A MORE PROGRESSIVE PROGRESS

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Jessica Silbey's new book, *Against Progress: Intellectual Property and Fundamental Values in the Internet Age*,[1] tackles one of the major issues fueling intellectual property ("IP") debates today: the meaning of "progress." Specifically, the book challenges contemporary frameworks for interpreting the Constitution's "Progress Clause,"[2] which authorizes Congress to establish laws granting authors and inventors exclusive rights to their respective writings and discoveries for the express purpose of promoting "the Progress of Science and useful Arts."[3] Though there is a wealth of theoretical literature addressing this topic,[4] Silbey takes the debate in a new direction. Rather than employing the tools of originalist Constitutional interpretation, Lockean property theory, or microeconomic analysis—all mainstays of the academic literature—Silbey views the meaning of "progress" through new theoretical and observational lenses. As such, she combines interviews with individuals who themselves create IP—the "Authors and Inventors" of the Progress Clause—with a fresh, contextualized reading of Supreme Court cases tackling IP issues. She seeks to elucidate not what "progress" meant to the Founding Fathers two centuries ago but what it means to the creators and judges who are on the front lines of IP controversies today. This approach leads Silbey to some important conclusions about the role that IP plays in contemporary society and how legal rules can be shaped to accommodate it.

Silbey's principal theoretical target is the "grand incentive narrative" that pervades IP discourse today.[5] According to this narrative, IP exists primarily to encourage the creation of *more* IP—more art and literature, more advanced technology, more wealth, and thus more social welfare. Silbey argues, however,

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

[2] U.S. CONST. art. I, § 8, cl. 8.

[3] *Id.*

[4] *See* SILBEY, *supra* note 1, at 337 nn.18, 20; *see also* EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE (2002); Sean M. O'Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733 (2015); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2006).

[5] SILBEY, *supra* note 1, at 5.

the incentive narrative "is clearly overstated to the point of being false."[6] If more IP leads to greater social welfare, then why, she asks, have Americans experienced skyrocketing education and living costs, stagnating wages, elevated mortality rates, overpriced health care, and a global climate crisis?[7] Greater technological and creative output has not mitigated these ills, so perhaps the underlying purpose of IP, and the "progress" that it seeks to advance, should be reevaluated in terms of "an expanding public purpose."[8]

In her prior book, *The Eureka Myth*, Silbey also rejected the incentive narrative, arguing that encouraging the creation of new IP is merely a secondary goal of IP.[9] It is the *dissemination* of new creative works to others, she argues, that is the "*ultimate* goal of IP law."[10] In *Against Progress*, Silbey broadens her view. Whereas she previously focused on the distributive justice implications of IP systems, she now adds four additional systemic considerations to the mix: equality, privacy, distributive justice, and institutional accountability.[11] Together, these four systemic features shape the role of IP in cultural and legal structures as wide-ranging as political speech, identity politics, labor standards, social hierarchies, health care access, and sustainable agriculture.[12]

In *The Eureka Myth*, Silbey explored the multifaceted motivations that drive ordinary individuals to create IP. Colleen Chien notes in a review, "[w]hat creators want isn't all that surprising: freedom, credit, and relationships with their audiences and customers."[13] These findings resonate with other studies of the motivations and attitudes of creators including open source code developers,[14] Wikipedia contributors,[15] amateur astronomers,[16] and genomic

[6] *Id.* at 337 n.18.

[7] *Id.* at 21-22.

[8] *Id.* at 21.

[9] *See* JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 221 (2015) (framing the Progress Clause in terms of the dissemination of IP).

[10] *Id.* at 221-22.

[11] SILBEY, *supra* note 1, at 5.

[12] *Id.* at 21.

[13] Colleen Chien, *Beyond Eureka: What Creators Want (Freedom, Credit, and Audiences) and How Intellectual Property Can Better Give It to Them (By Supporting, Sharing, Licensing, and Attribution)*, 114 MICH. L. REV. 1081, 1083 (2016) (reviewing SILBEY, *supra* note 9).

[14] ERIC VON HIPPEL, DEMOCRATIZING INNOVATION (2005); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006).

[15] Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 47 (2007).

[16] Michael J. Madison, *Commons at the Intersection of Peer Production, Citizen Science, and Big Data: Galaxy Zoo*, *in* GOVERNING KNOWLEDGE COMMONS 209 (Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg eds., 2014).

citizen scientists.[17] Based on these considerations, numerous authors have argued that the scope of IP does, and should, encompass non-economic aims such as personal fulfillment, public health and broader social goals.[18] Silbey is among the first, however, to link these considerations directly to the Progress Clause of the U.S. Constitution and to recast the interpretation of "progress" in this broader light.

Many recent analyses of creative output, particularly as it is influenced by digital technologies, focus on copyright law—the law of creative and authorial expression. Silbey, too, leans heavily on photography, visual arts, and writing in her case studies and interviews. However, to her credit, Silbey adds patents and trademarks to her holistic treatment of the field.[19] As a patent scholar, I was pleased to see a number of common and less common patent cases discussed in this book. For example, Silbey mentions *Bowman v. Monsanto Co.*[20] in the context of sustainable agricultural practices, which Silbey views as dampened by the assertion of patents on genetically modified seeds.[21] She uses *Moore v. Regents of University of California*[22] to make a point about the increasing relevance of privacy-type considerations in property and IP disputes.[23] Silbey uses *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*,[24] along with the copyright case *New York Times Co. v. Tasini*,[25] to demonstrate that lopsided contractual arrangements seldom help individual creators.[26] And Silbey uses a pair of little-known inventorship cases, *Shukh v. Seagate Technology, LLC*,[27] and *Pedersen v. Geschwind*,[28] to make points about the desire (or lack of desire) of inventors to be acknowledged for their work.[29]

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[17] Christi J. Guerrini, Jorge L. Contreras, Whitney Bash Brooks, Isabel Canfield, Meredith Trejo & Amy L. McGuire, *Idealists and Capitalists: Ownership Attitudes in Genomic Citizen Science*, 41 NEW GENETICS & SOC'Y (forthcoming 2022).

[18] *See* Jorge L. Contreras, Bronwyn H. Hall & Christian Helmers, *Pledging Patents for the Public Good: Rise and Fall of the Eco-Patent Commons*, 57 HOUS. L. REV. 61, 66 (2019); Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857 (2014).

[19] The inclusion of trademarks in this analysis is somewhat surprising because the Progress Clause makes no mention of trademarks, which are, Silbey explains, authorized under the Commerce Clause of the Constitution. SILBEY, *supra* note 1, at 8.

[20] 569 U.S. 278 (2013).

[21] SILBEY, *supra* note 1, at 126.

[22] 51 Cal. 3d 120 (1990).

[23] SILBEY, *supra* note 1, at 190.

[24] 563 U.S. 776 (2011).

[25] 533 U.S. 483 (2001).

[26] SILBEY, *supra* note 1, at 148-54.

[27] 803 F.3d 659 (Fed. Cir. 2015).

[28] 141 F. Supp. 3d 405 (D. Md. 2015).

[29] SILBEY, *supra* note 1, at 200-02.

Most welcome, however, is Silbey's discussion of patent pledges—unilateral commitments made by patent holders to refrain from full enforcement of their rights.[30] Using the example of Twitter's "Innovator Patent Agreement," in which the company promised not to assert patents offensively in litigation without the consent of its inventor employees, along with well-known non-assertion pledges by companies such as Tesla, Google, and IBM, Silbey argues that patent pledgors respond to "deeply rooted debates concerning distributive justice . . . [that] revolve around broader access to essential resources, the freedom to pursue creative and innovative work, mutual respect for creative and innovative practices . . . and an ethical commitment to human flourishing."[31] There is truth to these observations, though more commercial motivations likely lurk behind some of these commitments.[32] Silbey's point, however, is supported strongly by actions taken during the COVID-19 pandemic, in which dozens of large companies around the world pledged not to assert their patents against pandemic response efforts.[33] If "progress" were measured solely by the accumulation of IP rights and the extraction of wealth from them, then efforts like these would make little sense.

Silbey's project is an ambitious one, but one whose time has come. Her attempt to refocus IP law and the notion of "progress" on broader social concerns resonates with a similar movement within antitrust and competition law. To perhaps an even greater degree than IP, antitrust law has for the last half century been dominated by economic absolutism exemplified by a rigid definition of "consumer welfare" that is tied to sustained pricing effects.[34] Yet, during the last decade, a new progressive movement has emerged. Its proponents argue for a more inclusive view of welfare that variously accounts for corporate size, employment, innovation, market entry, wealth inequality, and human well-being.[35] This new approach has been labeled Neo-Brandeisian or, less flatteringly, "hipster" antitrust.[36] Despite criticism from the old guard, leading

[30] *See* Jorge L. Contreras, *Patent Pledges*, 47 ARIZ. ST. L.J. 543 (2015).

[31] SILBEY, *supra* note 1, at 265.

[32] *See* Contreras, *supra* note 30, at 572-92.

[33] *See* Jorge L. Contreras, *The Open COVID Pledge: Design, Implementation and Preliminary Assessment of an Intellectual Property Commons*, 2021 UTAH L. REV. 833.

[34] *See, e.g.*, Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843 (2020); A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741 (2019).

[35] *See, e.g.*, JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY (2019); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269 (2020); Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULL. 455 (2018); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017).

[36] Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a*

proponents of the progressive movement in antitrust have recently been appointed to influential positions in the Biden Administration and are poised to shift the national conversation substantially in this area.

As Silbey notes, it is time for a similar reorientation in the field of IP law, one that imbues the Constitutional directive to promote "progress" with notions of equality, privacy, distributive justice, and institutional accountability.

Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, 51 ARIZ. ST. L.J. 293 (2019).