**Belonging as Intellectual Creation**

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*This project considers the question of "what we create when we create." Certainly, one product of creation is "stuff"— inventions, trademarks, and works of authorship. But the same creative process also generates other public, personal, or social goods such as skills, self-actualization, and community. This project postulates that for some creators, a sense of belonging is a product of intellectual creation that has social value independent of the "stuff" associated with its creation. The project considers social science research establishing a sense of belonging as a fundamental human need and driver of behavior, and considers how in creative communities, a desire for a sense of belonging encourages both creation and adherence to copying and attribution norms that may differ from formal law. This refines the common narrative "stuff" as the only product of intellectual creation and calls for change in how we think about intellectual property law's exclusivity-based incentive structure.*

## I. Introduction

What is a "creation"? The standard narrative of intellectual property law is predicated on the idea that a "creation" is a physical, identifiable thing: an invention. A trademark. A work of authorship. The common conception of intellectual property presumes that these tangible creations promote progress and facilitate commerce, and proceeds under the premise that giving creators the ability to charge people money for certain copying or use of the physical products of creation both incentivizes people to make creations and makes the act of creation financially viable.

But what if our definition of "creation" weren't so limited? Of course, creators make "stuff"—inventions, marks, works of authorship—but as part of their creative endeavors, they may also create any number of other things that intellectual property law does not recognize as "creations." Creators may improve their own skills.[2] They may build or strengthen their own personalities and identities.[3] They may form communities.[4] These "creations" are no less valuable to the creators or to society at large, but they are not necessarily well-served by the "incentive" of intellectual property exclusivity, and they generally not the sorts of things that intellectual property law strives to promote. But why not? The idea of progress could easily embrace ideas of human flourishing that may be harder to measure than the quantity (or even the

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[2] Green paper.
[3] Green paper, eGirls chapter, Silbey.
[4] Id.

quality) of inventions, marks, and works of authorship, but are no less important.[5]  This paper suggests that one possible creation of intellectual endeavor is a sense of belonging, and that, as an intellectual creation, belonging is worth considering in the context of intellectual property law and policy.

Most normative theories of IP start from the premise of justifying and optimizing exclusivity.[6]  Only a few qualitative studies and explorations of IP theory consider non-exclusivity benefits of creating, such as developing skills, self-determination, or self-actualization.[7]  Even recent studies on the value of the public domain considered only the public domain's economic value, not its expressive or communicative value or its value in facilitating self-actualization, skill-building, or community through creation.[8]  A robust body of intellectual property scholarship indicates that exclusivity and stuff-creation are not inextricably linked,[9] but although such scholars often discuss creative communities, they still come at the question of creation from a stuff-based standpoint.  As William W. Fisher has noted, analyses of human flourishing in relation to intellectual property "are unusual in modern American legal scholarship, in part because they repudiate the principle central to both the dominant form of economic analysis and to the dominant form of contemporary liberalism: that the state ought to remain neutral concerning alternative conceptions of the good."[10]  That rarity makes human flourishing analysis no less important, however.

In fact, many creators may be more concerned with human flourishing than with more standard ideas of "progress."  Emprical study conducted by Jessica Silbey's revealed that many

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[5] There is considerable debate among intellectual property scholars concerning the definition of "progress." [discuss quality/quantity debate]; recent empirical study indicates that many creators may view "progress" in a different way altogether.  Silbey, IP and Constitutional Equality. "Progress" for makers "appears to resonate less with quantity and quality of work and more with equality and distributive justice regarding their practices and experiences of work." Many artists from a variety of disciplines describe their interests in making art as focusing on, in significant part, the accomplishment of social or public benefits such as community-building.  *See* Jessica Silbey, *Promoting Progress: A Qualitative Analysis of Creative and Innovative Production*, THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 515, 522, 525 (Matthew David & Debora Halbert, eds., 2014) (hereafter, Silbey, *Promoting Progress*).

[6] See Merges, Fisher, Hughes, Opderbeck, Katyal, etcetera.

[7] *See* Jessica Silbey, THE EUREKA MYTH (Press, 2014).  Rosenblatt and Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use*, EGIRLS, ECITIZENS 385 (U. Ottawa Press, Jane Bailey & Valerie Steeves, eds., 2015).

[8] *See, e.g.* Erickson, Heald, et al., *Copyright and the Value of the Public Domain*, CREATe Working Paper 2015/01 (February 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571220 (empirical study analyzing the economic value of public domain photos); Erickson, Kretschmer, and Mendis, *Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Asessment of the Regulatory Options*, Intellectual Property Office (UK) (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602698, *but see* Rosenblatt & Tushnet.

[9] Add many cites; note my work on negative spaces and Madison's work on governing knowledge commons.  This is true even of Even recent efforts, including those that recognize the inadequacy of a theories that "reduce[] human persons, human ideas, and human cultures to bits, memes, and utility machines," see David W. Opderbeck, *Beyond Bits, Memes and Utility Machines: A Theology of Intellectual Property as Social Relations*, 10:3 UNIV. OF ST. THOMAS L.R. 738 (2013) (summarizing social relations and virtue ethics theories of intellectual property and proposing a theory based on Christian theology).  Madhavi Sunder and Carys Craig have each proposed relational theories of intellectual property [cites] with different results [describe], but even relational theories tend to focus on the relationship between creator and audience/user, rather than the human flourishing of creators. [work on this idea more].

[10] *Id.* at 1463.

artists study saw their mission as contributing their communities in ways that "helped, that brought pleasure, that connected people." This connection between people—separate from the objects created—was part of the artists' vision of "progress."[11] Yet the prevailing Constitutional interpretation of "progress" focuses exclusively on the production and advancement of material goods. For many creators, progress requires not only that they are able to produce goods, but also that those goods are available to the community that can benefit from them.[12] For these creators, formal intellectual property law is both over- and under- inclusive: it protects new works regardless of whether they provide public benefit, while creating unnecessary or cumbersome barriers to their use.[13]

This is only one example of how economic benefits are far from the only, or even always the most important, benefits people gain from engaging in creative endeavors. Stuff-focused accounts of intellectual property map poorly onto what many creators have to say about what they believe they are creating when they engage in creative endeavors. Music students report that a sense of belonging to a community is the chief, and for some, the only, reason they participate in music programs.[14] Woodworkers in community programs value that the sense of community that they get from mentoring and working with others, which overshadows the physical artifacts of their participation.[15] Fans describe participating in fanwork-creating communities as a sort of "savior," providing them with community, empowerment, and enhanced sense of self.[16] Professional artists report a sense of belonging as a key aspect of their creative endeavors that drive them not only to create art, but also to engage in activities that support their artistic communities outside the context of capitalist market transactions.[17]

Furthermore, stuff-focused accounts of intellectual property do not account well for certain common aspects of creator behavior. Why do some people create when they are unlikely ever to see financial benefit from doing so? ["starving artist;" commercially unpopular works; negative spaces] Why do some creators give their works or inventions away for free, or decide not to rely on intellectual property exclusivity? Why do some creators engage in copying or attribution norms different from those imposed by formal intellectual property law?

I suggest that some of these answers can be found by examining the concept of belonging. Belonging is a fundamental need and the desire to belong is one of the most powerful

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[11] *See* Silbey, *Promoting Progress, supra* note **Error! Bookmark not defined.**, at 534.

[12] *See* Silbey, *Promoting Progress, supra* note **Error! Bookmark not defined.**, at 534.

[13] *See* Silbey, *Promoting Progress, supra* note **Error! Bookmark not defined.**, at 534.

[14] June Countryman, *High school music programmes as potential sites for communities of practice – a Canadian study*, 11:1 MUSIC EDUC. RSCH. 93, 94-95 (2009).

[15] Megan L. Ballinger, Lyn A. Talbot and Glenda K. Verrinder, *More than a place to do woodwork: a case study of a community-based Men's Shed*, 6:1 J. Men's Health 20, 24 (2009) (discussing how participating in activities such as mentoring at a woodworking-focused "men's shed" contributed to older men's senses of belonging and well-being).

[16] *See* Rosenblatt and Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use*, EGIRLS, ECITIZENS 385 (U. Ottawa Press, Jane Bailey & Valerie Steeves, eds., 2015).

[17] *See generally* Gordon Waitt & Chris Gibson, *The Spiral Gallery: Non-market creativity and belonging in a Australian country town*, 30 J. OF RURAL STUDIES 75 (2013) (Describing operation of an art gallery collective that "operates as a space to facilitate and legitimize the subjectivities of women and men as artists, to socialize, to earn an income . . . to form new community networks, and to generate a sense of 'belonging' based on reciprocal relationships of care."). [add more examples]

drivers of human behavior. Belonging is, frequently, a product of creative endeavors that rivals "stuff" in importance and rivals exclusivity as an incentive to create. By examining belonging—the conditions that promote and undermine it, its relationship with intellectual creation, I believe we can learn much about creative endeavor and find lessons that can guide intellectual law and policy toward human flourishing.

[add some summary of points below before roadmap]
Part II of this paper defines belonging and identifies conditions that are conducive or hostile to the creation of a sense of belonging. Part III of this paper explains how belonging is can be product of creative endeavor that is different from, but synergistic with, tangible products of creation. Part IV connects belonging with intellectual property law, first explaining how belonging can be incentivized or discouraged just as tangible creations can, and second explaining why belonging matters even in the context of promoting the creation of "stuff." Finally, Part V identifies some lessons that intellectual property law and policy can learn from examining belonging.

## II. How Does Belonging Work?

### A. Defining Belonging

Belonging is a feeling—a personal and contextually-mediated emotion that people experience when they feel (a) secure, accepted, included, valued, and respected by a group; (b) connected or integral to the group; and (c) that their values are in harmony with the group.[18] This experience is a basic, and possibly innate, human need.[19] In his seminal work describing a hierarchy of human needs, Maslow placed the need for belonging subsidiary only to physiological survival and the need to feel safe and secure.[20] Psychologists describe it as a vital component to mental health that derives from the experience of being valued, needed, or accepted and fitting into a system or environment.[21] Sociologists describe it as a relationship between self and society that reflects a sense of ease with oneself and one's surroundings.[22]

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[18] *See* Tracy Levett-Jones and Judith Lathlean, *The Ascent to Competence conceptual framework: an outcome of a study of belongingness*, 18 J. of Clinical Nursing 2870, 2872 (2009). Because the concept of belonging incorporates both a relationship of reciprocal value and a concept of "fit" with the group, having a sense of belonging is not the same as having social relationships—even close relationships. *See* Lambert et al., *To Belong is to Matter: Sense of Belonging Enhances Meaning in Life*, 39 Personality & Social Psych. Bulletin 1418, 1425 (2013).

[19] *See* Gregory M. Walton et al., *Mere Belonging: The Power of Social Connections*, J. PERSONALITY & SOCIAL PSYCH. 1, 2 (Oct. 24, 2011) (discussing studies); Barbara M. Newman and Philip R. Newman, *Group Identity and alienation: Giving the We Its Due*, 30:5 J. OF YOUTH AND ADOLESCENCE, 515, 520 (2001) (discussing evolutionary basis for a need for a sense of belonging); Tracy Levett-Jones et al., *Belongingness: A critique of the concept and implications for nursing education*, 27 NURSE EDUC. TODAY 210, 211 (2007) (same).

[20] A. H. Maslow, *A theory of human motivation*, 50 PSYCH. REVIEW 370 (1943); MOTIVATION AND PERSONALITY 236 (1954).

[21] *See* Bonnie M. Hagerty, Reg Arthur Williams, and Hiroaki Oe, *Childhood Antecedents of Adult Sense of Belonging*, 58:7 J. OF CLINICAL PSYCH. 793 (2002) (describing belonging as vital to mental health); Hagerty and Patusky, *Developing a Measure of Sense of Belonging*, 44:1 NURSING RESEARCH 9, 9-10 (1995) (describing components of belonging experience).

[22] *See* Vanessa May, *Self, Belonging, and Social Change*, 45 SOCIOLOGY 363, 368 (2011).

Social scientists from many disciplines have concluded that a "sense of belonging" is a basic human value.[23]

While individuals differ in how strongly they experience a need to belong and different cultures place greater or lesser stress on the importance of belonging in comparison with other values,[24] many consider it to be universal, fundamental, and pervasive across cultures.[25] Scholars have described it as one of the most far-reaching and integrative constructs currently available to understand human behavior.[26] In fact, research shows that attaining a sense of belonging is more important to well-being than one might initially expect. Empirical study has shown that a sense of belonging is strongly tied to whether people find life to be meaningful.[27] When people's sense of social connectedness is threatened, their IQ performance, their motivation to achieve, their physical health, and even their life expectancy decline.[28] Belonging to groups helps reduce the distress of subjective uncertainty, provides stability, and allows people to pursue collective goals.[29] Experiencing a sense of belonging provides a buffer against the anxiety of self-doubt, and can enable people to feel a sense of achievement.[30]

Because belonging combines the "I" and the "we," it is closely tied to two related concepts: identity and community. From an identity perspective, the experience of belonging provides people with opportunities to "be" and "become" themselves by defining and enacting their own identities.[31] To a large degree, people define themselves by association.[32] Their concept of themselves derives from their social relations,[33] and part of their self-esteem derives from the groups to which they belong.[34] In creative communities, for example, people define themselves partly by what they make and partly by association with others who create similar types of things.[35] Participation in creative communities provides people with belonging, which in turn provides them with both self-definition and self-worth.[36]

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[23] *See* Hagerty and Patusky, *supra* note 21, at 9.

[24] *See* Karen R. Whalley Hammell, *Belonging, occupation and human well-being: An exploration*, 81 Canadian J. of Occupational Therapy 39, 40-41 (2014).

[25] *Id.*; *see also* Hagerty and Patusky, *supra* note 21, at 9; Levett-Jones et al., *supra* note 19, at 211.

[26] R. Baumeister and M. Leary, *The need to belong: Desire for interpersonal attachments as a fundamental human motivation*, 117:3 Psych. Bulletin 487 [GET] (1995).

[27] *See generally* Lambert et al., *supra* note 18.

[28] *See* Walton et al., *supra* note 19, at 1 (noting examples of belonging's positive impact on people, including increased IQ and longer life, 3 (discussing motivation to achieve studies); Levett-Jones et al, *supra* note 19, at 213 (discussing studies).

[29] *See* Lambert et al., *supra* note 18, at 1419-20.

[30] *See* Matthew T. Crawford and Lucy Salaman, *Entitativity, identiy, and the fulfilment of psychological needs*, 48 J. OF EXPERIMENTAL SOCIAL PSYCH. 726, 727-29 (2012).

[31] Cite Levett-Jones et al studies; others.

[32] Wolfgang Steinel et al., *How intragroup dynamics affect behavior in intergroup confliect: The role of group norms, prototypicality, and need to belong*, 13 GROUP PROCESSES & INTERGROUP RELATIONS 779, 780 (2010).

[33] Barbara M. Newman and Philip R. Newman, *Group Identity and alienation: Giving the We Its Due*, 30:5 J. OF YOUTH AND ADOLESCENCE, 515, 518 (2001).

[34] Emanuele Castano et al., *I Belong, therefore, I Exist: Ingroup Identification, Ingroup Entitativity, and Ingroup Bias*, 28 Personality and Social Psych. Bull.135, 136 (2002).

[35] Insert cites and discussions from case studies; Spiral Gallery; first person accounts.

[36] *See* Walton et al., *supra* note 19, at 2.

Like identity, community both defines and is defined by belonging.[37] Psychologists define community as "the perception of similarity with others, an acknowledged interdependence with others, a willingness to maintain this interdependence by giving or doing for others what one expects from them, [and] the feeling that one is part of a larger dependable and stable structure."[38] In modern Western society, a sense of community tends to develop among people who have shared interests, and tends to satisfy community members' need for belonging.[39] For a community to persist, members must find the association to be rewarding—for example, they may derive status, acceptance, success, or a sense of competence from belonging to the community.[40]

Belonging is also a major motivator of behavior.[41] People adopt goals and norms from their communities of interest, which influence not only their public behavior, but also their internally-held beliefs about nearly everything—even what they find interesting.[42] One study, for example, found that when students discovered even minor social commonalities with a math major—such as discovering that they shared a birthday— their interest in math increased.[43] People who experience belonging are even more motivated to achieve.[44] People who experience belonging are likely to trust members of a shared community,[45] and will help other community members even at personal cost to themselves.[46]

Boundaries are relevant to belonging: the idea that one may belong to a community necessarily implies that others do not.[47] However, although people often experience belonging to an ingroup at least partly by comparing themselves to or setting themselves apart from an outgroup,[48] belonging is not necessarily oppositional. Experiencing belonging requires an awareness of a connection between self and group, but not necessarily a comparison with outsiders.[49] The more a group member perceives a group as a real entity—in social science terms, the more "entitativity" the in-group has—the more they experience a sense of belonging in the group.[50] For this reason, although belonging implies the existence of boundaries, those boundaries need not be rigid; they can be porous and fuzzy, and different people may draw different boundaries. People often belong to multiple groups, and can hold multiple identities at

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[37] *See* Terri Mannarini, Alessia Rochira, and Cosimo Talo, *How Identification Processes and Intercommunity Relationships Affect Sense of Community*, 40:8 J. OF COMMUNITY PSYCH. 951, 952 (2012).

[38] Patricia Obst, Lucy Zinkiewicz, and Sandy G. Smith, *Sense of Community in Science Fiction Fandom, Part 1: Inderstanding Sense of Community in an International Community of Interest*, 30:1 J. COMMUNITY PSYCH. 87, 88 (2002).

[39] *Id.*

[40] *Id.*

[41] Gregory M. Walton et al., *Mere Belonging: The Power of Social Connections*, J. PERSONALITY & SOCIAL PSYCH. 1 (Oct. 24, 2011)

[42] *Id.*

[43] *Id.* at 9.

[44] *Id.* at 2.

[45] *See* Ling Zhao et al., *Cultivating the sense of belonging and motivating user participation in virtual communities: A social capital perspective*, 32 INT'L J. OF INFO. MGMT. 574, 578 (2012).

[46] Cite

[47] Obst et al., *supra* note 38, at 89.

[48] Castano, et al., *supra* note 34, at 136.

[49] Lowell Gaertner et al.*, Us Without Them: Evidence for an Intragroup Origin of Positive In-Group Regard*, 903 J. PERSONALITY & SOCIAL PSYCH. 426, 428 (2006) (discussing complications in literature).

[50] *Id.* at 436 Castano, et al., *supra* note 34, at 136.

once.[51] For example, people often hold separate identities associated with their nationality and their religion, and feel a sense of belonging in each community.[52] In the context of intellectual creation, people can belong to groups with their own copying and attribution norms and follow the law at the same time, as long as the law and norms don't conflict with each other.

Finally, belonging is personal. Although it is socially-mediated, it is a feeling experienced by individuals based on their own experiences. Thus, although boundaries matter, they may often be drawn by the person experiencing (or not experiencing) belonging—not by the group as a whole.[53] This is not to say that belonging lacks power dynamics or gatekeepers. Often the question of belonging is tied up with questions of authenticity or qualification that can exclude people, sometimes unnecessarily or unfairly. Some groups have gatekeepers who define who's "in" and who's "out" (or at least purport to do so), and those gatekeepers can act as meaningful barriers to belonging. Other groups depend on threshold conditions such as attaining a particular academic degree or professional qualification. But in its most basic form, one need not necessarily be accepted by all—or even any—members of a group to experience belonging. One need only *perceive* acceptance, inclusion, value, respect, connection, and "fit." This will depend largely on the individual's subjective experience of interactions with in-group and out-group members. For most, it will depend in part on how the group defines itself, but it need not. Therefore, not only may group boundaries be fluid, but different group members may define the group differently.

[add discussion of how belonging is a thing about individuals and not about firms. Need this here to plant seeds for later.]

The discussion above shows that belonging is a fundamental need that individuals experience as intertwined with their senses of self and community, that individuals create themselves through interaction with others, that motivates their behavior. In the following section, I discuss how individuals create belonging, what conditions promote belonging, and what conditions undermine it.

## B. Creating and Undermining Belonging

Belonging is born of interaction. People develop the basic components of belonging— mutual acceptance, inclusion, value and respect; connection; and "fit" with the group's values— when they interact with and become visible to group members.[54] Developing the sense of comfort required for belonging usually requires repeated or prolonged interaction, but this

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[51] *See* May, *supra* note 22, at 370.

[52] Francesco Belvisi, *Legal Pluralism and Problems of Legal Application*, Univ. of Leicester Sch. of Law Rsch. Paper No. 14-05, _ (2014)

[53] Being ostracized from a group, however, undermines a sense of belonging and causes great emotional pain as a result. *See* TV Ostracism study.

[54] *See* Newman and Newman, *supra* note 19, at 521; Blokland & Nast, *supra* note 59, at 1155 (describing importance of recognition to experience of belonging).

interaction need not take place in-person; in fact, studies show that a strong sense of community can form without geographic proximity and in the absence of regular face-to-face contact.[55]

Studies show that several conditions strongly promote the development of a sense of belonging. Belonging tends to develop in communities of **shared endeavor.** When community members work on related tasks, engage in creative collaboration, or strive toward a shared goal, they are more likely to experience belonging. Researchers hypothesize that a sense of shared endeavor provides participants with a feeling of group legitimacy and common identity that inspires members to participate, gives meaning to their actions, and results in the development of relationships that foster a sense of belonging.[56] To the extent that the group's core behavior is a particular sort of creative endeavor, therefore, participants in that endeavor may develop a sense of belonging by creating or contributing to that type of work or invention. Relatedly, individuals are more likely to develop and maintain a sense of belonging when they have the **opportunity to participate in decision-making** (for themselves, or for the group as a whole) about the shared endeavor.[57] Thus, a sense of belonging is not merely the result of individuals internalizing shared conditions, but the result of individuals contributing in some way to those conditions.[58]

For a community to persist, members must also find the association to be **rewarding**. Being **recognized and acknowledged** as a member of a community is a dominant form of reward that both promotes a sense of belonging and motivates participation in the group.[59] Other important rewards include **status, acceptance, success, or a sense of competence** from belonging to the community.[60] I suggest that this need for reward may be one reason why members of creative communities persist in creating: not (only) because they crave financial remuneration, but (also) because they crave the reward of acceptance, acknowledgement, and competence, and the resulting sense of belonging, that comes from creating and having one's work recognized or appreciated by community members. Studies bear this out: People create in order to belong to creative communities, and they are motivated to create by belonging to those

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[55] Patricia Obst, Lucy Zinkiewicz, and Sandy G. Smith, *Sense of Community in Science Fiction Fandom, Part 1: Inderstanding Sense of Community in an International Community of Interest*, 30:1 J. COMMUNITY PSYCH. 87, 97 (2002).

[56] *See* Countryman, *supra* note 14, at 98, 107 (describing roles of shared endeavor, mutual engagement, and creative collaboration in forming community).

[57] *See* May, *supra* note 22, at 369 (discussing importance of ability to make decisions in fostering belonging); Countryman, *supra* note 14, at 102-103, 107 (describing role of self-direction and autonomy in creative decision-making in creating a sense of belonging among music students); *See* Matthew D. Thibeault, *From compliance to creative rights in music education: Rethinking intellectual property in the age of new media*, 14:1 MUSIC EDUCATION RSCH. 103, 109-110 (2102) (discussing how self-directed creative access to copyrighted materials enhances music students' sense of belonging).

[58] *See* May, *supra* note 22, at 369.

[59] *See* Samuel Pehrson et al, *Is everyone Irish on St. Patrick's Day? Divergent expectations and experiences of collective self-objectification at a multicultural parade*, 53 British J. of Social Psych. 249, 250 (2014) (noting that having one's identity acknowledged promotes belonging and participation); Talja Blokland & JuliaNast, *From Public Familiarity to Comfort Zone: The Relevance of Absent Ties for Belonging in Berlin's Mixed Neighbourbods*, 38:4 Int'l J. of Urban & Regional Rsch. 1142, 1155 (2014) (finding that "recognizing and being recognized" creates a "comfort zone" that allows people to experience a sense of belonging).

[60] *Id*.

communities.[61]   Belonging is less consistent with conditions that encourage competition or secrecy rather than cooperation or sharing.[62]

Belonging is synergistic with **shared values** and **mutual trust.**  The greater the belief uniformity in a group, the more likely its members will feel belonging,[63] and people who share values with a community are more likely to experience a sense of belonging in that community.[64] Relatedly, people who experience a sense of belonging with a community tend to shape,[65] adopt,[66] and enact the values of that community,[67] which in turn reinforces their sense of belonging with the community.[68]  Without shared values, communities are less able to withstand centrifugal forces, so the continued existence of a community of belonging is contingent upon a degree of commitment to a set of shared values.[69]  In contrast, people's feeling of belonging erodes when they are asked (by the community or an outsider) to comply with norms that don't conform to their own.[70]  Similarly, mutual trust is a major aspect of belonging.[71]  When community members are able to trust each other to follow established norms and rules, that fosters a sense of belonging among community members.[72]  People who experience belonging generally feel trusted and respected.[73]  Lack of trust is a major barrier to the forming of communities of belonging.[74]

As alluded to above, there are also conditions that inhibit belonging.  Individuals who experience ostracism or exclusion are less likely to experience belonging,[75] and gatekeepers who

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[61] Cite to music studies; Walton et al.

[62] Carolin Haeussler, *Information-sharing in academia and the industry: A comparative study*, 40 RSCH. POL'Y 105, 106, 117 (2011) (noting that academic scientists more often hold pro-sharing norms while industry scientists more often share information only on a reciprocal basis).

[63] *See* Stroope, *supra* note 64, at 580.

[64] *See* Samuel Stroope, *How Culture Shapes Community: Bible Belief, Theological Unity, and a Sense of Belonging in Religious Congregations*, 52 The Sociological Q. 568, 573, 580 (2011); Antony Zogg and Tony Hooper, *Does the Need to Belong Drive Risky Online Behavior?*, PROCEEDINGS OF THE 4TH INT'L CONFERENCE ON INFO. SYSTEMS MGMT. AND EVALUATION (2013).

[65] *See* Samuel Pehrson et al, *Is everyone Irish on St. Patrick's Day?Divergent expectations and experiences of collective self-objectification at a multicultural parade*, 53 British J. of Social Psych. 249, 250 (2014) ("behavior actively shapes group norms in a deliberate way rather than merely following them")

[66] *See* Newman and Newman, *supra* note 19, at 524.

[67] *See* Steinel et al, *supra* note 32, at 781.

[68] *See id*.

[69] *See* Samuel Stroope, *How Culture Shapes Community: Bible Belief, Theological Unity, and a Sense of Belonging in Religious Congregations*, 52 The Sociological Q. 568, 573 (2011).

[70] *See* Levett-Jones, et al., *supra* note _, at _.

[71] *See* Ling Zhao et al., *Cultivating the sense of belonging and motivating user participation in virtual communities: A social capital perspective*, 32 INT'L J. OF INFO. MGMT. 574, 578 (2012); Jackie Lawson et al. *'It's like having a day of freedom, a day off from being ill':Exploring the experiences of people living with mental health problems who attend a community-based arts project, using interpretative phenomenological analysis*, 19 J. OF HEALTH PSYCH. 765, 766 (2014).

[72] *See* Hsiu-Fen Lin, *Determinants of successful virtual communities: Contributions from system characteristics and social factors,* 45 INFO. & MGMT. 522, 523 (2008).

[73] Jackie Lawson et al. *'It's like having a day of freedom, a day off from being ill':Exploring the experiences of people living with mental health problems who attend a community-based arts project, using interpretative phenomenological analysis*, 19 J. OF HEALTH PSYCH. 765, 766 (2014).

[74] *Id.*

[75] TV study

impose (or purport to impose) qualifications for community membership or engagement in shared endeavors can frustrate belonging for those left out in the cold. Exclusivity of group membership can enhance entitativity (and hence a sense of belonging) for those within the group,[76] but can create barriers to group entry and discourage a sense of belonging for those who have difficulty breaking in.

With these conditions in mind, I suggest that creative communities are often well-suited to developing belonging: they unite people around types of creative endeavor, and they provide opportunities for people to experience a sense of competence and accomplishment. It seems, however, that some sorts of creative communities are more likely than others to foster a sense of belonging: those that provide opportunities for recognition, collaboration, and status; and those that embrace shared norms and facilitate trust among members. The following section conceptualizes and discusses belonging as an intellectual creation similar to, but different from, the "stuff" that creators make when they engage in creative endeavors.

### III. Belonging As Intellectual Creation

Empirical evidence shows that participants in creative endeavors often experience a sense of belonging as a result of their participation. For example, studies of community arts programs directed show that that participants experience a sense of belonging and attain a sense of empowerment drawn from gaining an identity as an artist within a community.[77] Studies of science fiction and media fans show that individuals who engage in creative fandom such as writing fan fiction experience a sense of belonging and identity as a result.[78] A study of a regional art gallery established that the participants who worked there experienced a powerful sense of belonging and identity artists and fueled their participation in gallery activities.[79] Case studies into writers of open source software,[80] roller derby participants,[81] wiki contributors,[82] chefs,[83] scholars,[84] and athletes[85] demonstrate that participants value the sense of community and

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[76] Lowell Gaertner et al.*, Us Without Them: Evidence for an Intragroup Origin of Positive In-Group Regard*, 903 J. PERSONALITY & SOCIAL PSYCH. 426, 436 (2006); Castano, et al., *supra* note 34, at 136.

[77] *See, e.g.*, Lawson et al., *supra* note **Error! Bookmark not defined.**, at 766; Anne W. Lipe, et al., *The effects of an arts intervention program in a community mental health setting: A collaborative approach*, 39 The Arts in Psychotherapy 25, 26, 29 (2012).

[78] *See* Green Paper; Patricia Obst, Lucy Zinkiewicz, and Sandy G. Smith, *Sense of Community in Science Fiction Fandom, Part 1: Inderstanding Sense of Community in an International Community of Interest*, 30:1 J. COMMUNITY PSYCH. 87, 97 (2002); Tushnet, *Payment in Credit* [add full cite] (discussing community among creators of fan fiction).

[79] *See generally* Waitt & Gibson*, supra* note 17.

[80] See Rebecca Giblin, *Physical World Assumptions and Software World Realities (and Why There are More P2P Software Providers than Ever Before)*, 35 COLUM. J. L. & THE ARTS 57, 102 (2011) (identifying "strong norms in the software development community that promote sharing [software secrets] with the world"). [add discussion of free software movement]

[81] *See* Fagundes [full cite] at 1108-10.

[82] *See* Garon [full cite] at 06-11 (discussing community value of sharing and curation in wiki and Internet communities; indeed, among wiki contributors, community holds an even higher value than attribution).

[83] *See* Fauchart von Hippel, [full cite] at 193-94 (discussing community of sharing and hospitality norms among chefs).

[84] *See* Strandburg [full cite] at 108-09 (describing community-enforced penalties for failing to share among academic scientists, including "loss of esteem" and "denial of the scarce resources of research funding and attention").

belonging that these endeavors create.[86]  In interviews and performances, pop musicians such as Lady Gaga and Viktoria Modesta have described their work and success as giving them a sense of belonging.[87]

[add discussions from Silbey case study] [add other case studies – drag queens; graffiti/street art; cocktails] [add discussion of pharma/medical devices from Strandburg and others[88]] [possibly include discussion of participatory research[89] and jobzines/professional research subjects[90] and industry science researchers[91]].

Much of this evidence comes from studies of very specific creative communities.  But even so, it spans across a wide range of endeavors, including amateur and professional.  It includes endeavors generally considered to depend on formal intellectual property incentives (*e.g.*, popular music, visual art) and endeavors generally considered to be governed by "low-IP" community norms (*e.g.*, open source software, roller derby, wikis, haute cuisine).  As a result, it's fair to generalize that one possible consequence of pursuing creative endeavors is a sense of belonging that can rival financial remuneration in terms of its importance and benefit to the creators.  This result may seem intuitive when it comes to hobbyists or low-IP communities, but it is true even of commercial creative endeavors.  For example, research into regional arts production shows that creativity and creative communities can have collective and collaborative dimensions that make creativity "a means to enhance interaction rather than ('just') interaction as a means to enhance creativity."[92]  I do not mean to suggest that the desire to belong is the *only* motivating force for these creators or that every one of these creators experiences a sense of belonging—but for at least some, "matters of the market such as paying rent, selling artworks and funding materials acquisition are only part of a mix of motivations, attitudes and practices," and financial needs are often "downplayed or overridden by ways of doing things that are often consciously chosen for reasons that have nothing to do with money."[93]

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[85] *See* Magliocca [full cite] at 876-77 (discussing effects on innovation of community among athletes).

[86] Polish cites and confirm findings.

[87] *See Channel4 presents latest collaboration with world's first bionic pop artist*, http://www.viktoriamodesta.com/; *See also* Jennifer Newton, *Channel 4 blows £200,000 on X Factor final advert featuring one-legged singer in dig at Cowell's 'painfully dull manufactured pop'*, DAILY MAIL, Dec. 12, 2014, http://www.dailymail.co.uk/news/article-2871399/Channel-4-spend-200-000-X-Factor-final-advert-featuring-disabled-singer-riposte-painfully-dull-manufactured-pop.html; *Lady Gaga Interviewed by O2 for Daily Mail*, November 2013, http://gagamedia.net/?p=16715 ("We sort of like to say if we can belong together you and I, or me and my fans – if we can belong together in this room and make love then maybe our dream of these two things—art and pop— belonging together, maybe that could come true."); Lady Gaga The Monster Ball at Madison Square Garden, https://www.youtube.com/watch?v=gNaTkvxKYwI (urging fans to reject insecurities that make them feel they don't belong; indicating that her career has made her feel a sense of belonging and empowerment).

[88] Note that in 1922 the American Pharmaceutical association really wanted people to belong to it.  (Per Google book search) fwiw.

[89] *See* Jarg Bergold & Stefan Thomas, *Participatory Research Methods: A Methodological Approach in Motion*, 13:1 FORUM: QUALITATIVE SOCIAL RESEARCH, art. 30 (2012).

[90] *See* Roberto Abadie thesis (2006) ca page 104, google book search.

[91] *See* Peter Gwynne, *Careers for Postdoctoral Scientists:  Beyond the Ivory Tower*, SCIENCE, October 27, 2006, http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2006_10_27/science.opms.r0600024 (describing importance of "belonging" and fit to decision to pursue a career in science industry rather than academic science).

[92] Waitt & Gibson, *supra* note 17, at 77.

[93] *Id.*

Considering the discussion above of conditions conducive to developing a sense of belonging, this result should not be surprising. Engaging in creation usually means engaging in shared endeavors:[94] making the same sort of things as others, working toward solutions to similar problems, making the same types of works. Creating not only provides opportunities for competence, recognition, status, and acceptance among creators, but also between creators and their audiences or customers. Creative endeavors can provide opportunities for repeated and prolonged exposure to other creators and innovators and the development of shared values.

Creative endeavors also enable the sort of collaborative work that is particularly effective at promoting a sense of belonging among participants. [95] Collaboration provides interdependence and opportunities for mutual trust, and studies show that people engaged in collaborative activities find them more meaningful than independent activities: for example, studies involving high school students show that the experience of making music with others generates a sense of community and belonging.[96] No doubt, some creators toil in isolation. But while overt collaboration may be particularly fertile ground for developing belonging, belonging may still grow for relatively isolated creators because no creator is truly alone. Even the lonest of wolves cannot help but encounter larger contexts of shared endeavor. Their audiences, funding sources, or distribution gatekeepers will apply common standards of quality, such as entertainment, usefulness, marketability, and the like. Studies show that one of the key virtues and values of practicing an artistic or innovative endeavor, or of any endeavor that requires the sort of dedicated practice that creation and innovation demand, is that it binds people within particular communities around shared standards, thereby fostering a sense of belonging even among non-collaborative makers.[97] In other words, by engaging in creative endeavors, one naturally situates oneself within a larger community and can derive a sense of belonging from that implicit (or explicit) relationship.

Creative endeavors provide opportunities to engage with a larger creative community or network that can provide identity creation and self-empowerment. Sometimes the relationship between belonging, community, and identity is easy to see: for example, people who create characters in multi-player games or who create self-insertion "Mary Sue" fanworks create alternative versions of themselves as part of community-focused creative endeavors.[98] But the synergistic effect of creation, identity, and belonging is also documented in less-obvious contexts: for example, studies of both amateur and professional arts communities have demonstrated that creating as an individual member of a larger artistic community provided participants with the identity of "artist," sustained artists' senses of self, and made belonging

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[94] *See* Countryman, *supra* note 14, at 99.

[95] *See* Lipe et al., *supra* note 77, at 28.

[96] *See* Hammell, *supra* note 24, at 43-44.

[97] Silbey, *Promoting Progress*, *supra* note **Error! Bookmark not defined.**, at 527 (describing argument made in Alasdair MacIntyre's groundbreaking *After Virtue*).

[98] *See* Casey Fiesler, *Pretending Without a License*, 9 BUFF. INTELL. PROP. L.J. 1, 17 (2013) (discussing creation of characters in the Milliways Bar game, where users collectively make a single journal-style work by interacting in a game world as characters from other works); add scholarship about mary sues

possible.[99]  Popular singer/songwriter Viktoria Modesta, who is an amputee, explains that her stylized musical commentary on beauty and disability situates her "in mainstream pop-culture, where I have always known I belonged."[100]

Creative endeavors also provide opportunities for mobility among communities of belonging.  For example, makers of fanworks are "playing in someone else's sandbox," a vivid metaphor for including oneself in a category with the original creator.[101]  Thus, fanwork makers may experience belonging in multiple communities:  a community of fans who love particular fictional characters, and a larger community of "people who make works relating to those characters."  Creation of the work may well be secondary to the desire to exist within the sandbox.  People may embark on creative endeavors in order to legitimize belonging and identity as part of a particular group: "Artist." "Writer."  "Musician." "Inventor."

[Discuss signaling literature]

Creators can obtain legitimacy, recognition, and even a sort of immortality by association with other creators.[102]  By making, creators situate themselves in communities of makers,[103] and belonging to a community or network allows them to feel a part of a larger symbolic entity that expands the boundaries of their own selves.[104]  This is consistent with studies establishing that when people are reminded of their mortality or uncertainty about their futures, their need for a sense of belonging grows and they associate more closely with their communities.[105]  Group membership provides a symbolic identity that allows people to project themselves beyond their personal death.[106]  Therefore, creators alleviate their fear of mortality by creating works that strengthen their bonds with the community and satisfy their need for a sense of belonging.

The importance of engaging with something larger and longer-lived than oneself may be seen in the value that many creators place on attribution—they value the immortality of their

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[99] *See* Lawson et al., *supra* note **Error! Bookmark not defined.**, at 766; Anne W. Lipe, et al., *The effects of an arts intervention program in a community mental health setting: A collaborative approach*, 39 The Arts in Psychotherapy 25, 26, 29 (2012); Waitt & Gibson, *supra* note 17, at 83-84.

[100] *Channel4 presents latest collaboration with world's first bionic pop artist*, ://www.viktoriamodesta.com/.  *See also* Jennifer Newton, *Channel 4 blows £200,000 on X Factor final advert featuring one-legged singer in dig at Cowell's 'painfully dull manufactured pop'*, DAILY MAIL, Dec. 12, 2014, http://www.dailymail.co.uk/news/article-2871399/Channel-4-spend-200-000-X-Factor-final-advert-featuring-disabled-singer-riposte-painfully-dull-manufactured-pop.html.

[101] *See* Casey Fiesler, *Pretending Without a License*, 9 BUFF. INTELL. PROP. L.J. 1, 7 (2013) (discussing widespread use of sandbox metaphor to describe fanwork creation).

[102] *See* Waitt & Gibson, *supra* note 17, at 80-81.

[103] Karen E. Wohlwend, *Damsels in Discourse: Girls Consuming and Producing Identity through Disney Princess Play*, 44 Reading Res. Q. 57, 62 ("[C]hildren use the play to form affiliations in the local peer culture where they strategically use popular media as cultural capital."); Waitt & Gibson, *supra* note 17, at 84 (participation in gallery enabled "transformations in personal and professional identity" and "generated a sense of belonging that amongst many participants expressed as being empowered, and not condemned to a life in the margins").

[104] *See* Lambert et al., *supra* note 18, at 1419-20.

[105] Castano, et al., *supra* note 34, at 137; Sherman et al., *supra* note **Error! Bookmark not defined.**, at 95; Hogg et al., *Uncertainty, entitativity, and group identification*, 43 J. EXPER. SOCIAL PSYCH. 135 (2005).

[106] *Id*. at 140.

work and the reputation it provides.[107] [Add discussions from Silbey and street art article about creators wanting to engage with something larger than themselves]. While creators' desire for attribution does not directly implicate their desire to belong, it reflects that at least some creators crave persistent and non-monetary acknowledgement of their role in creating their work. That acknowledgement not only builds reputation, but as described above, also provides recognition that enables the creator to maintain a self-identity as a creator and a member of a community or network of creators.[108]

[Possible added discussion: some types of creators generate belonging only for the creators; others also generate belonging for a larger community (eg an audience)]

[Add discussion of BIRG "basking in reflected glory" concept.]

[Discuss: whether participants in creative endeavors experience a belonging may be quite separate from whether or not their endeavor produces "stuff."]

This is not to say, however, that participating in creative endeavors always generates belonging or that every individual who endeavors to create or invent will necessarily reap a sense of belonging from it. Creating apart from a community provides fewer opportunities for belonging than creating within one, and indeed, even participating in a creative community may not result in a sense of belonging. Considering the subjectivity of belonging, some individuals may simply not experience acceptance, connection, or fit even when others would. In addition, participants may be shunned or rejected from creative communities, for reasonable or arbitrary reasons. For example, individuals may embody traits that some group members aggressively do not accept. A few visible examples demonstrate this phenomenon: certain men have publicly rejected female and trans participants in game development communities;[109] in certain types of fan communities women, girls, and people of color are rejected or held to greater standards of authenticity than male participants;[110] "independent" academics unaffiliated with institutions may be excluded from opportunities for belonging, such as academic conferences, because of pro-institution bias on the part of organizers.[111] [add other examples]. This experience of rejection or ostracism can be very painful and frustrating. Moreover, individuals may make (or be perceived as making) decisions that do not reflect the collective values of a group. For example, in certain artistic and musical circles, creators may be rejected as "sellouts" if they elect to take advantage of markets and formal intellectual property protections.

However, even in these instances, the existence of alternative creative communities has the potential to balance insider/outsider dynamics to create a sense of belonging for individuals whose opportunities for belonging in other groups might otherwise be limited. So-called "sellouts" may find a sense of belonging in more commercially-oriented art or music communities; in game development, media fandom, and certain academic disciplines, new

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[107] *See* Silbey, *Promoting Progress*, *supra* note **Error! Bookmark not defined.**, at 528 (noting literature on the importance of attribution in the arts and sciences).

[108] *See* Silbey, *Promoting Progress*, *supra* note **Error! Bookmark not defined.**, at 528-9 (noting that attribution helps in "building community and matintaining on-going relations" as well as establishing reputation).

[109] Cite discussions of Gamergate.

[110] Cite discussions of "fake geek girl" phenomenon.

[111] Cite discussions of independent academic phenomenon.

creative communities have grown among "outsiders" and provided belonging and legitimacy to those individuals. Social media outlets have facilitated community development among creators who might otherwise feel isolated from dominant culture. In other words: certain communities may have gatekeepers, but the very act of engaging in a creative endeavor provides opportunities for alternative forms of belonging. So as long as there aren't gatekeepers on the preventing individuals from undertaking creative endeavors, those endeavors have the potential to generate a sense of belonging.

Belonging is not the inevitable result of creative endeavor, however, and intellectual property has the potential to disrupt opportunities for belonging in the creative context. If law prevents individuals from undertaking particular shared endeavors or from engaging in creative decision-making, the law stands in the way of opportunities for those individuals to gain a sense of belonging through those endeavors. If law disrupts opportunities for creators to interact, or otherwise discourages reciprocal recognition and acknowledgement of creators' work, it fails to provide the opportunities for status and success. If law conflicts with a creative community's values, it undermines the shared values and mutual trust that promote a sense of belonging among members. The following section discusses in more detail the potential relationships between intellectual property law and a sense of belonging.

## IV. What Does Belonging Have To Do With Intellectual Property Law?

### A. Belonging is a Creative Output That Law Can Promote or Undermine

Discourse about intellectual property law has long taken a predominantly "stuff"-focused approach, exploring how best to maximize the quality or quantity of the physical products of creation.[112] This is predictable, considering that from a Constitutional perspective, intellectual property law exists to advance the progress of science and the useful arts (for copyrights and patents) or to regulate commerce (for trademarks).[113] It also reflects the undeniable truth that "stuff" is far easier to measure than human-flourishing benefits such as belonging.[114]

But we do humanity a disservice by focusing only on tangible production. Some scholars have considered the relationship between intellectual property law and various aspects of human flourishing,[115] but as William W. Fisher has noted, such analyses "are unusual in modern American legal scholarship, in part because they repudiate the principle central to both the dominant form of economic analysis and to the dominant form of contemporary liberalism: that the state ought to remain neutral concerning alternative conceptions of the good."[116] That rarity makes such analysis no less important, however, and as demonstrated above, belonging is a crucial aspect of human flourishing that the law overlooks at its peril. As demonstrated above, belonging is a natural, but not inevitable, result of many creative endeavors, and law can interact

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[112] Cite articles re quality/quantity debate.

[113] Cite Constitution; relevant cases.

[114] *See* Opderbeck, *supra* note **Error! Bookmark not defined.**, at 745 (noting the appeal of measurability in utilitarian theories); Silbey, *Promoting Progress*, *supra* note **Error! Bookmark not defined.**, at 526; *see also* studies on how to measure belonging; note their complication.

[115] *See, e.g.,* William W. Fisher III, *The Implications for Law of User Innovation*, 94 Minn. L. Rev. 1417, 1463-72 (2010) (discussing scholarship on intellectual property and human flourishing)

[116] *Id.* at 1463.

with creative communities in ways that promote or undermine belonging. In setting legal policy, therefore, it is worth being aware that the law may be encouraging, discouraging, or even abridging access to a fundamental human need. And, as discussed below, it is worth being aware that when law undermines individuals' sense of belonging, it may be excluding certain people from creative endeavors disproportionately.[117]

It is no doubt possible for people to create without deriving much, or even any, sense of belonging from the process. As discussed below,[118] they may create less or less well in the absence of a sense of belonging, but they may yet create. Reams of intellectual property scholarship have explored how to encourage creation and innovation without reference to belonging at all. But while it is at least theoretically possible to create stuff without creative communities, it is more difficult to create belonging without creative communities. As discussed above, the experiences of competence, recognition, and reward are among the key promoters of a sense of belonging, and creative communities have the potential to provide outstanding opportunities for each. Thus, to the extent the law promotes creating in the context of communities, it also likely promotes a sense of belonging. To the extent the law discourages community formation, it may not discourage creation, but it still undermines a sense of belonging.

Intellectual property law can undermine belonging in the creative context in a number of ways. At the most basic level, law can make it illegal to engage in a particular creative endeavor, as municipalities have done with graffiti and street art and as the Copyright Act has for expression and invention that require decrypting technological protection measures.[119] By preventing shared endeavors in those areas, opportunities for belonging in those areas fade— aside from the small community of belonging that may arise among those who thrive on collective legal transgression.[120] But something need not be illegal to be discouraged by law: Law can place certain creative endeavors out of reach for many potential creators by making those sorts of creation prohibitively expensive or risky. For example, law can create a "clearance culture" that demands licensing for even expressive uses of trademarks, making it risky or expensive to create expressive works about modern-day brand-filled culture.[121] Law could demand that individuals who want to translate a particular copyrighted work into another language obtain permission to do so, thereby inhibiting the development of creative communities surrounding that work.[122] Law could demand that individuals who want to experiment using patented inventions obtain permission to do so, making it difficult for individuals to engage in

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[117] *See infra* §_.

[118] *See infra* §__.

[119] *See* street art articles; 17 U.S.C. §1201 (providing that circumventing technological protection measures on copyrighted material is a violation of copyright, regardless of whether circumvention is done for otherwise non-infringing purposes, in the absence of an express exemption from the Copyright Office).

[120] *See* Street art studies; tinkerer information (& fanworks)?

[121] *See* Elizabeth L. Rosenblatt, *Rethinking The Parameters of Trademark Use in Entertainment*, 61 FLORIDA L.R. 1011, _ (Dec. 2009) (discussing chilling effect on expression of trademark maximalism); Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property Law*, 93 VA. L. REV. 1899, _ (2007) (discussing pernicious impact of "clearance culture" encouraged by trademark maximalism); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, _ (2007) (discussing potential chilling effect on expression of trademark rights accretion).

[122] *See* 17 U.S.C. § _ (defining translation as derivative work); Lea Shaver, *Copyright and Inequality*, 92 Wash. U. L. Rev. 117, _ (2014).

technological improvement projects.[123]  In these scenarios, opportunities for belonging diminish for those who lack access to the resources or negotiating power to overcome those constraints.

Law can also erect barriers to community formation by acting as a gatekeeper to certain kinds of creation or creative decision-making.  For example, although copyright fair use likely permits fans to create most sorts of follow-on works and share those works with their communities, fans who wish to create follow-on works may feel discouraged from joining communities of noncommercial fanwork creators by the uncertainty of copyright fair use and trademark expressive use doctrines,[124] or discouraged from joining the community of "professional creators" out of fear that if their follow-on works were commercialized they would no longer constitute fair use.  Trademark law gives mark holders ownership over the signals of belonging that populate our daily lives, and that ownership informs creative decision-making by the very creators who value those signals.  Casey Fiesler describes one instance in which fear of trademark reprisal directly disrupted the formation of community in the City of Heroes multi-player video game by preventing players from creating characters modeled on existing characters.[125]  The gatekeeping function of copyright and trademark law may have a disproportionate impact on women's formation of creative communities.  Studies show that women and girls, more than men and boys, engage with copyrighted and trademarked materials through follow-on creation.  Interfering with these women's ability to make follow-on creations impinges on their ability to create the sense of belonging that is part and parcel of fandom because it prevents them from making creative choices about how to engage with existing works.[126]  Likewise, studies show that one key element that promotes belonging among music students is the ability to build upon and perform works that resonate with them (as opposed to working only with public domain materials),[127] but many lack the resources or negotiating power to gain performance access to works still protected by copyright.  Public high schools had a rude awakening in 2015 when a copyright licensing company called Tresona demanded they pay exorbitant fines for past alleged infringement and forward-looking licensing fees for arranging and performing popular music, and explained that certain artists' music simply wasn't available for use under any licensing terms.[128]  When the law reduces creators' freedom of choice about what to create, that undermines participants' ability to make creative decisions and thus diminishes opportunities for belonging to thrive.

Law can intrude on the values ecosystems of creative communities, undermining the opportunities for belonging in those communities.  Studies show that a focus on copyright "compliance" in music education discourages participation and a sense of belonging among

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[123] *See* Madey v. Duke Univ., 307 F.3d 1351 (Fed. Cir. 2002) (narrowly defining experimental use exception to infringement); relevant articles _.

[124] *See* Fiesler; Rosenblatt.

[125] *See* Casey Fiesler, *Pretending Without a License*, 9 BUFF. INTELL. PROP. L.J. 1, 27-28 (2013).

[126] *See* Casey Fiesler, *Pretending Without a License*, 9 BUFF. INTELL. PROP. L.J. 1, 29 (2013). This disproportionate impact is particularly ironic considering that the need for a sense of belonging is particularly important in developing the self-esteem of people who have experienced rejection.  *See* Megan L. Knowles and Wendi L. Gardner, *Benefits of Membership: The Activiation and Amplification of Group Identities in Response to Social Rejection*, 34 Personality & Social Psych. Bulletin 1200, 1204 (2008).

[127] *See* May, *supra* note 22, at 369; Countryman, *supra* note 14, at __.

[128] See letters on file with author.

students,[129] and that being expected to take on norms or roles to which one does not subscribe or with which one does not feel comfortable can disrupt a sense of belonging.[130]  As discussed below, norms regarding creation and copying may help create a sense of belonging and define community boundaries.[131]  When communities rely on norms for community governance, the availability of differing legal regimes can undermine those norm systems, eroding community boundaries, removing opportunities for unity of belief, and creating rebels who choose to participate in certain aspects of community without conforming consistently to norms.[132]  These renegades, in turn, erode the mutual trust and shared values that are central to maintaining a sense of belonging among members.

Based on the conditions described above, Intellectual property law could also promote belonging more than it does. Law could enhance opportunities for creators to experience recognition and status by creating rules that value or encourage attribution.[133]  Law could enhance opportunities for collaboration by creating rules that favor collective creation over individual creation. [Elaborate!] I do not mean to suggest that either of these is a wise choice, either from an operational workability standpoint or from the standpoint of maximizing tangible output—but these two areas represent intellectual property law's potential to promote pro-belonging values.

## B.  Belonging Matters Even In A Stuff-Based World

Even those who care only about the physical output of intellectual endeavors should still care about belonging, because belonging is synergistic with physical output.  As discussed above, the desire for a sense of belonging is a powerful motivator and shaper of behavior.  As such, it undoubtedly plays a significant role in individual creators' motivation to create and their decisions to follow or diverge from formal intellectual property law.  Or to put it differently: Belonging motivates creation of more and better stuff, helps define what stuff people create, and promotes stable management regimes for how people use, copy, and attribute stuff within creative communities.

### 1.  Belonging motivates individuals to create stuff and helps them create more and better stuff

For many creators, belonging operates in an independent ecosystem of incentives and rewards that has relatively little to do with exclusivity or pecuniary benefit.  For these people, creating is both a condition and a manifestation of belonging, and belonging is a reward for creating.  This sort of ecosystem has been documented in many case studies of low-IP "negative space" communities,[134] including such diverse communities as media fans,[135] graffiti and street

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[129] *See* Matthew D. Thibeault, *From compliance to creative rights in music education: Rethinking intellectual property in the age of new media*, 14:1 MUSIC EDUCATION RSCH. 103, 109-110 (2102).

[130] *See* Newman and Newman, *supra* note 19, at 526.

[131] *See infra* § _.

[132] *See* Rochelle Cooper Dreyfuss, *Fragile Equilibria*, _.

[133] Elaborate; cite Lastowka and Tushnet.

[134] *See* Sprigman & Raustiala, *The Piracy Paradox*, _ (defining "negative space"); Rosenblatt, *A Theory of Intellectual Property's Negative Space*, _ (creating a taxonomy of intellectual property "negative spaces" and describing conditions conducive to their creation and maintenance).

artists,[136] performance magicians,[137] professional athletes,[138] hip-hop mixtape makers,[139] jamband performers and fans,[140] academic scientists,[141] drag queens,[142] wiki contributors,[143] and roller derby participants.[144] Although these communities have little in common cosmetically,[145] each requires that members contribute creative products to the community and rewards such contribution with belonging.[146] But this phenomenon is not unique to negative spaces. For example, in one study of artists who worked at a professional art gallery, the artists identified the sense of belonging, identity, and empowerment that the gallery provided as a driving force in their participation, with financial concerns taking a backseat. By creating and sharing their creations with other community members, creators make contact with and become visible to other community members, and they are rewarded with their sharing of products with the belonging born of repeated interaction and the opportunity to experience competence and the recognition of community members.[147] With this in mind, it may not be surprising that many give their work away, especially to others in the same creative communities, for free. For many, membership in a community is its own reward, and copying (with attribution, according to community norms) both enriches the community and promotes a sense of belonging in a way that exclusivity would not.

[add discussion: documented both in low-IP/IP without IP categories and in industries with IP rights. Scholars; scientists; MTAs; journalists, mid-list musicians, screenwriters.] [some in Silbey; add others]

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[135] *See* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 657 (1997) [hereinafter Tushnet, *Legal Fictions*]. Tushnet explains:

> The ethos of [fan fiction] is one of community, of shared journeys to understanding and enjoyment. Regardless of literary value, fan fiction is a pleasurable and valuable part of many fans' experiences. The political importance of fandom stems from sharing secondary creations. Fans feel that they are making significant life choices when they share their work with a broader community of like-minded people.

*Id.* (footnotes omitted); Casey Fiesler (describing how fans identify as part of fandom communities and communicate with other fans by making fanworks such as fanfiction, fanart, and cosplay).

[136] Marta Iljadica, others. (describing how street artists create in particular styles in order to reinforce subcultural belonging).

[137] Loshin (describing how performance magicians must create and perform tricks in order to belong to magician community, and comply with secrecy norms to maintain belonging).

[138] F. Scott Kieff et al., *It's Your Turn, but It's My Move: Intellectual Property Protection for Sports "Moves,"* 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 765, 768-81 (2009) (discussing community as a value trumping protection in athletics); Gerard Magliocca (describing how athletes create original moves to be admitted to and maintain membership in elite athletic communities).

[139] Horace Anderson (community built upon creation and sharing of music)

[140] Mark Schultz (community built upon creation and sharing of music)

[141] Strandburg? Rai?, study of academic vs. industry scientists

[142] *See* Eden Sarid, *Don't Be a Drag, Just Be a Queen – How Drag Queens Protect their Intellectual Property Without Law*, [cite] (12) (describing participants' view that "the feeling of belonging to a community (unrelated to the greater gay community)" is a strong motivation for creation of drag personas and performances).

[143] Jon Garon

[144] David Fagundes (describing how participants in roller derby must create a unique derby name in order to participate).

[145] Clean up cites, confirm accuracy, add others.

[146] See notes 135-145 and sources cited therein.

[147] *See* Newman and Newman, *supra* note 19, at 524 ("Group identity emerges out or continuous interactions, through which one becomes visible and known to other group members, and they become visible and known to you.").

Because creation generates belonging, belonging incentivizes the creation of more stuff. Studies show that the more a particular behavior satisfies the need to belong, the more group members will engage in it.[148]  Thus, creative activity that promotes connection with a creative community is, in a sense self-perpetuating: it creates conditions conducive to the development of belonging, such as feelings of recognition and competence, and the resulting sense of belonging motivates participants to continue engaging in it.  In many settings, belonging may be better than mere economic benefit at promoting creation.[149]  Therefore, although it may seem instinctive that the belonging aspect of creation serves personhood interests of creators,[150] belonging also demonstrates aspects of being a utilitarian incentive for creation.[151]  It also works well as part of a labor-desert story for creation:  Sometimes, a creator's "purpose" for creating expressly envisions that others will take and use their work, and that they will receive a non-financial reward such as respect or membership within a particular community.[152]

Research shows that people engage in creative and innovative activities more when they're engaged with communities of belonging.  A desire to belong may not be the initial motivator that inspires people to create in the first place,[153] but the opportunity for a sense of belonging both attracts and retains creators.[154]  Moreover, the transformative impact and appeal of belonging to a creative community make creation possible for people who, as one study found, "may have been reluctant to openly pursue a creative practice," facilitating production of creative products and for some, transition from amateur to professional status.[155]  This may be particularly true for marginalized people who are able to find their voices through participation in a community of creation.[156]  As a result, the opportunity to experience a sense of belonging may bring a greater diversity of approaches and voices to creative endeavors, something that is beneficial to creation and innovation as well as human flourishing.[157]

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[148] Mark Manning, *When We Do What We See: The Moderating Role of Social Motivation on the Relation Between Subjective Norms and Behavior in the Theory of Planned Behavior*, 33:4 BASIC AND APPLIED SOCIAL PSYCH. 351, 357 (2011

[149] Indeed, there is little empirical evidence for the premise that economic benefit spurs creativity, and good reason to believe that it does not.  [cite E Johnson fallacy]; Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty* 4 (Case Research Paper Series in Legal Studies, Working Paper No. 09-20, 2009), available at http:// ssrn.com/abstract=1410824 ("[S]tatistically, there is no uniform or fully predictable relationship between laws that increase copyright term, subject matter, rights, or criminal penalties and the number of new works registered in general.... [T]he data suggest[] that these relationships may be essentially random.... So while increasing copyright protection may increase the rewards available to authors, it does little to change their incentives overall.").

[150] Cite personhood & IP literature.

[151] Cite basic utilitarian theory.

[152] Cite labor-desert theory literature.

[153] *See* Jessica Silbey, THE EUREKA MYTH, at __ (finding that for many professional creators, the initial impetus to engage in creative endeavors is curiosity, compulsion, or the desire to solve particular problems.)

[154] *See* Countryman, *supra* note 14, at 106 (describing how "communities of practice" music programs foster a sense of belonging and attract and retain a broader range of participants than programs that focus primarily on musical output).

[155] *See* Waitt & Gibson, *supra* note 17, at 82.

[156] Green paper

[157] *See* Ethan Zuckerman, REWIRE, at __ (discussing the benefit of diverse approaches to problem solving to technological and social progress); public domain research re benefits of diverse voices.

[add discussion of how belonging encourages sharing of information]

[Consider competition-based communities. (Steam; Video game maps; Hip hop dancing)—one-upmanship means you can't copy; pushes progress even further than IP would?]

In addition, the experience of a sense of belonging pushes people to create *more* and *better* tangible products. Studies show that people persist more at difficult tasks when they experience a sense of belonging and that the desire to belong directly influences the amount of effort someone will exert at an activity.[158] For example, people express a persistently higher level of enthusiasm for challenging puzzles when they have experienced being part of a puzzle-solving group.[159] Moreover, oneself as a competent member of one or more groups is fundamental not only to self-concept, but also to one's willingness to contribute to society.[160] Thus, attaining a sense of belonging frees creators to focus on competence and excellence,[161] and enables people to create in a way that contributes to society. Further, experiencing belonging in creative communities provides a sense of ownership and motivation in connection with their work, which improves the quality of their work.[162] So to the extent "progress" is defined as solving problems through expression and innovation, there can be little question that fostering a sense of belonging also fosters progress.

Of course, a desire to experience belonging cannot be the *only* reason people create or strive for excellence—just as a desire for fame or fortune cannot be. Nor is a desire to belong likely to be a motivating force for every individual creator—even in the same creative community. While the desire to belong is relatively universal,[163] not every person finds belonging in the same way.[164] Creators have many reasons for creating, and get many different things out of their participation in creative communities. Some may have strictly pecuniary interests; some may be driven by non-monetary incentives like a desire for fame;[165] some may be

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[158] *See* Mysirlaki, *supra* note 203.

[159] *See* Walton et al., *supra* note 19, at 12.

[160] *See* Newman and Newman, *supra* note 19, at 521.

[161] *See* Levett-Jones, *supra* note 18, at 2874 ("until students feel accepted by staff and are assured of a valid place in the team they remain reoccupied with fitting in and their progress is negatively impacted").

[162] *See* Countryman, *supra* note 14, at 103-04 ("[Sense of belonging] ended up resulting in better quality performing because everybody was more motivated, they had more ownership.").

[163] *See* Hammell, *supra* note 24, at 40-41.

[164] For example, one in-depth qualitative study of an Australian "Derby Grrl" creative community contrasted two participants' self-created narratives about the pursuit, only one of which focused heavily on the community's ability to provide belonging and identity experiences. *See generally*, Adele Pavlidis & Simone Fullagar, *Narrating the Multiplicity of 'Derby Grrl': Exploring Intersectionality and the Dynamics of Affect in Roller Derby*, 355 LEISURE SCI.: AN INTERDISCIPLINARY J. 422 (2013).

[165] *See generally* [cite and incorporate] James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 189 (2008) ("Assume a random distribution of incentive structures in different people ... [I]t just does not matter why they do it. In lots of cases, they will do it. One person works for love of the species, another in the hope of a better job, a third for the joy of solving puzzles, and a fourth because he has to solve a particular problem anyway for his own job and loses nothing by making his hack available for all. Each person has their own reserve price, the point at which they say, 'Now I will turn off Survivor and go and create something.'"); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1177 & n.25 (2005) (arguing that the desire for fame is a primary incentive for creativity); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 42, 58 (2007) (arguing that copyright law should be reconfigured to support reputation-based incentives as well as

driven by intrinsic motivators like curiosity or compulsion;[166] most will be driven by some combination of these things. Furthermore, even the most "belonging"-focused creator may benefit from economic incentives that make it possible to make a living as a creator. For these reasons, the economic impact of intellectual property laws cannot be ignored. But I do suggest that in analyzing creators' motivations to create, there is little reason to privilege economic benefit above other human values[167]—and the complicated nature of creation and creative incentives makes belonging relevant to discussions about intellectual property law and policy.

[Add discussion: an important point. A desire to belong is unlikely to be a significant motivator for firms or collective entities. While individual directors and employees may be motivated by the desire to belong, corporations and other collective entities may by their very nature lack the capacity to care about values such as "belonging." These entities are more likely to be driven by purely economic motivations—and are also likely to act as important intermediaries for the dissemination of creation.]

## 2. Belonging helps shape what stuff people make

- Belonging theory also does a better job than other incentive approaches in saying anything useful about why people create what they create. If it's just for money or fame, why does anyone make nature poetry?[168]
- Follow-on creation is often beneficial from a belonging standpoint,[169] It follow-on creation provides a less threatening entry point to creation, which may be why many inexperienced creators use follow-on creation as a training ground.[170]
- In professional fiction writing, genre defines how creation manifests; belonging to a particular community or network of genre creators defines some creative boundaries.[171]

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monetary incentives); Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841, 851 (2008) (We need not specify what motivates ... authors [who share their works for free or for nominal prices] .... We need only observe that ... non-monetary incentives sometimes suffice to inspire authorship).

[166] *See* Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009) (describing roles of love, desire, and other passions in creation).

[167] Indeed, there is little empirical evidence for the premise that economic benefit spurs creativity, and good reason to believe that it does not. [cite E Johnson fallacy]; Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty* 4 (Case Research Paper Series in Legal Studies, Working Paper No. 09-20, 2009), available at http:// ssrn.com/abstract=1410824 ("[S]tatistically, there is no uniform or fully predictable relationship between laws that increase copyright term, subject matter, rights, or criminal penalties and the number of new works registered in general.... [T]he data suggest[] that these relationships may be essentially random.... So while increasing copyright protection may increase the rewards available to authors, it does little to change their incentives overall.").

[168] Tushnet, *Economies of Desire* at 521-22.

[169] *See* Lawson et al., *supra* note **Error! Bookmark not defined.**, at 767 (noting that community arts project shown to foster belonging among participants involved creating "responses to" existing participant-selected artworks); Green paper.

[170] Green paper

[171] *See* Neil Gaiman and Kazuo Ishiguro, *Breaking the Boundaries Between Fantasy and Literary Fiction*, The New Republic, June 7, 2015, at http://www.newrepublic.com/article/121982/neil-gaiman-and-kazuo-ishiguro-talk-books-storytelling-dragons (Arguing that while "genre" isn't useful as a concept outside of bookshops, genre-based communities encourage and inspire creation and provide useful storytelling constraints: "'Head over the wall to Science Fiction, mate, you'll be happier there.. .' or 'Come over here if you want but you're going to have to abide by our rules.'").

- Also Lots of low-IP and counterculture examples: roller derby, Brazilian straight-edge, fanwork shipper groups
- Professional examples: what scholars pursue
  o Viktoria Modesta: framed her message in a pop way
- Can quibble about whether this is good or bad—may want to encourage people to break out of the box—but people are less likely to create something if they think their audience are likely to reject it.

### 3. Belonging promotes stable management regimes for using, copying, and attributing stuff within creative communities, but not among them.

Belonging not only motivates creation of stuff, but also motivates people to create and comply with community norms and values.[172] Studies show that the desire to belong drives people to engage in behavior valued by the group, which in creative communities would include not only creation, but also adhering to copying and attribution norms.[173] These intellectual property norms are tailored to the needs of the community. This is because groups create their own norms organically,[174] as group members select modes of behavior that bond the group together and serve the needs of the creative community and its particular endeavor.[175]

Members comply with norms in significant part because a sense of belonging provides individuals with an "identity and associated consensual belief system that informs us who we are and how we should view and treat others, and how others will view and treat us."[176] The greater the belief uniformity in a group, the more likely its members will feel belonging.[177] People who desire a sense of belonging are likely to adopt the values and norms of the community to which they belong.[178] In creative communities, therefore, creators conform to their creative community's protection, enforcement, and copying norms because compliance reinforces their sense of belonging to that community.[179] People therefore absorb the norms and values of their communities, which informs their views about what sort of behavior is acceptable and what sort of behavior is shameful.[180]

Indeed, people motivated by a desire to maintain a sense of belonging will follow community norms even when those norms otherwise conflict with their self-interest. Studies show that a desire to experience belonging can be a prime motivator of volunteer behavior, for

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[172] *See* Levett-Jones, *supra* note 19, at 215.

[173] *See Id*. at 782.

[174] *See* Samuel Pehrson et al, *Is everyone Irish on St. Patrick's Day?Divergent expectations and experiences of collective self-objectification at a multicultural parade*, 53 British J. of Social Psych. 249, 250 (2014) ("behavior actively shapes group norms in a deliberate way rather than merely following them")

[175] *See* Newman and Newman, *supra* note 19, at 524).

[176] Hogg, et al., *supra* note 105, at 135.

[177] *See* Stroope, *supra* note 64, at 580.

[178] *See* Steinel et al, *supra* note 32, at 789 (finding that people on the outskirts of a group adhere even more closely to group norms than prototypical group members).

[179] *See* Steinel et al, *supra* note 32, at 781.

[180] Cite peer to peer file sharing study; Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, _ (2013).

example,[181] and that people may elect to engage in occupations they do not enjoy, solely to give pleasure to others or for the opportunity to spend time with others in shared occupation.[182] [in communities of IP sharing, people engage in IP forbearance even if exclusivity would result in greater profit. Cite Spiral Gallery article; case studies.]

These norms exist independently from formal law or institutional rules. Communities exist separately from institutions, even if they share affiliation with institutions.[183] For example, communities of musicians may be affiliated with a school, but they negotiate the terms of their work and create norms in ways that are not determined by the school, and may even reflect resistance to or autonomy from the school.[184] Creative communities exist within the institutional framework of formal law, but create copying and attribution norms that are separate from it, and may even contradict formal law.[185] For example, some creative communities rely on a philosophy of sharing,[186] where creators expect that others will consume and often copy their creations without paying them. But sharing communities also tend to incorporate various limitations on copying that formal law does not provide—for example, the expectation that all copiers will make copies freely available; expectations of attribution; or requirements that all copying be approximate rather than exact.[187] Community members follow those norms because failure to do so would challenge their identity and sense of belonging.[188] For example, [can use lots of negative space examples here; comedians protect ideas and not only expressions;[189] drag queens respect exclusivity of "signature" songs and even artists;[190] etc.]. This is consistent with the bottom-up creation of norms rather than top-down imposition of them.[191]

These norms can help define the boundaries of creative communities: "if you follow this norm, you're one of us; if you're not, you're out." [Discuss: include the id of the "sellout" in punk [use Brazilian straight-edge paper]. Many fan fiction writers, for example, strongly favor

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[181] *See, e.g.,* Paul Bramston, Grace Pretty, and Charlie Zammit, *Assessing Environmental Stewardship Motivation*, 43 ENVI. AND BEHAVIOR 776 (2010).

[182] *See* Hammell, *supra* note 24.

[183] *See* Francesco Belvisi, *Legal Pluralism and Problems of Legal Application*, UNIV. OF LEICESTER SCH. OF LAW RSCH. PAPER NO. 14-05, 5-6 (2014).

[184] *See* Countryman, *supra* note 14, at 99.

[185] Much of the law & norms literature discusses norms as they relate to fields outside the scope of formal intellectual property. [cite negative space articles, notes 4-19 of Shame article]. Another strand explores the relationship between norms and existing formal law. See, e.g., Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1905–06 (2007) (discussing influence of norms on scope of IP rights); Sean B. Seymore, *Rethinking Novelty in Patent Law*, 60 DUKE L.J. 919, 929 (2011) (referencing a "disconnect between patent law and the norms of science"); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543–50 (discussing disparity between copyright law and norms of infringement). See generally Christopher Jensen, *Note, The More Things Change, The More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531 (2003) (discussing attempts to create a link between digital copyright law and social norms surrounding tangible property rights).

[186] [cites – notes 148-154 of previous article].

[187] Cites to open source/free software study; fan studies; academic citation/attribution; French chefs.

[188] *Id.*

[189] Oliar and Sprigman

[190] *See* Eden Sarid, *Don't Be a Drag, Just Be a Queen – How Drag Queens Protect their Intellectual Property Without Law*, [cite] (20, 41).

[191] *See* May, *supra* note 22, at 369.

transformative copying, as long as it includes attribution.[192] They not only write transformative works, but also welcome others to remix (and attribute) their fanworks.[193] This norm sets fanwork creators apart not only from the world of "traditional authors," but also from the world of commercial pastiche writers, who are more likely to adhere to formal law rather than fandom's copying norms. The existence of norm-defined ingroups and outgroups does not necessarily impose or enforce rigid boundaries or exclusive membership, however. Most people belong to multiple communities,[194] and it is entirely possible for people to belonging to multiple communities with different norms systems.[195] People who belong to multiple communities can contextualize their norm adoption. For example, media fans tend to publish their fanworks under pseudoynms—even when, under their "real life" names they are well-known professional authors under their own names, and might garner greater readership for their fanworks if they used their own names. So why use pseudonyms? Because they appreciate the norms and boundaries of media fandom, as well as the norms and boundaries of their professional communities.[196] Indeed, the existence of norms and expectations in creative communities may actually facilitate mobility among groups. People comply with community norms as a way of building a sense of belonging within that community; as a result, in communities without formal barriers to entry, individuals may be able to gain recognition and acceptance in a particular community by creating the sorts of works or inventions that the community values and following the community's norms.[197]

Belonging therefore generates its own regulatory scheme for in-groups, optimized to communities and networks. Shared belief in these norms, in turn, strengthens participants' sense of belonging—which, as discussed above, promotes the creation of stuff. As a result, belonging can generate and maintain relatively stable governance systems for intellectual property within creative communities. Belonging is poorly suited, however, for governing intellectual property behavior *among* groups.

## V. What Can IP Learn from Studying Belonging?

Belonging is not a central intellectual property concept—and perhaps it shouldn't be. But although intellectual property laws exist to promote progress and facilitate commerce, those same laws have the ability to promote or undermine the fundamental human need for a sense belonging. And as demonstrated above, belonging is far more intertwined with intellectual property law and the physical production of intellectual goods than one might initially expect. So what lessons can intellectual property law take from a study of belonging?

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[192] *See* Fiesler, [full cite] at 752-54.

[193] *See id.*

[194] *See* May, *supra* note 22, at 370.

[195] *See* Belvisi, *supra* note 183, at _.

[196] cite Naomi and Seanan re fanworks; cite and use quotes from Green Paper submission.

[197] *See* Carol M. Rose, *Surprising Commons* (Jan. 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551265 (Effective intellectual commons have porous boundaries and opportunities for movement, but "some are participants and some are not"; membership "means something," but the communities are open to outsiders who can join by acting like insiders. To the extent that "acting like an insider" involves creating, the act of creation therefore not only creates an object, but also a sense of belonging in the creator.).

- Regulating IP exclusivity may promote or undermine individuals' access to a fundamental human need (belonging)
  - and we may be undermining their will to create "stuff" or ability to optimize community norms.
  - And may be warping who creates away from individuals and toward firms

### A. Belonging tells us stuff isn't everything.

- Stuff is only one of many creative products.
- If belonging were just a positive externality of stuff-making, then that would counsel in favor of IP policy that incentivizes stuff-making. But belonging is much more than a positive externality of stuff-making.
  - Belonging can be encouraged or discouraged even in the context of creative activity
  - Creative communities can foster belonging even with relatively minimal stuff-making
    - Can contribute by assisting, editing, commenting, discussing. Promote belonging but may actually slow production
  - Mentoring drives progress and belonging, but does not itself generate stuff.[198]
- IP law can promote belonging
  - Carries a signaling function—being an intellectual property owner legitimizes creation and situates creators in a community of "authors," "artists," "inventors," or the like.[199]
    - See Smita Kheria work
  - But don't need long terms or heavy protections to accomplish that.
- But by regulating exclusivity IP law can also regulating away or overlook elements that may be valuable to belonging
  - such as attribution.[200]
  - Work for hire rules take permit firms to take away individuals' recognition and immortality benefits of belonging.
  - Rules that fail to acknowledge the contribution of follow-on creators may undermine belonging
    - Attribution
    - control over verbatim copying of follow-on creations
  - current IP law is not particularly good at encouraging and accounting for collaboration, even though collaboration [even asynchronous?] tends to promote a sense of belonging.[201]

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[198] *See* Megan L. Ballinger, Lyn A. Talbot and Glenda K. Verrinder, *More than a place to do woodwork: a case study of a community-based Men's Shed*, 6:1 J. Men's Health 20, 24 (2009) (discussing how participating in activities such as mentoring at a woodworking-focused "men's shed" contributed to older men's senses of belonging and well-being).

[199] *See* Jessica Silbey, *Patent Variation: Discerning Diversity Among Patent Functions*, 45 LOYOLA UNIV. CHICAGO L. J. 441, 456 (2013) (noting that patentees appreciate being part of a "storied legacy of inventors" as a result of being named in a patent).

[200] *See See* Silbey, *Promoting Progress*, *supra* note **Error! Bookmark not defined.**, at 528 (noting mismatch between IP law and attribution in the arts and sciences).

[201] *See* Lipe et al., *supra* note 77, at 28; Countryman, *supra* note 14, at 107.

- o To the extent that IP law attempts to shape or direct *how* consumers re/create, it undermines community. (See: Kindle World, sports fandom, tinkerers. Licensing breeds censorship, may slow progress). Read/write consuming is a significant community builder, because it bonds people around shared love. (cite Green paper). Enclosure thus undermines belonging.
  - o Rules that increase barriers to entry for creative endeavors (such as discouraging follow-on works; lack of experimental use exception to patents; trademark challenges to expressive works) harm people's ability to participate in creative communities and experience belonging
- Forcing people to follow norms different from the norms of their group may undermine the existence of the group and thereby the people's experience of a fundamental need.[202]

## B. Belonging tells us money isn't everything, either.

- The financial incentive narrative may not always reflect reality of creation. (A conclusion that many other, wiser scholars have drawn before me: that the financial incentive narrative is only one way of looking at incentives, and that for some creation and innovation, financial incentives may be counter-productive.)
  - o Belonging tells us, as others have, that money isn't the only benefit that people get from creating, nor the only (nor necessarily the best) incentive to create.
  - o Belonging provides an alternative narrative to economic incentives and can help re-frame the incentive conversation
  - o I'm not saying that the financial incentive narrative is never applicable. It motivates firms, and it may make it possible for those motivated by other things to make a living creating and innovating.
    - BUT. Little reason to privilege monetary incentives over other incentives, such as belonging; and exclusivity does just that. It really only influences monetary incentives, not other motivators to create
    - This warps the "who creates" question because it privileges benefits to firms over benefits to individuals.
- Why consider belonging, as opposed to some other value? Wise scholars have identified other incentives. Indeed, additional wise scholars have identified other aspects of human flourishing that IP law may want to promote. [See Fisher.]
  - o The flippant answer is why not consider belonging? (Or, put differently, why privilege economic narrative over any other?) Could argue that money and "stuff" are both more measurable. That's true. But measurable isn't the same thing as important.
  - o But from an incentive standpoint, there is a reason to consider belonging in particular, which is that belonging is *both* a motivator and a benefit in and of itself.[203] (whereas money is merely instrumental).

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[202] *See* Belvisi, *supra* note 185, at 6.

[203] *See* Sofia Mysirlaki and Fotini Paraskeva, *Massively Multiplayer Online Games as Activity Systems: The Relationship between motivation, Performance and Community*, PROCEEDINGS OF THE 5TH EUROPEAN CONFERENCE ON GAMES BASED LEARNING 412 (D. Gouscos and M. Meimaris, eds., 2011) (motivational power of belonging); Gregory M. Walton et al., *Mere Belonging: The Power of Social Connections*, J. PERSONALITY & SOCIAL PSYCH. 1 (Oct. 24, 2011) (noting examples of belonging's positive impact on people, including increased IQ and longer life).

- o Belonging may also create better goods, as discussed above. Therefore, if IP law promotes belonging, it incentivizes progress, and when IP law undermines belonging, it may undermine progress in the process. Scientific advances result from the exchange and combination of information, which is more likely to happen in communities of belonging.[204] Studies show that scientists are more likely to share useful information when they perceive that they belong to a community with open science norms and when they believe the party seeking the information inquirer is an academic scientist rather than an industry scientist.[205] These findings suggest that a sense of belonging to an open science community promotes scientific progress, and that commodifying information may actually retard progress rather than promoting it. (See Rai, Strandburg)
- In other words, no reason other than measurability to privilege economic benefit over any other, especially belonging.


### C. Belonging suggests ideas about when intellectual property law is necessary to regulate behavior

- IP law likely necessary for regulating inter-group behavior, but not intra-group behavior
  - o exclusivity is neither necessary nor desirable for regulating intra-community interactions for communities where creation is substantially driven by a need for belonging. In fact, the intrusion of formal law may seriously undermine both the desire to create and the communities' ability to optimize rules. This echoes the principle articulated by legal sociologist Donald Black, that the closer the relationship between participants, the less need for external (read: legal) intervention in their relationship.[206]
  - o Suggests that the desire to belong, and associated community self-regulation mechanisms like shame and shaming, will likely govern protection, enforcement, and copying within particular creative communities at least as well as, or better than, formal law will. These communities will organically choose the norms that work best for their own creative needs, and members will comply with them. But these forces will do little—if anything—to regulate intercommunity behavior. Members of different communities will feel no compunction to live by each others' norms—in fact, they are most likely to reject each others' norms precisely because they are not their own.[207] Example: Drag queens more inclined to punish out-group members than in-group; entire work is based on performing works of another out-group (pop stars).[208]

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[204] Carolin Haeussler, *Information-sharing in academia and the industry: A comparative study*, 40 RSCH. POL'Y 105, 106 (2011); *see also* Zhao et al., *supra* note 71, at 584 (demonstrating strong correlation between a sense of belonging and willingness to share knowledge).

[205] Carolin Haeussler, *Information-sharing in academia and the industry: A comparative study*, 40 RSCH. POL'Y 105, 106, 117 (2011) (noting that academic scientists more often hold pro-sharing norms while industry scientists more often share information only on a reciprocal basis).

[206] Donald Black, *The Epistemology of Pure Sociology*, 20 Law & Soc. Inquiry 829 (1995).

[207] Cite studies on in-group regard and outgroup discrimination.

[208] *See* Eden Sarid, *Don't Be a Drag, Just Be a Queen – How Drag Queens Protect their Intellectual Property Without Law*, [cite] (12).

- o In fact, studies show that people prefer harsher punishments for rule or norm transgression by people who do not belong to the group than for transgression by group members, both because of favoritism toward ingroup members and because of prejudice against outgroup members.[209]
  - These findings imply to me that enforcement of intergroup rules is most likely to be fair and objective if done by third parties, such as courts. This implies that while formal law may be unnecessary for regulating intra-group intellectual property behavior, it may remain a necessary tool for mediating intergroup copying behavior.
    - For fans and commercial authors, the law does just that: the Copyright Act and its fair use provision provide parameters under which fans can make transformative use of commercial authors' works.[210]
  - Legal regulation likely especially necessary when multiple communities believe that they have "rights" in a particular intellectual creation (eg media/fans, acad/industry, pharma/health community); multiple claims on the same intellectual territory leads to conflict.[211]
- o But balancing considerations in setting inter-community rules isn't always money versus money. Sometimes it is, for example, money versus community. (Or money versus some other public benefit.)
  - Fair use is an example of when this happens; how can we refine the way we think about other inter-community regulations?
  - Balance is crucial. As important as formal law may be for mediating intergroup behavior, the law must take into account the belonging needs of each group it regulates. The norms of creative communities grow in response to community needs, and gradually optimize to promote creation in each community. If the law eviscerates the norms of creative communities, it undermines belonging (and as a result, can undermine the incentives of creators in those communities), rather than enhancing them.

- Regulation may also be necessary when a group's norms-based behavior is bad for society at large. [Consider whether to cut this because it's a sidetrack]

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[209] Bastian Schiller, Thomas Baumgartner, and Daria Knoch, *Intergroup bias in third-party punishment stems from both ingroup favoritism and outgroup discrimination*, 35 EVOLUTION AND HUMAN BEHAVIOR 169, 73-74 (2014).

[210] See 17 U.S.C. §§ 101, 107 (2006). [consider the following idea: there are ways of regulating that embrace belonging and ways of regulating that drive creators underground or disintegrate their communities. This goes for norm regulation as well as formal law. consider a fan who writes fanworks in order to belong to the community of people who play in a particular fictional universe's sandbox. IP holders for that universe (eg TV writers) can embrace fans and help to set fan norms, or they can exclude them from the belonging group and have no say at all in the norms adopted by the fans. The same goes for formal regulation; if lawmakers want to shape what people do, they have to make them feel like they belong within the rule set. Fair use does that—it shapes how people make derivative works by making room for derivative works. Eliminating fair use wouldn't eliminate derivative works—it would just make everyone who created derivative works into rogues.]

[211] *See* Dominic D. P. Johnson & Monica Duffy Toft, *Grounds forWar: The Evolution of Territorial Conflict*, 38:3 Int'l Security 7, 32 (2013/14) ("Where both sides perceive themselves to be the territory resident, [fighting is especially intense] because each side may expect to win and expect the other side to back down, somewhat regardless of size and strength.").

- o Eg when the norm is "women can't create" or when the norm is "violence for infringement." When that happens, it may be worth it to undermine a stable norm, thereby undermining a community of belonging, because we don't like what the community does or stands for. [Consider Alexandra George's study where punishment for unauthorized use of IP involves one tribe giving another tribe a child.].
- o [Think on this: if people will follow the norms with which they most identify, will legally regulating here even help, or will people just scoff at the law that conflicts with their community norms? Or will it disintegrate the community entirely, which might be a fine result if the norm in question is bad enough, but not if it's only iffy.]

### D. Belonging suggests that by privileging economic narrative over belonging, IP law privileges firms over individuals.

- Belonging motivates individuals rather than firms. (Or, it motivates firms only to the extent they are made of people.) While firms as entities are motivated predominantly by money (and reputation, which usually circles back into money), individuals are motivated not only by those things but also by belonging. And may in fact be counter-motivated by money.
  - o So undervaluing belonging privileges firm-made creations over individual-made creations. Undervalues the creative potential of individuals.
  - o And IP policies that undervalues individuals tends to influence who can be a "maker" by dividing the world into makers and consumers.
    - ▪ Can everyone "make" or only those who value economic incentives?
    - ▪ May think that by relying on exclusivity we're encouraging making
      - • But may also be stifling it by ignoring other reasons to make.
  - o "being allowed to create" is a kind of belonging that IP laws can undermine. Professional status confers permission, but a sense of belonging might as well, through things like fan acceptance. Question is where "permission" comes from—top down (law) or bottom up (belonging).
  - o Consider Alexandra George work in which IP has more to do with who's allowed to make certain kinds of works than with what those works look or sound like. Same is true of DMCA in many ways, as rights holders are the gatekeeper of who is permitted to use the materials of creation. Similar situation with patents on assays and data-gathering inventions.
- What about those who say, ok, belonging is a useful idea for individuals, but individuals' creation will never see the light of day without firms' assistance?
  - o Flippant answer: Who do you think makes the things that firms sell?
    - ▪ Discuss Quirky: Inventors who release their inventions through Quirky see some money from their endeavor, but "for most, the main satisfaction is being a part of ideas that make their way into the world as products. And there is recognition: The inventor's name appears on the packaging for each product."[212] The inventors develop things at least in part because

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[212] Steve Lohr, *The Invetion Mob, Brought to You by Quirky*, N. Y. TIMES, Feb. 14, 2015, http://www.nytimes.com/2015/02/15/technology/quirky-tests-the-crowd-based-creative-process.html.

they want to belong to the category of "inventors."  The companies invest because they get innovative products they can sell.[213]

## VI. Conclusion

Text

[add somewhere– same situation exists with community in real property.  Regional belonging obviously a big deal; enclosure of the commons; who owns "gang turf" etc.  Would make a good footnote.]

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[213] *Id.*