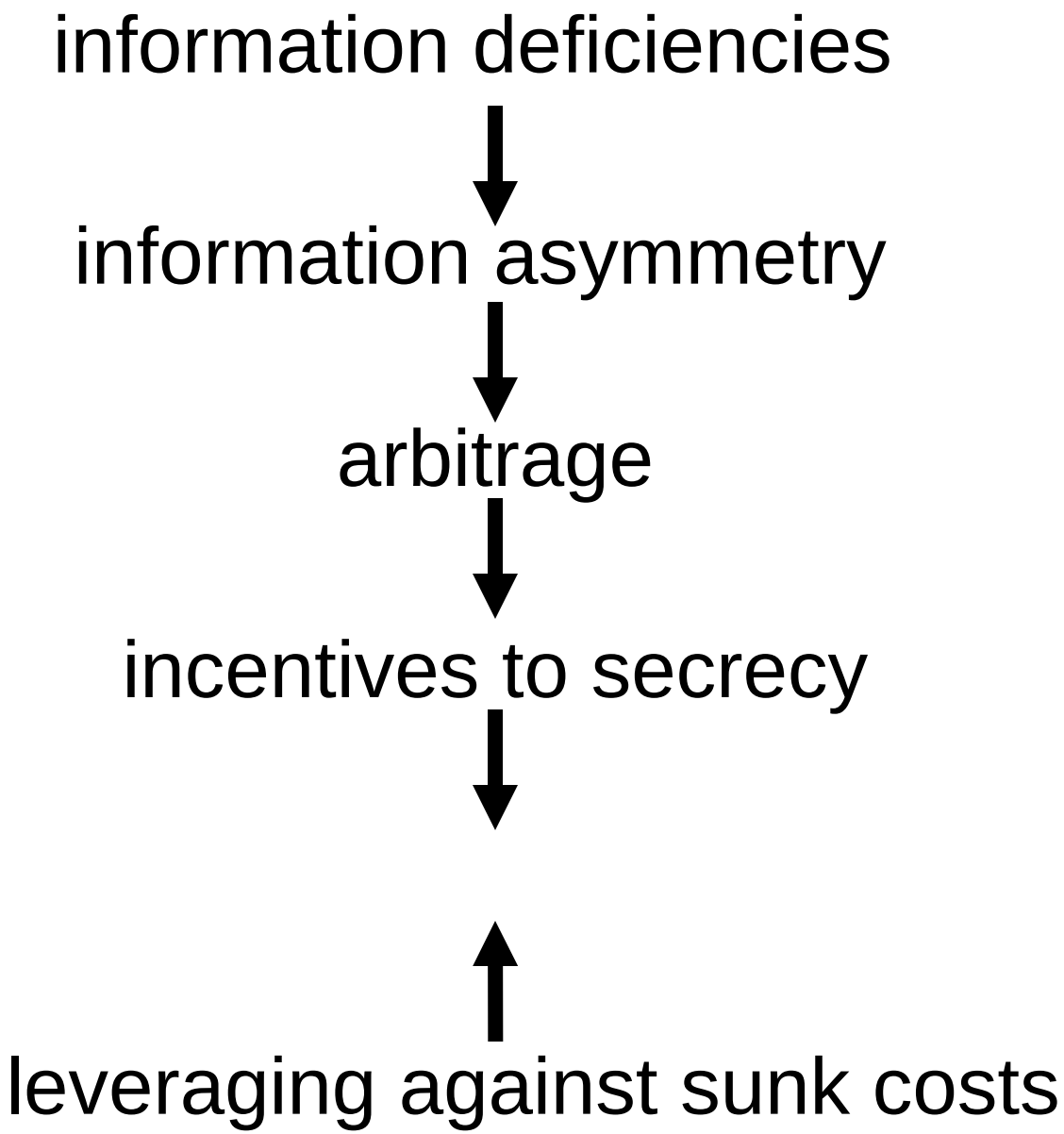
Mark Lemley, Ignoring Patents (2008)

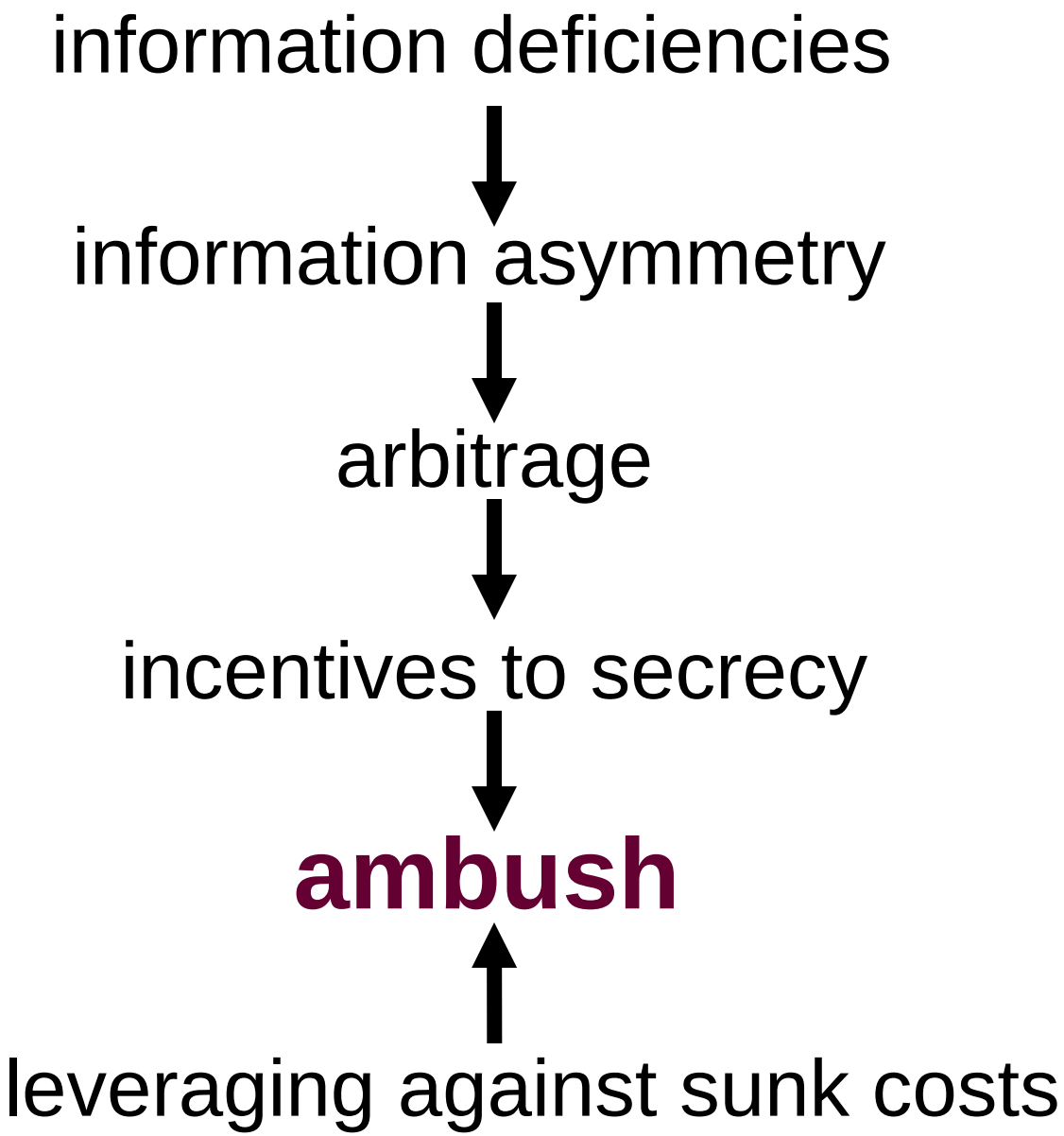
information deficiencies

information asymmetry


information deficiencies
information asymmetry
arbitrage


information deficiencies
information asymmetry
arbitrage
incentives to secrecy


information deficiencies
information asymmetry
arbitrage
incentives to secrecy
leveraging against sunk costs


information deficiencies
information asymmetry
arbitrage
incentives to secrecy
ambush
leveraging against sunk costs