
LESS AS MORE IN INTELLECTUAL PROPERTY LAW

A RESPONSE TO JESSICA SILBEY'S *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* (2022)

BARTON BEEBE*

In a free-wheeling interview in 1987, British Prime Minister Margaret Thatcher notoriously declared: “There is no such thing as society.”¹ Apologists for Thatcher and her brand of neoliberalism have tried ever since to explain that Thatcher’s slogan meant something other than what Thatcher’s critics took it to mean: that, in her view, humans are essentially sociopaths, atomized individuals, Mandevillian killer bees, each exploiting everyone else as each pursues his own coldly-calculated self-interest in economic, political, religious, and other markets.² Yet to its defenders’ dismay, Thatcher’s gaffe has lived on, such that recently, at the beginning of the COVID-19 pandemic, current British Prime Minister Boris Johnson tried once and for all to disassociate his Conservative Party from it: “One thing I think the coronavirus crisis has already proved is that there really is such a thing as society.”³ (Though here too the messaging was perhaps a tiny bit off.)⁴

In reading through Professor Jessica Silbey’s outstanding new book *Against Progress*,⁵ Thatcher’s slogan repeatedly came to mind as a suitable motto for our current, dismal regime of intellectual property law. As Professor Silbey persuasively sets out, patent, copyright, trademark, and the other areas of

* John M. Desmarais Professor of Intellectual Property Law, New York University School of Law.

¹ Margaret Thatcher, *Interview for Women’s Own (“no such thing as society”)*, MARGARET THATCHER FOUND. (Sept. 23, 1987), <https://www.margareththatcher.org/document/106689> [<https://perma.cc/84SE-PCH8>].

² See BERNARD MANDEVILLE, *THE FABLE OF THE BEES: OR, PRIVATE VICIES, PUBLIC BENEFITS* (Liberty Fund 1988) (1714), <https://oll.libertyfund.org/title/kaye-the-fable-of-the-bees-or-private-vices-public-benefits-2-vols> [<https://perma.cc/GTQ4-4Q44>].

³ PA Media, *There Is Such a Thing as Society, Says Boris Johnson from the Bunker*, GUARDIAN (Mar. 29, 2020, 5:37 PM), <https://www.theguardian.com/politics/2020/mar/29/20000-nhs-staff-return-to-service-johnson-says-from-coronavirus-isolation>.

⁴ In fairness to Prime Minister Johnson, the full quotation reads: “We are going to do it, we are going to do it together. One thing I think the coronavirus crisis has already proved is that there really is such a thing as society.” *Id.*

⁵ JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* (2022).

American intellectual property law are built on a bleak, even misanthropic assessment of creators and the creative world. Our neoliberal intellectual property law envisions creators as autonomous, independent market maximizers motivated to create solely by the prospect of property rights in their creations—that is, by the prospect of exclusive rights against the world, against everyone else. This is a story, in the words of Professor Silbey and of her many interview subjects, of “selfishness,”⁶ “exploitation,”⁷ “scarcity,”⁸ “coercion,”⁹ “distrust,”¹⁰ and “fear.”¹¹ It is also a story of “disproportionate rewards,”¹² of winner-take-all star systems in which those who win often mistake dumb luck for unique genius and those who lose often blame themselves rather than structural barriers to their success—all suggesting that it may be not the ideology of Romanticism but neoliberalism that drives the dominant intellectual property narrative.¹³ As Professor Silbey explains, this system seeks to fulfill the constitutional imperative to “promote the progress of science and useful arts”¹⁴ by pursuing a “progress is more” theory of progress.¹⁵ On this theory, technological and aesthetic progress takes the form of ever more output and accumulation of intellectual works. The focus is on commodified (and reified) works, not human workers. The focus is on the stockpiling of things. As for human consumers of these things, rights holders will rationally sell copies of these works to consumers at the most profitable price the market will allow. For consumers (and countries) who cannot afford access, copies may eventually trickle down to them. And as intellectual property rights continue to expand under this “more property, more progress” approach, we can expect more of all of the above.

It may well be that for all of its apparent cynicism (or historically hardened realism), raw neoliberal political economic theory may form the basis for the least worst system of organizing much of human conduct. It may even form the basis for the least worst system of organizing certain specific forms of innovation. But what Professor Silbey’s book makes clear is that it offers a terrible way to understand and organize most of current intellectual production. It turns out that for most forms of creative work, it takes a village (or a Valley). At their best, intellectual creators are collaborative and interdependent. Their creative relationships are trust-based, even gift-based. Innovation thrives on

⁶ *Id.* at 272.

⁷ *Id.* at 247.

⁸ *Id.* at 219.

⁹ *Id.* at 279.

¹⁰ *Id.* at 280.

¹¹ *Id.* at 281.

¹² *Id.* at 280.

¹³ My own earlier work failed to appreciate this. See Barton Beebe, Bleistein, *the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017).

¹⁴ SILBEY, *supra* note 5, at 4.

¹⁵ *Id.* at 10.

“social capital.”¹⁶ It thrives on “society.” Indeed, in the context of intellectual labor, we may turn Thatcher’s slogan on its head. Here, there is no such thing as the individual.

That creative labor at its best is “relational”¹⁷ in nature explains why we should care about one of the central insights of *Against Progress*: everyday creative laborers work and live under conditions of “financial and relational precarity,”¹⁸ conditions which our current intellectual property regime is only worsening. The tragedy is not that precarity negatively effects these workers’ level of creative output and thus the growth of our hoard of innovated things, though it certainly does that. The tragedy is that conditions of precarity corrode the intrinsic rewards of creative labor itself for those who engage in it. These intrinsic rewards are also relational in nature. Only a village can produce them. They come from collaboration, shared exploration, and solidarity in the challenge of innovation.

Our current intellectual property regime cares very little if at all about the intrinsic rewards of creative labor or the felt precarity that is destroying them. To the extent it does care, its doctrinaire framework would ask only if this precarity is limiting overall output. Is it on balance resulting in fewer books, fewer video games, fewer inventions? If the workers could be made happier, would our treasure hoard grow even larger? But Professor Silbey’s book prompts a better and more interesting question: what might an intellectual property regime look like that is devoted not at all, *not at all*, to maximizing the quantity or quality of creative things, but rather concerns itself *only* with the well-being of creative workers and the intrinsic human rewards of creative labor? At its extreme, such a regime would regard whatever works are ultimately created as relevant only to the extent that they enhance the rewards others take from their own creative labor. It would measure progress only in terms of human pleasure in the active process of creation, not in the passive consumption of whatever end products are produced.

Some intellectual property lawyers, especially those who represent Big Content and the stars of the system, would no doubt regard such a framework for intellectual property law as bizarre, as no way to run a railroad, and dismiss it as typically academic. But Professor Silbey’s interviewees, drawn from across the spectrum of creative and innovative labor, speak throughout of such a system of intellectual property law and creative production. As Professor Silbey reports, this is their “moral consensus,”¹⁹ that the law should focus on humans and human flourishing rather than things. Even so, the reality is that there is little chance that American intellectual property law will move in this direction in the near future. The political will may be there, but the campaign contributions are not. It may be that we will have to rely on European intellectual property law—

¹⁶ See NAN LIN, *SOCIAL CAPITAL: A THEORY OF SOCIAL STRUCTURE AND ACTION* (2001).

¹⁷ SILBEY, *supra* note 5, at 272.

¹⁸ *Id.* at 288.

¹⁹ *Id.* at 270.

less in thrall to neoliberal ideology, more open to the goals of social democracy, and historically more attuned to the possibility of intrinsically valuable conduct—to lead the way.