

Winter 2023

Questions of Intellectual Property and Fundamental Values in the Digital Age

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Recommended Citation

Jessica Silbey, *Questions of Intellectual Property and Fundamental Values in the Digital Age*, 27 Marq. Intell. Prop. & Innovation L. Rev. 1 (2023).

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I.TWENTIETH-CENTURY PROGRESS	3
II.DIGITAL AGE PROGRESS	8
A. Equality: The Case of the Monkey Selfie	9
B. Privacy: The Cases of the Defrauded Actress, the Wedding Engagement, and the Boston Break-Up.....	10
C. Distributive Justice: The Case of the Seed Saver	12
D. Institutional Resiliency: Flaws in the System and Focus on the Commonweal.....	14
III.RETHINKING DIGITAL AGE PRIORITIES	18

QUESTIONS OF INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE DIGITAL AGE

JESSICA SILBEY

First, I want to start with my sincerest thanks to Marquette University Law School for inviting me here to give this lecture. I was supposed to be here two years ago, in March 2020, but the pandemic hit the nation, and you will recall life then. It was a scary time with a lot of uncertainty and disappointments. And then came the isolation the pandemic created for so many people, which was also hard to endure. But as that isolation lifts and we get back to normal, events like this—where we can be together face-to-face talking about cutting-edge legal issues—become even more special. For this reason especially, I am so very happy to be here to share my thoughts on a topic I have been thinking about for a long time. Part of my excitement too, is because of how much I admire the scholarly work of your intellectual property faculty, including Professors Kali Murray and Bruce Boyden, whose research has influenced my own. I am proud to be their colleague from afar.

My talk today will focus on the changing nature of intellectual property in the digital age. In a lecture named after the distinguished jurist Helen Wilson Nies, whose decades of service to the profession and to intellectual property law are noteworthy, I hope to honor that reputation by describing new trends in the field and proposing a path forward.

My talk includes drawing on my forthcoming book, entitled *Against Progress: Intellectual Property and Fundamental Values in the Internet Age*.¹ The title takes its subject from the “progress clause” of the United States Constitution, which gives to Congress the power to grant limited-time exclusive rights to authors and inventors to promote the progress of science and the useful arts.²

This project, like so many academic projects, is a continuation of prior work—my 2015 book *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property*.³ In that book, I sought to understand from the creators and innovators how intellectual property works or does not work for them in their everyday lives. Is the right of exclusivity an incentive to produce? Is it something on which they rely to earn their living? Do they think about IP at all? Does it get in their way? That book was based on fifty in-person long-form interviews and on qualitative research sampling and interview methods. The findings were mixed and complex. But, in general, I found that IP does not work in the way the formal legal doctrine and theory say it does.⁴ It is not the proverbial carrot-at-the-end-of-a-stick for creators and innovators that incentivizes production and dissemination of creative and innovative work. *The Eureka Myth* explained that IP’s aims of incentivizing production and facilitating markets in creative and innovative work is in fact profoundly misaligned with the experience of creators and innovators doing and making the work every day. I will leave curious readers to grab a copy of the book to learn what in fact motivates creativity and innovation and whether IP helps creators and innovators do their work and keep doing it.⁵ This talk is not about *The Eureka Myth*, but about what I learned next next.

Writing *The Eureka Myth* had me scratching my head asking: what is the “progress” toward which IP aims? And can we or should we define “progress” in terms of real people and their everyday creative and innovative practices? This question is an open question for many reasons.

1. JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* (Stanford University Press 2022).

2. U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have the Power to ... promote the Progress of Science and useful Arts, by securing for limited Times to authors and Inventors the exclusive Right to their respective writings and Discoveries[.]”).

3. JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (Stanford University Press 2015).

4. *Id.* at 14-19 (introducing the book’s conclusion that IP law is misaligned with the motives and mechanisms for everyday creativity and innovation).

5. For open-access copy of the introduction to and chapter synopses of *The Eureka Myth*, see <https://www.sup.org/books/extra/?id=20869&i=Contents.htm>; *see also* <https://scholarship.law.bu.edu/books/125/>.

The first reason is because the Constitution is notoriously ambiguous, often by design, with its words and phrases intentionally capacious in order that the governing document can “adapt to the crises of human affairs” over time.⁶ What “progress” meant in 1789 can and maybe should be different than what it might mean today.

Second, the history of the “progress clause” is notably thin. Those who have devoted significant time to its history conclude that the language is largely inconclusive.⁷

Third, the legal history of intellectual property regulation since 1789 demonstrates themes and patterns related to sociopolitical and cultural shifts that respond to changes in technology and production, assist the growth of certain industries, and attend to certain powerful stakeholders.⁸ In other words, the “progress” promoted IP laws may be situational and historically contingent. And so, this project asks about what “progress” means for our current time in order to identify a trend that I believe is worth thinking more about given the growing centrality of IP in our digital age.

I. TWENTIETH-CENTURY PROGRESS

During the 20th century, we assumed that IP’s goal of “promoting progress” meant simply “more”: more patented inventions and more copyrighted works. Although federal trademark law is authorized under the commerce clause and is primarily in the nature of anti-competition regulation, it is also IP.⁹ And trademark likewise serves a progressive function—incentivizing the flow of goods and services, encouraging the investment in goodwill, and promoting competition in the marketplace. As with patents and copyrights, we might think “more trademarks are better”: more differentiation, more source identification, more branding, more competition.

We see this “progress as more” narrative flourishing during the 20th century with the broadening of IP’s scope in terms of subject matter, rights, remedies,

6. *McCulloch v. Maryland*, 17 U.S. 316 (1803).

7. For the sparse history of the progress clause, see, e.g., Ned Snow, *The Meaning of Science in the Copyright Clause*, 2 B.Y.U. L. REV. 259 (2013); Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L. J. 1329 (2012); Malla Pollack, *What Is Congress Supposed to Promote? Defining ‘Progress’ in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001); Paul Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119 (2000).

8. For an account of copyright legislation specifically as a history of powerful stakeholder negotiation over several decades, see JESSICA LITMAN, *DIGITAL COPYRIGHT 22-34* (Prometheus Books, 2001).

9. *In re Trade-Mark Cases*, 100 U.S. 82 (1879).

and duration.¹⁰ For example, the early copyright laws protected only maps, charts, and books.¹¹ The “progress of science” was reasonably understood to be promoting the knowledge of our world. But in a series of statutory amendments, copyright scope grew to include art reproductions, technical drawings, translations, photographs, film, advertising, manufacturing labels, and sound recordings.¹² The Supreme Court accelerated this expansion in the 1903 case of *Bleistein v. Donaldson Lithographing Company*, in which the Supreme Court extended copyright to a poster advertising a circus, stating that it would be a “dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of pictorial illustrations.”¹³ This inaugurated what we call the “nondiscrimination principle” in copyright law, in which aesthetic judgment is left to the market.¹⁴ Now, 120 years later, copyright subject matter is so broad and the originality threshold so low, that copyright covers everything from everyday Instagram photographs to shampoo labels.

And whereas the early copyrights in maps, charts, and books lasted only 14 years from publication,¹⁵ that length extended from 28 to 56 years in the first half of the 20th century, to the author’s life plus 50 years midcentury.¹⁶ The Copyright Term Extension Act in 1998 added another 20 years so that today a copyrighted work lasts 70 years after the author dies.¹⁷

In patent law, a similar expansion has occurred. Although patent law has not much grown in length of its exclusive grant the way copyright has, its subject matter scope has profoundly broadened. Originally, patent law was aimed at agricultural tools, fiber and leather work, improvements to stoves and

10. On problems of increasing scope in IP, see Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123 (2018); Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WILLIAM & MARY L. REV. 2197 (2016); Jessica Litman, *Billowing White Goo*, 31 COLUM. J. OF L. & ARTS 587 (2008).

11. The Copyright Act of 1790 reads: “An Act for the encouragement of learning by securing the copying of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned . . . [and] shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title.” Act of May 31, 1790, § 1, 1 Stat. 124 (1790 Act).

12. JULIE COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 28 (2020).

13. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

14. For an analysis of the problem of “aesthetic progress” and Justice Holmes’ evaluation of “progress” as market-based, see Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of America Copyright Law*, 117 COLUM. L. REV. 319 (2017).

15. See *supra* note 11.

16. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (describing Congress’ copyright term extensions over the history of the Copyright Act).

17. See *id.* (holding the CTEA’s durational extension constitutional under the “progress clause”).

printing technology.¹⁸ These were signature inventions for the early US economy. The industrial revolution gave way to new machines as inventions. And then, famously, in 1980, the Supreme Court held that “anything under the sun that is made by man” can be protected as long as the invention is novel, non-obvious, and useful.¹⁹ Since the 1980s, patentable subject matter has broadened to include business methods, parts and improvements of inventions (rather than whole machines), and even as genetic material, such as modified human DNA and genetically modified seeds, giving rise to new social movements around food justice and access to health care.²⁰

Trademark, too, has been expanding over time. We tend to think of trademarks in a traditional sense, as words and symbols, or other textual devices to signal the source of the good or service. But now trademark protection includes trade packaging and trade dress—the look and feel of the object (such as the shape of the thermostat or a grill).²¹ Trademarks can include single colors, like robin egg blue of the Tiffany box.²² They can include sounds (like MGM’s lion’s roar) and smells (like that of Play-Doh).²³ The trademark statute was amended mid-20th century to extend protection to anything that can serve a source designating function, without regard to the nature of the mark.²⁴ And commercial entities have taken that broad language to heart. At the end of the

18. Michael Risch, *America’s First Patents*, 64 FLA. L. REV. 1279 (2012); see also CHRISTOPHER BEAUCHAMP, *INVENTED BY LAW: ALEXANDER GRAHAM BELL AND THE PATENT THAT CHANGED AMERICA* 13-32 (2015).

19. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

20. *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) (extending patents to business methods); *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013) (upholding as valid patentable subject matter purified human gene); see also Sarah Burstein, *How Design Patent Law Lost Its Shape*, 41 CARDOZO L. REV. 555 (2019) (describing the trend of patenting of parts of articles of manufacture instead of the whole article).

21. *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205 (2000) (“The breadth of the definition of marks registrable under §2, and of the confusion-producing elements recited as actionable by §43(a), has been held to embrace not just word marks, such as “Nike,” and symbol marks, such as Nike’s “swoosh” symbol, but also “trade dress”—a category that originally included only the packaging, or “dressing,” of a product, but in recent years has been expanded by many Courts of Appeals to encompass the design of a product.”). Dan Barber, Opinion, “Save Our Food. Free the Seed.” *New York Times*, June 7, 2019. See also Jorge Contreras, *The Genome Defense: Inside the Epic Legal Battle to Determine Who Owns Your DNA* (2021).

22. *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159 (1995).

23. Lisa Ramsey, *Protectable Trademark Subject Matter in Common Law Countries and the Problem of Flexibility*, *THE CAMBRIDGE HANDBOOK OF INTERNATIONAL AND COMPARATIVE TRADEMARK LAW* 193-198 (Irene Calboli and Jane Ginsburg eds., 2020) (describing Play-Doh and the sound of the Zippo lighter).

24. See 15 U.S.C. § 1052 (2006) (“No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature . . .”).

20th century, the Supreme Court upheld trade dress for a Mexican restaurant described as a “festive eating atmosphere.”²⁵ There are very few limitations on trademark subject matter today.

What kind of story is this whose plot is growth and accumulation? It is a story that begins optimistically focusing on economic investment and opportunity and that is driven by the idea of a free market: accumulate lots of IP and the market will distribute it fairly and efficiently. It was born on the eve of the roaring 1920s and hit its growth spurt in the 1950s to 1970s when we inaugurated a new Trademark Act, Patent Act, and Copyright Act, which laws were then interpreted generously by courts.²⁶ In the backdrop is the midcentury growth in the United States of manufacturing and scientific discovery, advertising, and entertainment industries. The 20th-century expansion of IP appears as an exuberant race to maximize the benefits of a consumerist society amplifying values such as choice, individuality, abundance, and opportunity.²⁷ By the 1980s with the arrival of the personal computer revolution, it is fair to say that IP law was doing exactly what people thought it should: promoting progress as capital growth and dreams of wealth and comfort for businesses, certainly, and for many individuals as well.

The internet and the digital revolution disrupted that trajectory. The transformation of civil society in the digital age, it turns out, is an existential threat to IP laws, which aim to control making, innovating, and distribution except by authorized manufacturers. IP law’s exclusive rights of control over making and using are an exception to everyday freedom in the digital age. The internet and the creativity and innovation it has enabled have, as defining characteristics, generativity and copying by all. Routing around roadblocks that IP erects (or tries to) is one primary way the internet and its users both work and play.

Now, lest we think this has no precedent, before the internet were inventions such as the copy machine, the tape recorder, and the VCR.²⁸ And these also were threats to IP law. These devices were almost sued out of

25. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1995).

26. The midcentury substantial revision of intellectual property statutes included the Trademark Act in 1946, the Patent Act in 1952, and the Copyright Act in 1976.

27. Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 814-15 (2010).

28. Jessica Silbey, *How Xerox’s Intellectual Property Prevented Anyone From Copying Its Copiers*, SMITHSONIAN MAGAZINE (July 2, 2019), https://scholarship.law.bu.edu/shorter_works/140.

existence, so fearful were we that their copying technology would make books, music, and movies disappear because they could so easily be pirated.²⁹

But instead, in narrow court decisions, these devices were allowed to survive, and with them came new business models, new technologies, new copying machines, and new inventions for making and innovating—such as movie rental companies and later streaming services, handheld digital record-and-play devices, peer-to-peer file sharing platforms, e-commerce platforms selling new and used goods, and 3D printers and makerspaces. These were also considered threats to IP’s protections of patented technologies, copyrighted works, and trademarked goods and to the incumbent institutions that are sustained by them.

Yet as with the copy machine, which became essential to education, research, and business, we cannot live without the internet. It is here to stay. The Internet may be an existential threat to IP, but it won’t stop us from right-clicking, copying, and sending a photo over email or Twitter—which may be copyright infringement. It won’t stop us from repairing our cellphone, computer, or car, which could be patent infringement.³⁰ And it won’t stop us from commenting on or making art out of famous brand names, trademark infringement though it may be.³¹

All of this behavior, which is inevitable in the digital age—which some would call a kind of progress but also makes us all into pirates—challenges the rules of IP law and causes legal chaos.³² And that causes me to wonder if IP as historically understood and justified is set to change dramatically in our 21st century. It causes me to wonder if what IP is for today is changing.

In addition to the internet’s ubiquity now, there are several reasons, it seems to me, that the stage is set for this change. First, since the mid-1990s, the United States Supreme Court has decided intellectual property cases at a rate that is more than double that in previous decades.³³ The highest national court is a tone-setter, selecting content and focusing the debate among legal elites that

29. See, e.g., *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (in 5-4 decision holding that the maker of the VCR is not contributorily liable for copyright infringement of Universal’s copyrights).

30. For a discussion of the right of repair and IP’s interference with this fundamental right, see Leah Chan Grinvald & Ofer Tur-Sinai, *Intellectual Property Law and the Right to Repair*, 88 *FORDHAM L. REV.* 63 (2019).

31. *Rogers v. Grimaldi*, 875 F.2d 994 (2nd Cir. 1989).

32. Jessica Silbey, *We’re All Pirates Now: Making Do in a Precarious IP Eco-System*, 39 *CARDOZO ARTS & ENTER. L. J.* 691, 693-694 (2021) (describing the chaos as a “new piracy paradox”).

33. See Mark P. McKenna, *The Rehnquist Court and the Groundwork for Greater First Amendment Scrutiny of Intellectual Property*, 21 *WASH. U. J. OF L. & POL’Y*, 11 (2006) (counting cases from 1972 to 2006). From 2006 to 2020, the Supreme Court’s IP case load has continued apace, with approximately twenty-eight patent cases, fourteen copyright cases, and twelve trademark cases.

reverberates to national media and the public. The Supreme Court is a narrator of national values, interpreting federal and state law in light of the US Constitution and its general, democratic and procedural values. When it interprets and applies IP laws as frequently as it does today, it shapes those IP laws in terms of national values and practices. And thus, it reshapes what IP is and how it works.

Second, intellectual property law was previously a domain of technicians, a legal specialty that was isolated in practice and in law schools. Now, intellectual property law is a central part of legal education, with law schools building intellectual property and technology law centers to highlight the importance of the field in contemporary legal practice.³⁴ It is such a prevalent legal field that is not only in law schools but also in business schools, graduate science and humanities programs, and undergraduate schools.

Third, the mainstreaming of intellectual property leads it from an obscure corner of the law to a public consciousness that even teenagers acquire, transfiguring copyrights, patents and trademarks into subjects of everyday importance. Today, it is unexceptional to read about intellectual property law in news headlines or for intellectual property to be the subject of popular television shows.³⁵

This mainstreaming of IP—or what I have elsewhere called its “domestication”³⁶—affects the popular conceptions of creativity and innovation and thus the demands made on law that regulates both. New stories debating intellectual property’s justifiable scope proliferate. Instead of the dominant 20th-century theories of IP as about markets and money to incentivize creators and innovators, which is a kind of democratization, those stories now are being domesticated by fundamental values that structure democracy but may not be subject to the whim of its majority. The mainstreaming of IP has foregrounded fundamental constitutional values—values such as equality, privacy, distributive justice, and institutional inclusivity. These, I argue, are the new anchors of IP law.

II. DIGITAL-AGE PROGRESS

My data analyzing this question comes from two sources: a compendium of hundreds of court cases dating from the 1980s and from a set of 100 long-

34. See John Villasenor, *Intellectual Property: Valuable to Every Discipline*, CHRONICLE OF HIGHER EDUCATION (August 4, 2014), <https://www.chronicle.com/article/intellectual-property-valuable-to-every-discipline/> (Commentary).

35. See, e.g., *Silicon Valley* (HBO broadcast Apr. 6, 2014) (Seasons 1-6, 2013-2019).

36. Jessica Silbey, *Against Progress: Interventions About Equality in Supreme Court Cases About Copyright Law*, 19 CHI.-KENT J. INTELL. PROP. 280, 281 (2020).

form interviews I conducted over 10 years.³⁷ Let me begin with some examples from court cases.

A. Equality: The Case of the Monkey Selfie

The first case is about Naruto, a macaque monkey from Indonesia, who took a picture of herself using a camera set up in the jungle by nature photographer David Slater.³⁸ That is, it's a case about a monkey selfie. Slater set up the camera and encouraged the troop of monkeys to play with the equipment because for weeks he couldn't get a closeup that he liked. But, after setting up the camera and luring the curious animals to the machine, many of the monkeys ended up taking many close-ups and selfies.³⁹ Slater published these photos and sought to license them. But then the organization called the People for the Ethical Treatment of Animals (PETA) sued him arguing that the monkey and not the man was the author of the photo.⁴⁰

Every time I speak about this case, the audience erupts in laughter. And, of course, there *is* something humorous about this. But it wasn't a joke. This lawsuit demanded substantial time and effort from several federal courts, and a lot of money was spent on both sides. The hard-fought goal—which at first seems like it shouldn't be so hard—was to convince a federal court of appeals (and eventually also the Copyright Office) that only humans can be authors. But why is that so obvious? PETA brought this suit to assert the dignity of the animal in the way authorship provides: as an expression of will in the world. PETA asserted not that monkeys are human, but they should have some basic rights like humans.

Even outside the animal rights context, this is not absurd. Nothing under U.S. law prevents children from being copyright authors. Corporations can be authors too.⁴¹ Capacity and a human body are not necessary prerequisites. Can artificially intelligent machines be authors? Not yet. But that is being actively

37. For a description of the digital humanities methodology, I used to analyze the corpus of cases and of the qualitative interview-based empirical methodology, see SILBEY, *supra* note 1, at 311-318.

38. *Naruto v. Slater*, 888 F.3d. 418 (9th 2018). The photograph can be viewed here: https://en.wikipedia.org/wiki/Monkey_selfie_copyright_dispute.

39. David Slater published many of these photos in his book *DAVID SLATER, WILDLIFE PERSONALITIES 1* (Blurb Publishing 2014), available here: <http://www.djsphotography.co.uk/monkeyselfie.htm>.

40. *Naruto*, 888 F.3d. at 418.

41. This occurs pursuant to the copyright “work for hire” doctrine. See 17 USC § 101 (2010) (defining work for hire as “(1) work prepared by an employee within the scope of his or her employment; or (2) a work specially commissioned for use . . .”).

debated.⁴² As I describe these debates in my most recent book, they are about much more than whether PETA will secure copyright royalties for Naruto and her endangered community. The case debated what it means to be treated equally and with dignity, not only under copyright law, but generally, and especially today, when the planet's natural resources are growing scarce, and when empathy, cooperation, and mutuality are necessary to survive.

B. Privacy: The Cases of the Defrauded Actress, the Wedding Engagement, and the Boston Break-Up

The next case is about privacy—bodily privacy as it so happens. The case concerns Cindy Lee Garcia, who auditioned for and performed a small part in a film she was told was called *Desert Warriors*.⁴³ Her performance was five seconds, and she had only a few lines. She was paid and she went home. Months later, the filmmaker posted the film on YouTube, but Garcia's voice had been dubbed over with hateful anti-Muslim slurs. On YouTube, the film had the title *Innocence of Muslims*, and it was no longer an action film but a despicable screed against Islam. The film was viewed millions of times and seen all over the world. Cindy Garcia received death threats and had to hire personal security.

When Garcia asked YouTube to take the film offline, YouTube refused because she wasn't the copyright owner; the filmmaker was. And this is true. An actor's performance in a film does not create an independent copyright. The filmmaker is the author of the whole film and, therefore, the film's owner. Moreover, film authorship most often excludes all the other people who contributed to the film including actors, set designers, and lighting experts among many others.⁴⁴ The only way to get the video offline was to allege copyright ownership, which Garcia could not. This case went up on appeal twice because the issues were so dramatic and the equities so concerning. The filmmaker was outside the jurisdiction of the United States. And YouTube (Google) stood by its policy that only copyright authors as owners had control. Google prevailed.

This case is not really about copyright, though. It's about Garcia's bodily autonomy, her privacy as a person invaded by the misrepresentation and fraud perpetrated by the filmmaker. It's also about the exacerbation of that privacy

42. Margot E. Kaminski, *Authorship, Disrupted: AI Authors in Copyright and First Amendment Law*, 51 U.C. DAVIS L. REV. 589 (2017); see also Pamela Samuelson, *AI Authorship?*, COMMUNICATIONS OF THE ACM (July 2020), <https://cacm.acm.org/magazines/2020/7/245693-ai-authorship/fulltext>.

43. *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014), amended by 766 F.3d 929 (9th Cir. 2014); rev'd en banc, 786 F.3d 733 (9th Cir. 2015).

44. *Almuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

invasion by platforms, such as YouTube, Twitter, Google, Facebook, Amazon, whose policies prioritize efficiency and growth over other values.

IP and privacy are often at odds. IP aims to disseminate knowledge and useful inventions. Privacy aims for seclusion and control over identity, one's things and effects, one's life's choices. Some copyright cases, in which the estates of famous authors, like James Joyce and Willa Cather, sue to prevent the publication of private letters and unfinished manuscripts, might seem properly within the scope of both copyright and privacy.⁴⁵ These are cases about papers, effects, and private thoughts that were left *undisseminated*. And we know that privacy in the United States extends to our papers and other things, and to our private spaces (e.g., our homes, cars)—that is the Fourth Amendment's promise.⁴⁶ So using copyright to prevent the publication of these kinds of literary works may make sense, and the authors' estates often prevail, much to the consternation of literary historians and scholars. But they are nonetheless uncomfortable copyright cases because copyright is supposed to promote the progress of science, not to protect the privacy of public figures whose heirs wish to hide their writings as long as the copyright lasts (which is a long time).

But what about cases like *Hill v. Public Advocates*, in which the claim of privacy is over public photography?⁴⁷ In this case, a photographer makes a photo of a couple's engagement, here two men, and posts it to her website with their permission. Then an anti-marriage equality group scrapes the photo from the website and reprints it for some of their campaign literature criticizing same-sex marriage. How should this case come out? Using someone else's published work to criticize its message is usually permitted under copyright fair use as a form of free speech under the First Amendment.⁴⁸ But when the couple and the photographer sued alleging copyright infringement (but really an invasion of their privacy, their right to control the representation of themselves to the public, and their defense of marriage equality), courts were listening. This case got so far toward trial that the defendant settled and took down the photo from its campaign website. We may be sympathetic to the couple and the photographer—at least I am—but this is a blow to free speech. And, this is not the usual copyright case, which worries about market substitution and lost revenue. This is a case about misappropriating someone's identity, which is squarely a privacy concern, not typically a copyright concern under U.S. law.

45. Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253 (2017) (discussing cases).

46. U.S. CONST. amend. IV; *see also* Riley v. California, 573 U.S. 373 (2014) (holding the contents of a cell phone protected under the Fourth Amendment during an unreasonable search).

47. *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347, 1351-52 (D. Colo. 2014).

48. 17 U.S.C. § 107 (2022) (fair uses include for purposes of "criticism [and] . . . comment").

Now for something a little different: the use of trademark law to protect associational autonomy and privacy. *Scholz v. Goudreau* was a 2015 dispute among members of the 1970s rock band Boston.⁴⁹ The band Boston was known for such hits as “More than a Feeling” and “Peace of Mind.” After breaking up in 1981, the former band members fought over who could continue to use the name “Boston” in reference to themselves. The issue was lawful use of the trademark “Boston” without confusing audiences about who was and was not a “founding” or “former” band member. Tom Scholz and other Boston band members sued Barry Goudreau, their former bandmate and guitarist, to prevent Goudreau from describing himself as an “original founding Boston member.” And the plaintiffs harnessed trademark law to do it. Negotiations and the lawsuit lasted decades.

Plaintiffs sought to limit Goudreau to the designation of “formerly of the band Boston” and to prevent him from using the term “founding Boston member.” The plaintiffs alleged that the phrase “founding Boston member” would confuse the public as a “false designation of origin” and a “false or misleading description of fact.”⁵⁰ These are words in the trademark statute, to be sure, but they are most often used to combat false advertising and consumer confusion in the marketplace for goods and services. Trademark law is not usually used to negotiate band breakups.

This unusual trademark case went to trial, and Goudreau won the ability to designate himself as he pleased. In August 2018, a federal appellate court affirmed the jury verdict. But the dispute spanned three decades and cost hundreds of thousands of dollars, confirming that intellectual property is an imperfect but alluring framework in which to negotiate the terms of affective relations, a dimension of privacy law today.

C. Distributive Justice: The Case of the Seed Saver

Finally, maybe you heard about Farmer Bowman from Indiana and his soybean seeds?⁵¹ Vernon Bowman (aged 83) was sued by Monsanto, the seed giant. Monsanto had a patent on a special soybean seed that was “Round-Up” ready—plant it and fertilize it with Round-Up® fertilizer and your soybeans will be resistant to crop-destroying diseases. Bowman was a fan of Monsanto and had been buying their seed for years.

49. *Scholz v. Goudreau*, 132 F. Supp. 3d 239 (D. Mass. 2015).

50. 15 U.S.C. § 1125(a) (2012).

51. *Bowman v. Monsanto Co.*, 569 U.S. 278 (2013).

Buying the seed came with a license to use the patented seed (just as buying your cell phone comes with a license to use the patented technology within it).⁵² Farmer Bowman was allowed to use the seed as seed (to plant it and grow soybeans to sell as food). Like many farmers, he planted the seed to sell the majority as food, yes, but *also* to use some of the resulting soybeans as seeds for the risky late-season crop. Planting the patented seeds, which he had purchased, produced soybean for sale and *other soybeans to plant as seeds*—seeds that contained the patented invention. The very act of farming was a form of patent infringement, making a copy of the invention, which Monsanto permitted once to plant and sell as soy, but not again to replant as seed. The late-season soybean crop was always risky, and so investing in more seed would increase the expense. Saving seed from the first crop was something farmers had been doing, well, forever. What Monsanto’s lawsuit accomplished was interrupt that timeless practice with a claim of 21st-century patent supremacy.

Bowman’s claim against Monsanto went like this: “I’ve paid you for the seed and its invention once already. You got the benefit of the bargain, as all patentees do. No one else can sell Monsanto seed. But that is not what I’m doing. I’m just using the seed I lawfully purchased.”

In response, Monsanto says that by growing soybean to plant as seed and not merely as soybeans to eat or sell as food, the farmer is making unlawful copies of Monsanto’s patented invention and using them beyond the limited authorization. Bowman had replaced Monsanto’s seed with his own and therefore cut into Monsanto’s rightful monopoly.

The only way out of this debate is to realize it’s a patent case that is really about distributive justice. It is an argument about the rightful reach of the patent monopoly and when, frankly, enough sales are enough. On the one side is a giant agribusiness whose soybeans seeds are used for more than 90 percent of U.S. soybean acres.⁵³ On the other side, is Farmer Bowman struggling to make a living as a farmer.

52. This liberty to use your tangible property is encompassed by the first sale doctrine, which this court derived in patent and trademark law and statutorily-created in copyright law. *See, e.g.*, *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 1523 (2017) (patent law); 17 U.S.C. § 109 (2008) (copyright law first sale); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:41 (5th ed. 2019); and *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947) (trademark law).

53. Scott Tong, *Monsanto: The Behemoth that Controls 90 Percent of Soybean Production*, MARKETPLACE (May 13, 2013), <https://www.marketplace.org/2013/05/13/monsanto-behemoth-controls-90-percent-soybean-production/>.

Bowman lost the case. The Supreme Court said there is no exception to the patent monopoly even for inventions that regenerate themselves naturally.⁵⁴ And yet the arguments that Monsanto's gross and imbalanced rewards profoundly interfere with age-old sustainable and frugal practices among farmers resonated with enough people that a movement has started to "free the seeds" and diversify agriculture.⁵⁵ *Bowman* is an example of one of the many IP cases that concern distributive justice and its relationship to human flourishing. And thus, I argue, it forms a pattern of legal action that indicates a turning tide in the purpose of intellectual property in contemporary culture.

D. Institutional Resiliency: Flaws in the System and Focus on the Commonweal

Let us move to my interview data. In those interviews with everyday creators and innovators, their business managers and lawyers, I heard similar themes and more. Specifically, when I asked creators and innovators what they would do to change the IP system to facilitate their work—what "progress" means to them—most describe a system that is deeply out-of-balance and plagued by civility breakdown and incumbency biases. To most everyday creators and innovators, IP does not promote progress but rather it thwarts it.

And so, these everyday creators and innovators tend to live by other rules, adapted for their own practice. One of those rules, in fact, is that most artists and scientists I interviewed are much more generous than the IP system provides. They are content with many forms of copying and borrowing that the IP system would not permit (that is, that would be considered infringement). So, for example, a singer-songwriter explains:

"A total copy rip-off, you know, not so great. But if someone's just taking parts, I mean, and being influenced by it, that's totally great—or inspired in some way by it . . . It's all this big pool, and we're throwing

54. *Bowman v. Monsanto, Inc.*, 569 U.S. 278, 289, 133 S. Ct. 1761, 1769 (2013) ("Our holding today is limited—addressing the situation before us, rather than every one involving a self-replicating product. We recognize that such inventions are becoming ever more prevalent, complex, and diverse. In another case, the article's self-replication might occur outside the purchaser's control. Or it might be a necessary but incidental step in using the item for another purpose . . . We need not address here whether or how the doctrine of patent exhaustion would apply in such circumstances.").

55. Michael Carolan, *Freeing the Seed*, EARTH ISLAND JOURNAL (Jan. 1, 2019), <https://www.earthisland.org/journal/index.php/articles/entry/freeing-the-seed/>; Dan Barber, *Save our food. Free the seed.*, N. Y. TIMES, (June 7, 2019), <https://www.nytimes.com/interactive/2019/06/07/opinion/sunday/dan-barber-seed-companies.html>. More information available here: <https://osseeds.org/>.

stuff into it. So if someone is being inspired to write something by it, or stealing an image, that's unavoidable."⁵⁶

In other words, everyday creators and innovators seek to do their own work and to enable others to do their work as well. For them, the benchmark is a kind of mutual flourishing, not a winner take all. I heard this refrain repeatedly.⁵⁷

A basic understanding of everyday creators and innovators is that most creativity and innovation are expected to be built from others' work, that copying is essential to creativity and innovation. For example, a long-time IP lawyer for technology clients said to me:

"A software programmer . . . would consider [it] malpractice in their field to create a program from scratch if there's a perfectly good set of algorithms . . . laying around that they could use. You know: 'It's tried, proven; we know this thing is bug-free. Of course we want to use that one.'"⁵⁸

Because copying and borrowing are essential to the work being done, everyday creators and innovators often ignore intellectual property rules that restrict borrowing and sharing. These accounts describe a much more tolerant, more generous regime in which the public domain is richer and bigger. This resonates with the original purpose and structure of the Constitution's progress clause, underscoring its role in the production and dissemination of fundamental knowledge with a much narrower scope and duration for intellectual property exclusivity.

Thus, overly aggressive assertions of IP really bother everyday creators. I know this because they describe others' claims of exclusivity as norm-breaking—violent and uncivil—suggesting a breakdown in the rules of community engagement. For example, an internet entrepreneur said to me:

". . . the companies that I work for, we all file patents. And we are pretty cynical about it . . . we don't think these patents are really necessarily going to ever be worth anything . . . except in this whole morass that is

56. SILBEY, *supra* note 1, at 233.

57. *Id.* at 232-235 (describing sharing and borrowing practices as part of contributing to a "big pool" comprising a new category of uses I call "fairer uses").

58. *Id.* at 253 (The issue of copying of software as a practice among professionals was one of the issues considered in *Google v. Oracle*, 141 S. Ct. 1183 (2021)).

people wagging sticks at each other and saying, ‘I am going to sue you over your patents.’⁵⁹

In a similar vein, a company executive described to me the threat of patent litigation as a “shake down” beginning with “unsophisticated small companies that don’t have a lot of patent experience.” “They [plaintiffs] really identify the weak links in the chain [and] . . . go after them” as a strategy.⁶⁰

Later in that interview, the CEO told me that whoever has the “bigger stick” or can withstand the “squeezing” will “survive” the threats.⁶¹ Some creators and copyright defendants describe “coercive” contracting situations, in which the more powerful party takes you “hostage” like a “feudal lord,” exerting control because of “rapacious” tendencies to protect their incumbent position and minimize their own risks.⁶²

These are stories about how winners are foreseeable (as capitalized incumbents and intermediaries) and how the system doesn’t seem fair or open to all. They are accounts about how threats generate unjust order. To everyday creators and innovators, therefore, IP strictly enforced is more like a rule of law for the powerful than a rule of law for the many. And this makes the system seem illegitimate. This is a story of institutional breakdown and precarity, the opposite of what we’d hope the rule of law promotes, which, among other values, is institutional inclusivity and resiliency.⁶³

While these harms may sound individualized, they are not. These are complaints about systemic dysfunction and a breakdown in organizational integrity of IP. In the interview accounts about what is wrong with IP today, I did not hear about zero-sum contests in which for one person to win, another person has to lose. Instead, the analysis of how IP optimally works depicts an interrelated, system-level analysis.⁶⁴ Despite the importance of being called an author or inventor for many creators and innovators, they nonetheless appreciate the structural mechanisms through which their creativity and innovation flourish or are thwarted. And they appear to appreciate that these structures of interactive, interdependent relations constitute IP as a system in need of reform.

Many of these descriptions contain images of power imbalances related to size and influence rather than to the quality of the work done or value produced

59. As quoted in Jessica Silbey, *Intellectual Property Harms: A Paradigm for the Twenty-First Century*, 99 B.U.L. REV. 2447, 2459 (2019).

60. *Id.* at 2460.

61. *Id.*

62. SILBEY, *supra* note 1 at 278.

63. For a fuller discussion of this argument, see SILBEY, *supra* note 59, at 2447 (2019).

64. *Id.* at 2452.

for society. They describe how financial rewards are not distributed proportionately based on the work's quality or on who is doing the work. Instead, those who get ahead in this system are not those who made the work but, rather intermediaries or lucky acquirers. For example, a film producer describes frustration with platforms and databases containing photographs, that hold creators and filmmakers hostage for essential raw material. She says:

“It is rare . . . that the person [who] that actually took the photograph still owns it and holds it, and is selling you the rights. Extremely rare . . . most common that either it's collectors or historical societies often who have been given the material for free . . . who are insisting on getting paid for it to be used. I can understand paying for copying costs, and paying for processing, but oftentimes the pay goes way beyond that as a moneymaking venue.”⁶⁵

A different filmmaker describes how she is not disappointed in

“necessarily the rules [of copyright], although those are difficult. What's disappointing is that people control access to those images, so that even if they don't own the copyright, or they cannot legally restrict the copyright, if they own the image, they can restrict your making a copy of it [because they have physical control], . . . and hold you hostage for inordinate amounts of money.”⁶⁶

Thus, another harmful effect of a precarious legal system with these characteristics is that the products are slower to arrive and may be more costly to make, and their quality may be compromised. Intellectual property promotes not progress but “plaque in the arteries” which leads to inefficient workarounds and lower-quality products.⁶⁷ As I've written elsewhere, “a sclerotic system . . . induces risk-averse behavior [and] produces mediocre . . . instead of cutting-edge results.”⁶⁸ In other words, these IP rules are not producing innovation. Worse, to many everyday creators and innovators, they are producing waste.

These are not individualistic complaints; these are complaints about a system and institutions. This is important to emphasize because it is a structural critique in three parts. It is a critique of how capital is working in communities in which IP matters; it is a critique of how labor is valued in those communities;

65. *Id.* at 2462.

66. SILBEY, *supra* note 1, at 278.

67. SILBEY, *supra* note 59, at 2466.

68. *Id.* at 2467.

and it is a critique of what counts as “value” and who has a fair shake at sharing in the profits in those communities. Transforming the notion of “harm” from an individual assessment to a systemic one suppresses the defensive, individualist instinct and opens up possibilities of system-level change to benefit many more people. This is what everyday creators and innovators are saying in their accounts of work. Progress should be measured in terms of social welfare and the public good, not as an aggregate of individual preferences of the “rational actor” or “homo economicus” who relentlessly pursues personal self-interest and who forms a fictional foundation for so much law and economic theory (including for intellectual property).

This transformation of the analysis of law’s application and its basis as a proposition for law’s reform would go a long way to centering our *shared fate* in the digital age in terms of creative and innovative practices, which we celebrate as being made more possible today than ever before. Accounts of lived experiences like these, in conjunction with the proliferation of court cases previously described, challenge us to rethink IP’s contours for the internet age and urge us to highlight the role of the commonweal in the practices of creativity and innovation. They raise the specter of the need for systemic reform and anchor the goals of “progress of science and the useful arts” in the enrichment of the public domain and the shared values that sustain it.

III. RETHINKING DIGITAL AGE PRIORITIES

What do I make of these pressures on IP in the 21st century, in the end?

First, I think they are evidence of a growing critique of the digital age’s promise to promote more equality and freedom. With technological progress, we expected welfare-maximizing regimes. But instead, we see dramatic wealth inequality and labor precarity. We had hoped the information age would spread democracy, not demagoguery. Instead, it has undermined the modernist story of progress with its narrow, numerical market-based metrics, exposing competing claims to the common good and to justice.

Second, these new stories about IP are moral narratives, urging us not to outsource our morals to markets. These new narratives seek an ethical consensus about what we should be caring about when we care about IP. They are narratives that infuse intellectual property with discussion of fundamental values and, in doing so, expose how the modern debates concerning the role of markets and property rights are also laden with values (of private property and unregulated markets), that help preserve the status quo in favor of traditionally privileged classes.

Third, these new stories center on plots that worry about the vitality of the rule of law today and also about law’s ability to preserve fundamental,

democratic values such as equality, privacy, fairness, and institutional inclusivity through features of transparency, accountability, proportionality, and nonviolence. These new stories are doubling down on the rule of law, and we lawyers should embrace that move.

Fourth, and finally, when IP becomes a legal framework to debate fundamental values that are increasingly at stake in the digital age, we can more easily reorient “progress of science and the useful arts” in the 21st century towards those interests that we share. Doing so shines a light on our interdependence on this planet as we work towards sustainability and mutual flourishing. That is something to celebrate because we can only solve our problems if we work together.