
AGAINST PROGRESS: THE VALUE OF DISTRIBUTIVE JUSTICE IN INTELLECTUAL PROPERTY[†]

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The centrality of the internet to all of our daily lives in the twenty-first century cannot be overstated, particularly given the ongoing COVID-19 pandemic. During the early days of the pandemic in March 2020, the internet was the binding force in most of our lives, allowing us to continue to connect with friends and family with whom we could not see physically (even if they were down the street) for fear of exposure to an unknown and deadly virus. Those who had internet access were able to continue this connection, while those without were isolated or had to put themselves at risk of infection. Moreover, those whose work relied on the internet (mainly white collar workers) could continue to earn their livelihood from the relative safety of their homes, while those whose work required physical labor could not (including health care professionals, emergency response personnel, and many other service-based jobs). And, as the pandemic has dragged on into its third year, good access to the internet has determined for some families whether their children have access to a reasonable education.

In *Against Progress*,¹ Professor Jessica Silbey highlights the centrality of the internet and echoes these larger societal struggles in the realm of protecting creative and inventive works. The internet, and the Digital Age as a whole, has created a fairly large fissure in the twentieth century analysis of intellectual property law as being primarily justified by economic theory. Instead of simply being a tool to lower transaction costs or to prevent alleged free-riding, Silbey puts forth a well-documented and well-reasoned case for how intellectual property protection can (and to some extent already does) incorporate more fundamental, constitutional values that are prevalent in how the law works in the everyday lives of creators and innovators.

To do this, Silbey utilizes a variety of methodologies, including a qualitative empirical analysis of interviews of approximately 100 creators and innovators, as well as their lawyers and business partners.² Drawing from these interviews and a close reading of case law, Silbey documents that the fundamental values

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

² See *id.* at 311-14.

of equality, privacy, and distributive justice are part and parcel of how everyday people see themselves intersecting with their communities and with intellectual property law. Silbey draws connections among her interviewees' stories and provides compelling evidence that intellectual property law should be, if it not already is, much more about efficient markets.

Acknowledging that these fundamental values have a place in intellectual property law uncovers a vast set of implications for the law, as well as for norms of intellectual property enforcement. In particular, distributive justice as a fundamental value underscores that intellectual property rights are an exception to the default of a public domain and are not absolute property rights.³ Although intellectual property law and some large rights holders have been on an "accumulationist" path, the value of distributive justice provides a counterpoint to over enforcement of such rights.⁴ If this value could be explicitly recognized and internalized, the problems of abusive and over-enforcement of intellectual property rights could perhaps be mitigated.

In Chapter 4, Silbey paints a picture of communities of creators and innovators who have already internalized the value of broad access to works that would otherwise be protected by intellectual property law. "Most creators and innovators must copy from and build on others' work to do their own work."⁵ These creators and innovators recognize that without a rich public domain from which to draw upon, their ability to flourish would be greatly limited. In turn, they tolerate levels of infringement that a textualist reading of intellectual property law would not. Silbey recounts situations where creators and innovators have noticed unauthorized uses of their work but shrug it off, given this internalized value.⁶

However, these communities also utilize a judgement-based analysis to decide whether unauthorized uses of their works are infringing or not—something that the law does not sustain. As Silbey points out, the U.S. Supreme Court in *Bleistein v. Donaldson Lithographic Co.*⁷ explicitly states that those trained in the law should not be making value judgments of what should constitute protectable based on aesthetics.⁸ But this is what creators and innovators do when they decide whether something is an acceptable homage or unacceptable copying.

A question that Silbey leaves open for us to consider is: how do we put into practice this view of intellectual property law? Like other areas of the law, intellectual property law struggles with whether the law should simply be reflective of practice, or whether it should be proscriptive. In laying down the

³ See *id.* at 221 ("Remember[] that intellectual property protection is the *exception*, not the rule . . .").

⁴ *Id.* at 229-30.

⁵ *Id.* at 232.

⁶ *Id.* at 232-36.

⁷ 188 U.S. 239 (1903).

⁸ *Id.* at 251-52.

rule of ideological neutrality, intellectual property is intended to foster diversity of creations and innovations, but the impact of this is far from such aspirations. Is there space within the law to allow these communities to foster a nuanced approach to intellectual property protection in order to really foster diversity of expression?

The answer to this should be “yes,” because judges have been notorious for their unwillingness to draw bright lines or hard-and-fast rules when it comes to what is considered protectable intellectual property or infringement. Given that each allegation of infringement is context-specific, there could be a way for these everyday creators and innovators to have the best of both—more “fairer uses”⁹ of works but enforcement against “bad faith”¹⁰ actors. In fact, since much of intellectual property enforcement occurs extra-judicially, meaning that allegations of infringement occur through private channels, such as cease-and-desist letters and take-down requests, this is already likely happening.¹¹

But, the intellectual property ecosystem includes many actors other than everyday creators and innovators (who, to be sure, are part of its backbone). Large entities that aggregate intellectual property rights, as well as the everyday consumers of works (who may also be creators and innovators themselves), are also part of this ecosystem. It is unclear whether these groups have internalized distributive justice to the same extent, and whether it is a similar notion of distributive justice.

Part of the modern conception of distributive justice that Silbey identifies as a value of everyday creators and innovators is the expectation of “mutual sharing of private property in order to develop and grow resources in common.”¹² Although Silbey does document that a number of large entities (Twitter, Tesla, Google and even IBM) have pledged to use their patent portfolio as “defensive” measures, this has not yet become a widespread trend.¹³ But, for the few entities who have done this, their pledges reflect a similar notion of distributive justice. For example, the reason Tesla opened its patent portfolio on electric vehicle technology was so that progress on electric vehicles could be stimulated, which benefits other electric vehicle manufacturers, as well as Tesla.¹⁴ Other large entities, though, such as Apple or Ford Motor Corporation, exhibit the exact opposite tendencies, utilizing a maximalist viewpoint of intellectual property protection where the value of distributive justice is nowhere in sight.¹⁵ While it

⁹ SILBEY, *supra* note 1, at 214.

¹⁰ *Id.* at 245-48.

¹¹ See generally Leah Chan Grinvald, *Policing the Cease-and-Desist Letter*, 49 U.S.F. L. REV. 409 (2015) (exploring the growing practice of resolving disputes through use of “abusive cease-and-desist letters”).

¹² SILBEY, *supra* note 1, at 223.

¹³ *Id.* at 261-65.

¹⁴ *Id.* at 264.

¹⁵ Examples of this “maximalist” position include utilizing intellectual property laws to prevent consumers and others from repairing products without authorization. See, e.g., Leah

is hard to expect that all large entities will internalize this value, for it to be operationalized, a good percentage of them must do so.

Moreover, it is hard to know whether the everyday users—consumers of the works that are produced by creators and innovators—hold similar notions of distributive justice. While many everyday users are themselves creators and innovators (for example, meme creators or garage inventors) who are involved in sharing, many others are simply consumers who, as some of Silbey’s interviewees bemoan, view all content on the internet as free to use as they see fit without providing any form of remuneration.¹⁶ This belies the conception of distributive justice as mutually beneficial to all.

Still though, there appears to be progress in moving away from an accounting of intellectual property based solely on efficiency. Values such as distributive justice are becoming part of our everyday discussions around access to information and resources, which were traditionally thought of as exclusive to their intellectual property rights holders. Social movements and organizations such as Creative Commons have been calling for broader access and sharing of such intellectual property, with their successes growing each year. For example, Creative Commons has been around for twenty years and has approximately 600 million items to reuse under a CC license.¹⁷ Silbey deftly demonstrates that there is another story to progress, one in which we can all flourish.

Chan Grinvald & Ofer Tur-Sinai, *Intellectual Property Law and the Right to Repair*, 88 *FORDHAM L. REV.* 63, 66-67, 74-75 (2019) (recounting tactics of Apple, Ford, and other companies to stymie repair).

¹⁶ SILBEY, *supra* note 1, at 59.

¹⁷ OPENVERSE, <https://wordpress.org/openverse/> [<https://perma.cc/YZ6V-58B8>] (last visited Apr. 28, 2022).