
PROGRESS IS LESS INTELLECTUAL PROPERTY

ORLY LOBEL*

Jessica Silbey’s *Against Progress: Intellectual Property and Fundamental Values in the Internet Age*¹ is a triumph. Building on her groundbreaking research and her important first book, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property*,² *Against Progress* is a book that goes straight to the heart of twenty-first-century innovation policy. With her signature sociolegal and linguistic depths, Silbey uncovers how the path of intellectual property law has been predictably patterned to favor power and wealth accumulation. Silbey demonstrates how the mandate of promoting “progress of science and the useful arts”—the constitutional purpose of intellectual property—has received a narrow reading that emphasizes more ownership, more protections, and more resource concentration.³ The irony, as Silbey so powerfully presents it, is that the more technology and society bring ease to copying, the more intellectual property law has pushed back and expanded its scope. Silbey therefore warns that intellectual property (“IP”) law is facing an “existential challenge” because “intellectual property law is anti-copying regulation. But digital technology and the internet depend for their existence and functioning on the ability to copy, transform, and distribute.”⁴ In a critical move, Silbey demonstrates how, with each fraught battle over the scope of intellectual property, we are not simply making decisions about profits and ownership but in fact deciding about distributive justice, equality, privacy, dignity, and our collective future.⁵ Building on the rich insights of interviews and everyday practices of creatives, *Against Progress* is a persuasive exposé of the mismatch between how the law and the courts have framed the debates around IP and how the public (and especially those who create) thinks about innovation. Even more importantly, *Against Progress* is not just a critical account of the current state of intellectual property but also a call to action. Imbued in each of Silbey’s chapters is the insight that legislation and adjudication have fallen prey to a “progress is

* Warren Distinguished Professor of Law, University of San Diego School of Law; Director, Center for Employment and Labor Law, University of San Diego School of Law.

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

² JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015).

³ See SILBEY, *supra* note 1, at 227.

⁴ *Id.* at 7.

⁵ *Id.* at 12.

more IP” fallacy—a fallacy set against the normative insight that often, progress means less IP protection.⁶

In this short Essay, I engage with Silbey’s powerful analysis, comment on the “progress is more” paradigm as something that goes beyond law and courts and into technological use itself, and offer several paths of inquiry that flow from the book’s call for a paradigm shift in how we understand intellectual property. These paths for further research include expanding Silbey’s *Against Progress* framework to trade secrecy law and to curtailing practices of overreaching beyond what the legal system supports. They further include a revisiting of employment and contract laws—not only intellectual property law—when creative and inventive human capital is increasingly precarious and gigified.

In *Against Progress*, Silbey describes the “progress is more” paradigm as a corporate demand for and a legislative and judicial facilitation of more intellectual property. At the heart of these tensions are the competing meanings embodied within the concept of “progress.” For some, progress may simply mean more rapid technological invention. For others, progress means a *progressive trajectory* toward a better, happier, healthier, safer, and more inclusive society.⁷ The book’s title is a play on these tensions. Silbey of course is not “against progress,” but against a narrow reading of progress. *Against Progress* reimagines IP policy—and the constitutional mandate of advancing progress in arts and science—in ways that include fundamental values central to human flourishing. She explains why the trajectory of an ever-expanding intellectual property regime is one that is driven by an idealized free market and that has foreseen winners and losers: those who win are already the “haves,” the “one percent.”⁸ Instead, Silbey calls for a progressive interpretation of progress. Silbey is a research wizard and is masterful in weaving together evidence from close analysis of case law and legislation, qualitative interviews, and George Lakoff-inspired linguistic analysis of popular debates. *Against Progress* peels away layer upon layer of dry phrasing to reveal what is actually at stake. Silbey argues that with technology racing forward to enable more forms of both copying and policing, and with new insights on why people engage in creative ventures and how creativity happens, the traditional explanations of why knowledge and information are protected are inadequate. She shows that other values embedded strongly in constitutional law and common law, including privacy, equality, fairness, self-determination, and community welfare, are primary concerns in the public debates over the scope and reasoning behind intellectual property.

⁶ *Id.* at 7, 10.

⁷ See generally Orly Lobel, *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781 (2020); MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* (2012); ORLY LOBEL, *THE EQUALITY MACHINE: HARNESSING DIGITAL TECHNOLOGY FOR A BRIGHTER, MORE INCLUSIVE FUTURE* (forthcoming Oct. 2022).

⁸ SILBEY, *supra* note 1, at 10, 275.

The lens of “progress is more” helps crystalize aspects of my own concerns about IP: that not only is intellectual property expanding on its own terms on its foundational pillars—call it vertical expansion (i.e., copyrights becoming longer, patents covering more subject matters, each becoming ever more expansive in what is defined as infringement)⁹—but expanding horizontally as well. The horizontal includes expansion of below-the-radar pillars of intellectual property, in particular trade secrecy, as well as propertization of data, knowledge, and potential for innovation through contract, policies, and practices.¹⁰ Reading *Against Progress* has deepened my understanding of the problematic trajectory of an often-shrouded tentacle of intellectual property, one that has figured prominently in my own research. Lurking in the background of IP as a catch-all residual policing mechanism is the neglected sister of patent and copyright law: trade secrecy law. Trade secrecy, the fourth pillar of intellectual property, has experienced similar and perhaps even more dramatic expansions in both law and application.¹¹ Trade secrecy would particularly benefit from Silbey’s framework of competing normative values, as its expansion is the workhorse of digital technologies, online data accumulation, and algorithmic advancement, going to the heart of questions about who gains from the knowledge that is so intrinsically tied to our identities: our biological, cognitive, and behavioral data that are serving as the building blocks of artificial intelligence advancement.¹²

Related to the race to artificial intelligence, data mining, and automation, *Against Progress* provides an important framework to examine how digital technology itself is being designed within a framework of “progress is more IP.”¹³ The book focuses on the tension between technology as enabler of copyright and the law as blocker. But technology is not only enabling new ways of copying and novel access to copyrighted works, but also facilitating copyright policing, privatized content moderation, automated anti-plagiarism engines, digital non-fungible tokens (“NFTs”), and more. This means that the practices that have always been problematic—in *terrorem* overreaching beyond what the law protects—are now in some contexts “on steroids.” The “progress is more”

⁹ See ORLY LOBEL, *YOU DON’T OWN ME: THE COURT BATTLES THAT EXPOSED BARBIE’S DARK SIDE* (2017).

¹⁰ Orly Lobel, *The DTSA and the New Secrecy Ecology*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 369 (2017).

¹¹ See, e.g., *id.* (evaluating the Defend Trade Secrets Act and the creation of a civil cause of action for trade secret misappropriation, questioning the expansion of trade secret law and its relationship to “entrepreneurship, information flow, and job mobility”); Rochelle Cooper Dreyfuss & Orly Lobel, *Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security*, 20 LEWIS & CLARK L. REV. 419 (2016) (discussing the effects of the Economic Espionage Act and trends in trade secrecy enforcement on innovation).

¹² See also Orly Lobel, *Biopolitical Opportunities: Between Datafication and Governance*, 96 NOTRE DAME L. REV. REFLECTION 181 (2021).

¹³ SILBEY, *supra* note 1, at 7.

default is baked into technology itself, oftentimes making the law redundant and expendable. Beyond traditional monitoring and enforcement of intellectual property, digital platforms are quick to remove images, sound, writing, and videos that are flagged by automated systems as unoriginal. Even more than in adjudicative settings, the private policing defaults are skewed toward certainty at the expense of nuance and contextualized doctrinal defenses such as fair use. At the same time, technology can offer a cautiously optimistic intermediate path between the more and the less—a desirable Goldilocks path. Technology can be used to trace and track copying in ways that facilitate attribution, offering a third way for protections (for example, giving credit without compensation or permission) that often seem to be more important to the artists that Silbey interviews in her book.¹⁴

Finally, Silbey’s analysis becomes even more acute with the rise of the gig economy and online marketplaces. Chapter Five describes the institutional precarity of creatives such as photographers, musicians, and filmmakers.¹⁵ The gigification of creativity is an endogenous process: the more companies are outsourcing, offshoring, and gigifying their production and services, the less training and investment these creatives are receiving. Paradoxically, however, creatives under these precarious work conditions also have less control and leverage over their intellectual property. In my work on human capital and employment law, I’ve warned against a reality beyond intellectual property in which companies are now extracting “cognitive property” from their employees, through restrictive human capital contracts.¹⁶ Freelancers are supposed to retain more ownership over their human capital, to be free to work competitively, and contract with multiple companies. The blackletter law of copyright, patent, and trade secrecy—doctrines such as work-for-hire, hire-to-invent, and duties of loyalty—favors freelancers over employees when it comes to owning one’s creativity and potential for creativity. And yet, it seems that companies are angling to get the best of both worlds: increasingly, freelancers are required to sign away their copyright and competition rights through boilerplate terms of services even as they forgo the protections of traditional employment law.¹⁷ The ways in which gig workers contract away their intellectual property rights through boilerplate policies needs further research and inquiry, and policy must address contract law as an integral part of the true range of intellectual property law.

The urgency of Silbey’s call to action cannot be overstated. I am confident that *Against Progress* will quickly become one of this century’s seminal books about intellectual property and innovation. Innovation for good—for progressive

¹⁴ See *id.* at 236-44.

¹⁵ *Id.* at 266-303.

¹⁶ See Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015).

¹⁷ Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877 (2021).

progress—has always been on the agenda, but it is especially so as the world is racing to halt and recover from a global pandemic, overcome the immense threats of climate change, and meet the challenges presented by precarious work, automation, and artificial intelligence.