Jessica Silbey
Northeastern University School of Law

from book in progress:

Against Progress: Intellectual Property and Fundamental Values in the Internet Age
(forthcoming 2020 Stanford University Press)

Chapter 5: Harm

Intellectual property injuries are usually conceived in individual terms. That is, individuals or individual companies are the agent of the harm and object of abuse. Often, descriptions of injuries sound like one-to-one combat with underdogs, heroes, and villains. An infringer is a thief. A corporation overclaiming IP rights is greedy or engaged in immoral conquest. Complainants suffer because of bad motive or acts. Indeed, the previous three chapters describe the fundamental values grounding intellectual property discourse as values rooted in the person, although they are by necessity also relational and structural. Equality is by its nature comparative. Privacy requires accepting societal trade-offs of non-disclosure and isolation for self-determination and autonomy. And distributive justice, although about individual sustainability, requires attention to dispersal and management of community resources. This chapter explains how individual harms and abuses in intellectual property discourse are in fact descriptions of and concerns about systems and institutions. It explores how everyday creators and innovators in their accounts of IP harms champion the central role of these systems and their structure – such as law and the socio-political and economic organizations law makes possible – to promote fundamental values.

The shift from an individual analysis to a structural one makes sense when we think of intellectual property and its constituent elements as themselves products of systems and organizations. Intellectual property law tends to focus on the "author," "inventor," "consumer," and "brand owner" as the agents of copyright, patent, or trademark law. This chapter shows how the accounts of everyday creators and innovators elaborate upon the inevitable but often invisible

connections between those individual agents, the practices in which they engage, and the structures in which both are situated. These systemic connections make persons into authors, inventors, consumers or brand owners while simultaneously enacting the structural mechanisms through which creativity and innovation is produced and regulated by law as well as other institutions (e.g., professional and economic). These connections constitute IP as a system of interactive and interdependent relations forming larger structures to be investigated as such.

Understanding IP as a set of systems in terms of their content, processes, and context brings welcome clarity to the analysis of intellectual property disputes and discourses that may help diagnose deeply rooted problems and suggest possible solutions. For example, some of the IP problems arising in the digital age concern the virality of copying: its opportunities and drawbacks, which include more sharing and productivity but perhaps also less equality, privacy, and revenue for those doing the lion's share of work. Disputes among individual entities resemble zero-sum debates where one person's win is the other person's loss. And individual remedies such as injunctions and payment do not prevent the problems from reoccurring. As all know who have chased a take-down request or unknowingly bought counterfeit goods, the internet resembles a game of whack-a-mole. But when we analyze individual injuries in terms of an emergent structure with particular, identifiable characteristics and patterns of actions, we may then identify the mechanisms and relationships that explain the problems of digital connectivity while also, possibly, selecting for and isolating the benefits we seek from the same system. Explained independently from individual preferences, the IP system as a whole is nonetheless constitutive of participants' beliefs and behaviors, which change and adapt in character and effect when recognized as part of a larger structure. For example, when a person complains of a particular infringement by another, it sounds like a dispute between people about taking without asking. If viewed in the context of a structure that is instantiated by repeated practices, the harm may be better understood as a system with predictable outcomes in which foreseeable users experience outsized benefits as compared to other participants. This reconceives the analysis from a zero-sum calculation where one person loses because another wins to a system-level analysis where its qualities to be praised or faulted – e.g, proportionality, accountability, transparency – are evaluated on their own terms.

Trenchant critiques of IP as a dysfunctional system appear in the accounts from everyday creators and innovators. Everyday creators and innovators describe the current IP system as corrupted by incumbency bias, profoundly out of balance in terms of contributions, risks, and rewards, and plagued by a breakdown in civility norms such as meanness and cutthroat behavior. In contrast and by implication, their ideal system would cultivate a sense of shared interdependence, punish coercion and threats, disincentivize exclusivity and hierarchy lacking social and shared benefits, and would reward only truly new and original work to avoid wasted time and money and enable more freedom to work. Their accounts arrive at a moral consensus that demands cooperation to produce quality work and minimizes destructive competition that produces mediocrity or stifles better work from being done. As accounts that follow show, everyday creators and innovators expect reasonable disagreement and principled restraint among participants. But assume a baseline of truthfulness, transparency, and the respect for others. Contrary to the system they experience, an ideal IP regime would prioritize punishment of lies, misrepresentation, and denigrating practices higher than protecting exclusivity and control for market gains.

This moral consensus about how an IP system should ideally function sounds like a reaction to what contemporary socio-political literature describes as precarity or precarization: the state or production of insecurity and vulnerability regarding cultural and economic resources unevenly distributed.[1] Precarity produces the experience of disenfranchisement, displacement, and uncertainty regarding one's expectation for future betterment, both as an individual and as a member of a community. It is described as a function of advanced capitalist society in which free market ideologies dominate, capacity for collective action weakens, and feelings of belonging are about identity and difference rather than mutual interdependence and a shared fate.

Some suggest that precarity is strongly experienced in the creative and innovative industries where "IP operates as an architecture of division producing new class relations special to the information age."[2] Missing from the 21st century digital ecosystem, and therefore exacerbating precarity, are affective relations with invigorated political power built around the new forms of work and class alliances. These affective relations fail to emerge at all (or regularly) to resist the growing and diverse relations of domination by consolidated wealth and power of networked, digital capital.[3] And so it seems that complaints about the IP system and its subversion of affective alliances are expressions of resistance to property relations that claim to build connections when in fact they produce divisions. The accounts from everyday creators and innovators conjure an ideal structure with its moral narratives of collaboration, accountability, and quality standards as antidotes to the digital age's exacerbation of IP's features of ownership and exclusivity. In spite of a digital age that amplifies rather than reduces precarity, the accumulated accounts from everyday creators and innovators revive what in the past was called "the commons" but today is promoted as a "new public sphere."[4]

These accounts from everyday creators and innovators defy the pull of the hegemonic capitalist narrative fueled by supply and demand, as well as control and scarcity. That hegemonic story goes like this: we work hard to make something valuable, and law, like IP law, gives us a way to prevent someone from taking it away without paying. In this story of law and capital, equality is achieved when law applies to all alike who create and innovate according to the same standards, and freedom is realized by making and selling valuable things that enable us to move between socio-economic classes. Notice how in this story of capitalism, law and the state's authority to enforce it assume a precarity of power and self-determination in the very activity of producing art and science. We require the state to protect that which we make and value. This generates a discursive circularity as well as produces further insecurity in the person's relationship to the state by demanding more laws that facilitate more individual control, ownership, and thus also division.

We avoid this circularity by telling a different but similarly available story, one the everyday creators and innovators tell, which goes like this: we work long and hard to do and make things whether or not it is valued by the capital marketplace because doing so gives us purpose. In this alternative account, the intrinsic pull of creativity and innovation is so strong that the art and science continues even in "an age whose values are market values and whose commerce is buying and selling."[5] This subversive story (as related to the hegemonic one above) forces a reckoning with the possibility that protecting work by claiming it as private property even for nonremunerative purposes is not about capital as such but about justifying the activity as worthy in and of itself – a progress separate from market progress based in personal dignity.[6] This story revolves around mutual respect, self-determination, and voluntarism.

A socio-legal system refusing to recognize the alternative account of creativity and innovation, an alternative account that resists the story of capital accumulation as an end in and of itself, degrades people and the collective work they love by ignoring the celebrated processes and contexts that sustain both. Further, ignoring these sustaining social situations produces anxieties such as "who will see me and take care of me as a person who wants to work?" This fuels protectivism amplifying worries about resource scarcity, leading to privatization and selfishness and feeding the hegemonic story above because it is the one most available in our legal system for complainants. This leads us back to the focus on capital accumulation at the expense of the everyday value of work and its motivating affective relations. It also signals a more basic problem in civil society in the digital age: the dissolution of trust and of the mutuality of investment in our inexorably interdependent communities.[7]

What follows is an elaboration of the harms mentioned above more fully described in the accounts from everyday creators and innovators. These harms implicate the environment in which creators and innovators expect their practices to flourish, and thus their critiques are about the environment's failures. Arising from within contexts of the production of creative and innovative work, these accounts are transactional and dynamic rather than substantive or thing-like. This is important for two reasons. First, the accounts reject essential or preexisting notions of harm, for example, that loss (of money) is by necessity bad. A transactional account considers the situational context of the "loss" to understand its significance in terms of an ongoing set of discursive or material relations. Second, and relatedly, transactional and dynamic accounts of harm conceive the field of intellectual property as a set of actions rather than attributes. This takes us closer to examining possibilities for reformative transformation. Instead of describing standard IP harms to individuals as uncompensated losses or unpaid-for benefits, everyday creators and innovators describe IP systems that produce short-term thinking instead of long-term relationships, privileging current value instead of a future with shared benefits.[8]

In the digital age in which expression and inventions travel faster and farther, the harm of depleted income and stolen assets may accelerate claims for control, exploit precarity and double down on economic incentives as individually-based further pitting people against each other. But if these accounts from everyday creators and innovators are to be taken seriously, they critique this kind of capital system measured by individual attributes and motivations and redirect attention to systems and practices – a dynamic structure made more visible and powerful in the digital age. These everyday accounts focus on securing affective and respectful relations of work and community as the foundation of the public sphere rather than individual pursuit of maximal private reward to forestall fear and insecurity. The critique of the existing structure surfaces hopes for structural transformation, also made possible by the digital age. In their critique of intellectual property law and hopes for a sustainable future, everyday creators and innovators champion a system in which trust and interdependence predominate and practices of sharing, collaboration, transparency, and reciprocity advance science and art.

1. Incumbency Bias and Civility Breakdown

Descriptions of intellectual property harms initially appear personal. And yet when generalized, they amass into the common bases for law's coercive intervention to prevent the most extreme and basic forms of societal injuries: physical violence and unjust forms of dominance such

as threats. Accounts from everyday innovators and creators are replete with examples of these basic and deeply-experienced harms that often travel in metaphors for real violence. For example, a software engineer and internet entrepreneur describes how "all the companies that I work for, we all file patents. And we are pretty cynical about it … we don't think these patents are really necessarily going to ever be worth anything … except in this whole morass that is people wagging sticks at each other and saying, 'I am going to sue you over your patents.'" More explicitly, a pharmacologist and IP attorney who works in the medical delivery business depicts violent threats in the context of asserting intellectual property rights in gendered terms evoking patriarchal dominance. "To be totally frank with you, I'd say about 95% of the time, it's men spraying testosterone. Which frustrates the crap out of me. It's so unethical." An e-commerce entrepreneur on his second successful company uses softer language with the same effect, describing aggressive patent assertion entities as having the capacity "to level this company … [and] put us out of business" if they wanted to.

The language of physical violence and threats of physical destruction also describes extortion, the criminal offense of obtaining money or property from an individual or institution through coercion. This is a related injury that like physical violence resembles form of basic societal breakdown or disorder. A general counsel of a digital technology company describes her experience with aggressive IP owners as "extraordinarily painful" because "companies [are asked] to pay extortion in order to basically just make the [IP] litigation go away." The language of physical violence emphasizes the experience of wrongdoing that resemble assault on a person or property, which is the law's basic purpose to prevent or punish. But the professionals also emphasize an imbalance of power related to size and influence, which is often central to successful extortion schemes. Company executives describe the threat of patent litigation as a "shake down," for example, beginning with "unsophisticated small companies that don't have a lot of patent experience." After developing a record of settlements, these same IP holders pursue larger companies and are able to settle for higher financial sums. As one General Counsel said, "they really identify the weak links in the chain [and] … go after them" as a strategy. Those who have the "bigger stick" or can withstand the "squeezing" will survive the threats. In the background of these accounts of hurt and fear is a system without balance, plagued by incumbency bias, and whose civility norms have broken down.

By "without balance," I mean disproportionate outcomes given the quality and quantity of inputs by participants. And by "incumbency bias," I mean the perpetuation of exclusivity and exclusion through past successes, whether justified or not. The latter has been analyzed in the socio-legal literature in terms of "how the haves come out ahead."[9] The critical factor in the interview accounts is not, however, that the repeat players succeed because they have learned to play the game, but because their relative wealth and influence from past successes accumulates to assure their dominance and future successes. Both a lack of proportionality and a rigged system that maintains existing power and privilege structures predominate in the accounts below.

A common complaint is that significant financial returns from intellectual property rights do not correspond to meaningfully inventive or creative work. That is, the money made is out of proportion to the qualitative assessment of progress of science and the useful arts. Moreover, the wealth generated does not predictably return to those doing the work in the first place. For example, a telecommunication entrepreneur describes invention in the software industry as

> "this giant body of knowledge that … most of it was invented before there were computers, and now people are adding to it a little teeny bit … and are saying 'Well, now that I have added a teeny bit, … you can't send e-mail to a mobile device because I was the one who thought about sending a text message to the device to tell it it had e-mail!'" Like, you must be kidding me! And yet, here we are: RIM is out $1 billion because some trolls got them on that."

A copyright licensing attorney, who works for a publishing company, describes criticism he hears about these same inequities relating input to gains. "They say, 'We think everything should be free because it's obscene how much money these people are making over here. I am working hard and I'm earning $60,000, and Lindsay Lohan is earning $60 million and she can't find her way out of a paper bag." This is an exaggerated report of the critique of windfall profits, but he's not wrong about the critics, some who are on the distributer (not creator) side like him. A music agent explains "Every time technological changes happen, the [music] industry just made more money selling the same music again, right? It's still the same music five times to the same customer, in a different format." This agent explains a basis for revenue inequity as technological change, which certain industry players can exploit more easily than others. Supporting this claim, a film producer describes frustration with platforms and archives that have accumulated troves of photographs and who hold creators and filmmakers hostage for essential raw material. "It is rare that the person that actually took the photograph still owns it and holds it, and is selling you the rights. Extremely rare. … most common it's collectors or historical societies often who have been given the material for free … who are insisting on getting paid for it to be used. I can understand paying for copying costs, and paying for processing, but oftentimes the pay goes way beyond that as a moneymaking venue."

These accounts contain complaints about disproportionality relating input to output from the system devoted to promoting progress of science and the useful arts. They come from those self-described as caught in the middle and who are being asked to pay high costs to participate in a system that depends on creators and innovators but that fails to pay them as if they are fundamental to its functioning. In their view, small contributions should reap smaller rewards, and smaller contributors should not be able to exploit the system to crush competitors or other participants who are also attempting to make money in an iteratively innovative environment. Those who labor within the system express dismay at the disproportionate earnings that are unexplainable by talent and instead explained by timing and short-lived market fads. Sometimes, the wrong people are making the money: not those who created the work, but those whose luck or existing privilege enables them to cash in and exclude others. The same music producer describes a specific example in terms of the technological trends feeding off independent musicians. "Bose suddenly has a section on their website to just sell their PA systems to independent musicians. You have got Sonicbids and OurStage and these companies – Nimbit … that have popped up … to help these independent artists reach everybody. But also, let's be honest: they know that 80% of the money that they are making are not from people who are going to have long-term music careers." A film producer told a similar story. The photo aggregators are making all the money, while those who made the photos or use the photos to make other art struggle to make ends meet. This doesn't make a lot of sense to those who work to support creators and innovators in the first place, or who depend on their contributions to thrive.

The most extreme version of this critique of windfalls and proportionality may exist within the debate over non-practicing patent entities, those who "scoop[] up a handful of patents and … start[] suing people," as one technology CEO said. He explained that such an entity, who was really a single person, "made millions of dollars, and it's deplorable. … He does not sell a single good or service. All he does is shake down companies." The CEO compared this abusive practice to what he believed the Constitution actually envisioned when it assigned to Congress the power to grant patent rights, which is to define rights between inventive competitors so they may recuperate investment in their work to develop and commercialize it for the public. As the CEO explains, the non-practicing entity "does not conduct any business at all. He is not the inventor – he went out and bought [the patents]." This echoes the critiques above as those reaping the most rewards appear to have invested the least or whose contributions to the underlying creative work or invention is the smallest. Of course, we could dispute whether a platform's aggregation of photographs to make them viewable and searchable is a lesser contribution than the making of the photographs themselves. And certainly, the ability to access music across multiple devices is not a small feat; moreover, it is something music fans desire. And so, at the heart of many of these critiques is not only the bloated arbitrage in the innovative eco-system, but that those producing the underlying creative and innovative work, which is resold or leveraged by others, experience business as hostage-taking because the system feeds off the very work they do. They see little of the professional or personal upside.

Indeed, interviewees use the term "hostage" when describing their experience engaging in what should be ordinary business dealings. And they describe "coercive" contracting situations, in which the more powerful party can and does set terms. Like a "feudal lord," the person or entity exerts control to satisfy "rapacious" tendencies, to protect their incumbent position, and to minimize their own risks at the expense of others. A filmmaker explains below. She says she is not disappointed in

> "necessarily the rules [of copyright], although those are difficult. What's disappointing is that people control access to those images, so that even if they don't own the copyright, or they cannot legally restrict the copyright, if they own the image, they can restrict your making a copy of it [because they have physical control], … and hold you hostage for inordinate amounts of money."

A computer scientist, who is also a founder of several successful start-up companies, recounts a similar history of copyright licensing as "feudal."

> "[What is] happening with software licenses, and then with music licenses and with other licenses … [is] we were moving to a world where there's an infinite number of things for rent, and no market to determine what's the value of the thing that you're renting. Because if there are ever an infinite number of houses for rent the cost would be near zero to rent. So there has to be something that controls the number of copies that are available to rent. But instead we've moved, in the software model, to infinite rental model, with sort of a feudal lord setting the price. And this really bothered me."

Not only small entities or individuals launch these critiques. People with diverse and broad experience in IP businesses confirm the existence of cutthroat commercial dealings. An IP attorney who represents both authors and publishers claims that book publishing and even movie production

are less "rapacious" than the music business. "You want to talk about an industry that grinds its authors into the ground? You talk music."

Behind these critiques is the sense that creators and innovators have very little choice but to accede to the will of the intermediary or to a system that favors the scale commercializers rather than the individual creator or innovator. One painter, with successful gallery shows and a growing reputation, complains that "people who buy a lot of art just think they can walk in and get what they want." And because of the price instability of paintings, he feels particularly insecure about how to engage buyers without being exploited. Another artist, a sculptor whose livelihood depends on public commissions, describes the "gallery museum world" as "corrupt" whereas the public commission process is entirely "based on honorable trust, it really is. The reality is that I say I'm gonna provide a good-quality product, and they say they're gonna pay me, and I'm trusting them, they're trusting me." Another sculptor with a busy public practice was less sanguine, echoing the coercion others report. She says

> "theoretically it's a contract negotiation, in practice the city attorneys already got it down and they're not about to change almost anything. I've had some battles over certain bits of language, and occasionally I got some accommodation, but usually it comes down to take it or leave it. You want a job? Sign the contract."

The "take it or leave it" approach to selling one's work may be the price we pay in a competitive market economy, but the lack of trust artists describe undermines the virtue of open and fair markets. It also suggests a hierarchy of access and privilege. Those already with significant wealth or economy of scale, control the welfare and opportunities of others, even if the new entrants or everyday artists and innovators provide essential fodder for those on the top. To many, this appears not to be fair competition but unfair advantage. Even the business people who describe being overpowered by large or aggressive entities claim the problem is not normal competition but an attitude and strategy of taking advantage through scale. "So because we're selling to so many large companies, those procurement people … [have the] job to just absolutely minimize the costs on everything. And so they will take advantage of you. … they're famous for just squeezing people until they scream, until they die." Another entrepreneur describes clients who seek to license his software as "almost coercive" because they contractually limit service charges for on-going maintenance putting "us on the hook to do a lot of additional work for them" without any extra pay. Again, one might say, unequal bargaining power leads to these kinds of inequities and it is not the IP system's job to fix them. But when IP lawyers and companies with commercial leverage describe systemic distrust as part of intellectual property regimes, IP as a system of law fails to adhere to basic rule of law principles such as transparency, reciprocity, and accountability.

> "[There is substantial] distrust in the trade side of the business. And that's largely a perception of inequities and royalties, and royalty calculations and reporting, which I'm sure are probably true to some extent. Royalty processing and payment, and financial systems and the trade side of the publishing business has not always been of the highest quality."

This IP lawyer admits to accounting mismanagement, lack of transparency, and the likelihood that fees legitimately earned do not find their rightful earner. This contributes to the portrayal of a system built on a broken promise (or mislaid assumptions) of open markets and fair competition

to promote progress of science and the useful arts. The experience of individualized subordination or domination accretes into the larger system described as being sustained by these abuses.

A predominant effect of the distrust, coercion and disproportionate rewards is a system that accumulates wealth and power for those already advantaged in the game. This leads to a sense that the system is rigged against the newcomer or the everyday creator or innovator. An advertising executive seeking to become an independent filmmaker describes protecting his copyrighted content from misuse by established players, such as platforms and other major distributors, saying it "would take a lot of energy [to sue], and probably I wouldn't win, cause they have big film studio lawyers and I just have me." A telecom engineer and entrepreneur, who already successfully sold several companies, said something similar with regards to patents and resource allocation within the industry to promote more innovation. Describing a patent pool in video-streaming technology and the participation by some leading companies, he says

> "if you are a chipmaker and you are Philips, then you are loving it, because you contributed tons of the fundamental IP to MPEG, and so you don't have to pay a license. Whereas the Jessica and Dave Semiconductor Company has to pay a high fee."

The overwhelming sense from the interview accounts is that there are "insiders" and "outsiders" in the system, those who have and quickly accumulate leverage, and those who don't and are unlikely to. The description of "haves" and "have nots," or exclusion and inclusion in a system of opportunity, is also a picture of polarization – of giants and nobodies. There appears to be few companies or individuals who form a "middle class" of the creative or innovative enterprises, creating a specter of scarcity and fear. If true, or even believed, the system reproduces its own polarization and paradoxically generates claim for stronger protections for those who claim its protection at the same time as leaving those most vulnerable to venal forces that are described as unrepresentative of most of those who seek to participate.[10]

2. Deleterious System Effects on Quality and Process

Creators and innovators resort to tactics they call "playing dirty" to survive in a system that seems rigged against them. When being sued by a non-practicing entity, general counsel of an educational software company said "the worst thing you can do is settle, even if you get a favorable settlement" because that only encourages the plaintiff to continue with its litigation strategy. As an example of playing dirty, this lawyer said, "I wante[ed] [the plaintiff] to remember that [our company] … was a royal f'in pain in the ass. That we were cheap; that we wouldn't settle; that we gave him a million pages of toilet paper [in discovery], and that he wouldn't want to sue us again." Another IP lawyer at a small energy start-up describes how engineers and business developers in his company leading the most growth momentum frequently are "looking to get the edge. [They are] always looking to game the system" regarding patent filings, regulatory compliance, and contract negotiation. In the context of this interview, he speaks admirably about his colleagues, but like others he understands that playing by the rules (whatever those are) is not always advisable. Breaking them is better. He says about these colleagues

> "They were probably horrible juvenile delinquents in their youth. … Just from dealing with them on a day-to-day basis on all sorts of things. … They are looking for: how do you get

around this? If this is what it is, then how do we get around it? Or if these guys say they're doing this, well, so we can't do exactly that, but what if we do *this*, which is analogous to what they are doing?"

It is an arbitrary and capricious system that requires flouting the rules to survive or thrive, or that makes you a sucker for following the rules in good faith. In fact, such arbitrary and capriciousness is no law at all. On the other hand, some flexibility in the law – or in any system – enables adaptation and accommodates diversity of participants and contexts. Within the structure of IP law, however, the system is not simply described as flexible to achieve its overall goal of "progress of science and the useful arts." In this system, ordinary creativity and innovation practices underperform unless combined with rule breaking.

Creative and innovative professionals describe the IP system as having "plaque in its arteries" because it is "stopping the circulation of good ideas." This complaint is less about individual people or entities (although sometimes it is) than about a system that enables and even encourages hold-out behavior that stifles innovation and dissemination of science and art. A composer and theater producer described the problem of avoiding copyright holders to license their material because the "downside is if I brought it to [their] attention [they'd say] " 'You can't sing this ever,' [and] it means that all those kids next year won't get the chance to sing it." A telecom entrepreneur describes patent enforcement that prevents interoperability that

> "dramatically shrank the market for CDMA. So there's a great research opportunity to go figure out how that happened. I don't know if we got as much innovation and as much progress, because we pretty much had to let [the patent holder] do all of it."

A genetic biologist, who is also a trained attorney, describes hold-outs in her field who say "'No, we're not sharing anything' even when it really has no competitive advantage, and then you just garner ill-will in the field, as opposed to good will." These accounts of slowing or stifling the promotion of progress, which is defined as circulating ideas and developing new ones in a competitive environment of "good will," are explained through legal assertions of IP that undermine the system's goals. In this way, the system is characterized as diseased or infirm. As a filmmaker said about her frustrations with copyright licensing requirements, "at some point we need to come up with a system that does not preclude future generations from telling about our own patrimony and history."

The system inefficiencies stem from the sunk time to design around the exclusive right and the costs of avoiding the risk of an infringement lawsuit. Accounts from everyday creators and innovators imagine system efficiencies – a greater good in collective and harmonious actions that might sometimes also feel momentarily like an individual sting. But that is okay when the system works as it should. A software entrepreneur who is also a patent inventor describes his view of the problem this way:

> "It's a double-edged sword, right? On one hand, you want to have a patent if you come up with something really cool, because you want to prevent competition of using the same idea. But it has to be not a trivial idea. And the Patent Office cannot figure it out, what trivial and what not-trivial is. I don't know what the right solution is, I honestly don't, but if you come up with an interesting way of solving a problem, it should be patentable, on

> the one hand. On the other hand, you're forcing me to innovate around a patent, which I can almost always do."

The source of the problem in this case is a system that fails in administering the critical rules of novelty that justify the costs of exclusivity and the inefficient design-around behavior. One might say that design-arounds are exactly what the patent system (or copyright system) seeks; more work in a related field done in different ways is the kind of robust competition the IP system anticipates. The problem with this view is that creators and innovators believe that design-around processes, when patentability bar is so low, wastes a lot time and money; and, design-arounds don't address the real needs for exact uses, interoperability, quotations and references, and derivative works that may be fair use but are too risky to pursue. Moreover, design-arounds can still lead to liability or the specter of legal risk, which businesses then spend huge amounts of money trying to avoid. This happens increasingly when companies insist on indemnity provisions (or fight over them) and when institutional partners insist on policies of not "accept[ing] any liability whatsoever," as IP lawyers report. As one such lawyer with over forty years in the field said, "businesses waste a staggering amount of money trying to avoid liability for infringement, because it is a huge tax." He is talking about the costs of litigation, which is often described as ending without satisfaction for either side. Lawsuits are described as having "nuisance value" and "dragging on for a long time … [and] finally settle with a nominal payment." Progress of science and the useful arts slows when companies spend time and money not on innovation but managing risk of legal liability. An IP system that produces an outsized risk of infringement liability compared to the possibility of rewards from exclusive rights and novel innovation does not promote progress, except in the form of lawyers' financial wealth.

An effect of a system with these characteristics is not only that its products are slower to arrive or more costly to make but also their quality may be compromised. Creators and innovators describe this happening in several ways. The first is as a "race to the bottom," in the words of a biotechnology lawyer, who describes how grandiose goals or cut-throat behavior diminishes the possibility of anyone achieving or benefiting. We heard this above in the accounts of hold-out behavior. Several lawyers and scientists portray the problem as shooting for the moon and therefore missing other opportunities. An IP lawyer described this problematic behavior in his pharmaceutical clients, who tell him,

> '"We're only interested in drugs that'll generate a $1 billion or more of revenue.' But the mistake they are making is, there are many ways to get to a billion. You can have ten drugs that'll make $100 million each, or you can have one drug that'll make a billion. It's very hard to always hit a homerun. And so Big Pharma has backed themselves into a huge corner."

Technology entrepreneurs portray this same phenomenon in their relationship with venture capital funds. A computer scientist and software developer reports that

> "VCs haven't figured out how to deal with a normal company, which is not Google. Which is not gonna go public and [make a] gazillion dollars, … They want at least two companies to win big, versus everybody to do well. So you're sort of screwed, because you're forced to take huge chances … they're cowboys, they, you know, they shoot from the hip, and they want big returns, and they wanna look cool. And they actually think they know something. Actually, in reality, they don't know shit."

These kinds of races-to-the-bottom precludes or nullifies opportunities for iterative creative and innovative work.

Second, a sclerotic system that induces risk-averse behavior produces mediocre instead of cutting-edge results. Speaking about juried art contests aiming to reward and highlight the best public art, a renowned sculptor says the compromise at mediocrity is disillusioning. "What happens is that three members of the jury will feel very strongly about one, and three members will feel very strongly about another. They'll both agree on a third one, so it's kind of the person who is the least -- for which there's the least amount of objection. Which I don't think makes for the best art choice." Quality-compromises stem from battles over control, which may relate to liability issues, financial risk-averseness, superficial metrics of sell-ability, or what one scientist calls "packaging."

> "The way you make a living [in science] is you get paid by sponsors to play on their team. But that's pretty horrible. The sponsors are pretty horrible. … I really didn't like the politics in science. … I remember the first time I went to see [my mentor] and he's got this little cartoon on his door It says 'Packaging isn't everything – it's the only thing."

What may seem like small qualitative differences to sponsors, clients, or audiences are in fact significant compromises to the work quality, according to creators and innovators. For example, artists contend that commissioning entities regularly require waiver of rights of control under the Visual Artists Rights Act to continue with installation, which, as one world-renowned artist described as "awful. It has been to my detriment because I have lost control over the lighting, which is very important to me." An information-architect who designs information systems through website interfaces describes similar pressures from upper-management. He recounts a disagreement where he contended that he told his manager:

> " 'I don't approve of this. We designed it one way, we tested this way. I can't get behind this.' She was like, 'I need you to get behind this.' I said 'I mean, I will do it, but I can't tell you it is the best solution because we have already proven that it's not.'"

These pressures are often motivated by finances and aversion to cutting-edge creative and innovative work, which may be ahead of its time and prone to less significant up-sides. A system devoted to innovation and creativity should not diminish risk-taking, but enhance it. A creative director for his own brand-development agency explained he started his own company because of his prior employers' aversion to pursuing cutting-edge creativity.

> "The publishing company that I was working for was bought by a huge corporation, and they decided that everything was going to be bottom-line, straightforward, streamlined, and assembly line. So there was no really creativeness going into book publishing at that point. [My friend] called and said, 'I want to start my own company.'"

It feels impossible to extract oneself from the system producing these compromised results. But many creators and innovators describe how working alone (as a consultant or independent contractor) can minimize the compounded harms of multiple, integrated systems that compromise their high-quality goals as measured by standards in their field. Some eschew IP or contract lawyers altogether – as one artist said, hiring a lawyer "was the silliest waste of my money" – others opt-out of the for-profit system with (as they claim) its distorting financial goals. Whatever

coping mechanisms exist, however, for most everyday creators and innovators, the intellectual property regimes form an inescapable backdrop to their work that produces these unwelcome distortions of quality and process.

But hasn't the digital age and the internet's connectivity enabled so much more creativity and innovation, smoothing these rough problems, or at least compensating for them in other ways? Many creators and innovators have accepted the positive and negative effects the digital age networks have had on their working practice and its output – accepted in the way one accepts that we all age, and aging is better than the alternative. There is no real option of going backwards. People make do, as I explained in an earlier study of everyday creators and innovators.[11] Nonetheless, they have specific complaints related to the quality of the work that is produced and the effort that good work requires to be noticed and valued sufficient to make the labor worthwhile. These sentiments are sometimes explained in terms of abundance, scale, and crowding out. For example, a film producer and advertising executive says "I'm the biggest music fan, … but I like music less because it doesn't feel special anymore. It's so cheap." The move from albums to individual tracks, from investing in tangible, expensive products (like albums and CDs) to digital intangible digital downloads or subscription services, has left many pondering whether the affordability of a much larger volume of music has led to a homogenization of music production and listening tastes.[12] Photographers echo this sentiment, emphasizing how it not only takes more labor and investment to be noticed and paid as a professional photographer but it is more time-consuming to share photographs for profit or just for fun. A photographer who retired mid-career as a photojournalist to join a family business said:

> "the world is awash in crappy photographs... When a relative or friend says, 'Hey check out [photos of] my kid's blah --,' it's not just 'Look at this picture. It's slog on and wade through fifty [photographs] – I mean, it's my job, … [that's] the way I look at it. I'm working [to curate your photos.] Pay me. I'll tell which one you shoulda sent me, you know? This is the only one ever worth look at it. It's pollution."

These are complaints about diminished quality resulting from voluminous production and exhausting search costs for the work one values. It is also a complaint about the reduction in standards and the broadening spectrum of what we have come to accept as "good enough" music or photographs or other forms of creative or innovative works. I don't hear complaints about the democratization of creative fields per se; in general, creators and innovators embrace the possibility of the fields being open to newcomers. Instead, I interpret these complaints as about distorting what counts as good work towards which we should aim yet for which there is little incentive in a system that rewards accumulation and scale over excellence and distinction.

Rarely, however, do these complaints cause the creator or innovator to give up working (although the above photographer did stop making photographs for a living). Instead, people describe their resignation to a more precarious financial and professional situation to do the work they value. As one painter explains: "life is about survival … the difference between being able to be a full-time [artist] and having to go work in a library … has to do with livelihood. … what's the number? That's tough. It depends on whether you have a family, a lot of things." Another artist describes how some projects take all her time but sometimes commissions don't often pay like a full-time job. "So I had to pull out of other shows and solo shows, and stuff where normally they would sell things. So I just wasn't able to get those incomes that maybe normally I would be able to get."

Some creatives are in a better position to charge fees they can live on and are learning to balance income needs among projects by hiding fees in contracts and budgets. A sculptor who makes a living doing public commissions explains:

> "Some projects you make more money on than others. I make sure that I give my clients lots for their money. Sometimes I do it very cleverly, so I don't actually end up not making money. I make enough money on my projects, but I never make outrageous amounts of money. I give [my clients] a budget, but how much money I actually make they'll never know. … And that's the way it should be. When I had actually asked for twenty-five percent profit on something [explicitly in a contract], the lawyer [for the client] said 'What? This is outrageous.'"

Instead of being explicit about what this sculptor requires as a livelihood, she builds her fees into the budget, hiding her profit margin, which is her salary, to make the contract more palatable to the commissioning entity. Photographers describe a similar dynamic, where clients pay for labor and time, but balk at paying additionally for the photographs made – their reproduction and distributional uses. Labor and time (and equipment) is the cost of the photographer's work, the fees for the photographs is the income the photographer relies upon to sustain her business. As both are under pressure from low-end competition from amateur or emerging photographers in an increasingly visual, digital creative world, photographers describe having a harder time making ends meet. A Boston photographer with an expertise in food photography described it this way: "The digital realm I think has brought 'I believe that it's good enough.' . . . there's so much more content out there, and people are satisfied with less, I think. And that directly impacts budget and why they'll pay less. And you know I've seen budgets just decrease and decrease, and you know, once they pay less, why would they pay more, for something." The resignation and need for obfuscation in these accounts – building in a lack of transparency and a distrust of consumers and clients – feeds the critique of a dilapidated and tainted system in need of a reboot.

Financial insecurity is a regular source of stress for many creators and innovators, whose goal is usually to simply make enough to keep doing the work they do. They describe money being at the root of many conflicts with clients and fans. These challenging disputes concern "how much work [clients] needed to pay" and the feeling of "dispirit[edness to] .. pour[] your heart into [the work] and spend thousands of dollars … and get[] a .03% reward." A documentary filmmaker says "I am burdened with paying sometimes hundreds of thousands [of dollars] … in archival licensing fees [for music samples]. I am burdened with having to pay that stuff." And yet she pays. But her fees to distribute, perform or otherwise license her film barely cover her costs, if they do. She runs her production company largely on grants and investors, unable to sustain the filmmaking with intellectual property revenues that she nonetheless pays to others to make her films.

Sometimes, the creators and innovators sound almost fatalistic about their work. Most continue working at their profession because they are passionate about it and can make ends meet. But the system of capital investment and market competition in labor and expertise, grounded in owning the result of one's labor (a film, an invention, or a piece of art) and selling or licensing it to others for a marginal profit that can grow over time, doesn't work for them the way the hegemonic story of capital goes. Surplus value and costs of necessary resources like distributional platforms, time, assistants, space and material do not align to produce sustainable and predictable livelihoods for those invested in doing the work from the ground up. Without aid from an institution or organization that pays them separately and often reaps most of the rewards as owners

or proprietors, everyday creators and innovators describe a system in which they play a part but that doesn't support them or their interests.

Creators and innovators describe a system that largely exacerbates their sense of financial and relational precarity. They don't have enough resources or trusted affiliations to continue working predictably. The precarity does not extend to the intermediaries: lawyers, distributors, licensors, and large employers, who may also be clients or purchasers. Interviewees describe difficulty in productively managing their investment in their work – what they put in and what comes out. They also describe those who benefit from that investment as less often the creators and innovators but those who use, purchase, and build off the work. These are the institutional actors and those at the top of institutions, not the individuals who work with or in the institution. They may also be anonymous consumers. This results in a feeling of individual exploitation. The lack of a sense of shared fate among the many essential aspects and actors in the system – the individuals, the audience, and the institutional partners – drives those aspects and actors apart and forces them into defensive postures.

As described more below, creators and innovators critique the system's misalignment with personal values and morals. They also complain of its failure to explain how each person or institutional partner may be integral to the health of creativity and innovation at large and thus should be individually sustained for the good of the whole, even if at the cost of a net sacrifice to one part to feed another. The systems' deficiencies become personal for its failure to attend to that which is the profoundly personal – one's sense of belonging, value, and opportunity in increasingly congested and capricious socio-economic times.

3. Interdependence Rooted in Moral Consensus

Creators and innovators describe a system failing to promote individual welfare and a shared fate in progress of science and the useful arts. In addition to the systemic flaws just described, relating to proportionality, inclusivity and opportunity, risk-reward calculations, and quality, creators and innovators describe an IP system that does not reward truth or dignity. If this seems like a melodramatic claim, it nonetheless resonates with the language and explanations creators and innovators provide for basic and fundamental problems in their working lives.

Some of the most common and extreme complaints that resonate with fundamental values but are symptomatic of systemic flaws are those relating to lying and what is described as "stealing." Writers regularly summarize, quote, and borrow from other writers and researchers as a matter of practice and craft, but they nonetheless and fiercely criticize instances of plagiarism – copying without attribution. One writer and journalist said

> "if you look at cases of plagiarism in journalism where it's become a scandal … it usually involves stealing – never just stealing an idea. Always stealing not just the idea, but actual quotes from people. I mean, that's really going over the top. … I mean, it's fraud, because you are pretending that you spoke to this person when you didn't right?"

In the science and engineering fields, this kind of lying or stealing occurs through misrepresentation. Scientists and businesspeople confirm that more than copying without payment – infringement – the "bigger problem" are misrepresentations in client negotiations or false

advertising among pharmaceutical companies about quality testing results. Some artists and scientists even claim "idea stealing" borders on criminal, like theft or fraud. "My simple analogy is, I think it's wrong for other people to steal other people's homework," one biotechnology lawyer explained in the context of commercializing another's research results without asking. An artist complained about the copying of her conceptual idea for an art installation, saying "it feels kind of dirty, like 'Yeah, they must be stealing something.'" And an author of multiple children's book series distinguished "stealing" that crosses the line – "I would mind greatly if someone stole my idea" – with the expected and encouraged creativity built upon more generic and generic or descriptive concepts. Referring to her own genre of books, she shrugs saying, "but … another horse series? No I don't mind at all."

What these examples share is the personal affront to the "stealing" or lying: pretending you are someone you are not and did something you did not do which degrades another human being. In order to accomplish either, the thief gleans off another's work and personality, perhaps even claiming to be that person or personality on the basis of claiming as yours the work that another did.[13] Artists and scientists are quite tolerant of creative and inventive borrowing described as necessary or usual for developing work and teaching the doing of it in the first place, as the previous chapter illuminated. But many artists and scientists nonetheless distinguish those inevitable borrowing practices from personality theft that also accompanies lying about the origin of the work and benefiting from that lie. "I'm not going to go crazy about slippery slopes in the claim of ownership," one filmmaker said with regard to inevitable collage and mash-ups that happen in the digital age, "as long as people are not claiming ownership of something they didn't do." To some, this may seem contradictory and an impossible distinction. But understanding the essential difference between a fair situation and one that is unfair is critical for explaining what everyday creators and innovators consider broken in a system aimed to promote the progress of the work they are committed to pursuing.

Are these complaints about rogue bad actors in a culture of creativity and innovation that is otherwise reliable and trust-worthy? Or are these complaints about a society and system that is fundamentally flawed? Considering the above-described discursive patterns concerning systemic failures, my conclusion leans to the latter. And yet endemic to American culture is to blame individuals and not institutions. The celebrated story of "authors" and "inventors" with the IP-enabled dreams of fame and fortune generates a mythical tale of origins located in the individual, a dominant story that effaces the socio-economic organization of action and power.[14] We rarely blame or reorganize institutions when we can otherwise blame "the bad man" for the injury or insult.[15] Who was blamed amidst the professional scandals of the past decades concerning tobacco, accounting, and big banks? The tobacco executives who lie, the accounting executives who steal, and the bankers who exploit regulatory loop-holes to make billions of dollars while thousands of other people lose their homes. Sometimes, a few people go to jail. Some others are pay large fines. Left relatively unscathed are the business and legal institutions that reinforce each other by reorganizing and continuing to accumulate wealth and wield control. Occasionally come calls for new or increased regulation to the existing system. But the problems reoccur. And the people injured receive little relief and are unempowered to make significant changes (e.g., those addicted to cigarettes or left without a home or retirement savings).

How do we connect the individual infractions with the structural flaws of the systems in which people participate? And what explains cycles of ineffective reform or revolution? Some

suggest that methodological, political and economic individualism suffusing American culture and scholarship explains the failure to recognize the supereminent role of deep social structure.[16] Neo-liberal economic theory, dominant in the mid- and late-twentieth century in the United States, draws its force from the belief that society is an association of self-interested individuals whose wills and desires accumulate and compete, justifying free market mechanisms to maximize those preferences. C.B. Macpherson's critique of this "possessive individualism" focuses on flaws of political liberalism that derive from its emphasis on individual liberty instead of social obligation and also on the view that individuals "own" their personality and capacities without reciprocating commitment or responsibility to society for either. Moreover, the spread of pluralism and moral heterogeneity, celebrated for many good reasons, may undermine cultural solidarity and the sustainability of social interdependence based on moral consensus, fueling the commitment to isolated independence in the form of individualism.

Intellectual property law reproduces the problem of seeing only individuals and not social organization by explaining creativity and innovation as incentivized by private property rights produced by "authors" and "inventors." So deep is the hegemonic tale of individualism in IP (and U.S. law) that theoretical concepts such as "markets," "merit," and "pluralism," for example, are not about how systems and institutions work to sustain certain forms of authority and power but are stories of individual people, preferences and their characteristics. This is so even as United States IP law has developed to account for new business organizations – institutions not individuals -- such as large employers who nonetheless are called "authors" under the Copyright Act, and new business practices that aggregate patents even if they are not themselves inventors and the patents not immediately or obviously useful or valuable. Despite describing new corporate practices and organizations, IP law's explanations for these practices embed theories of self-interested hard-work, market efficiency, meritocracy and pluralism in line with liberal and neo-liberal theories that take the individual (person or firm) as the relevant object of study. Doctrines such as "work for hire" designate employers as constructive "authors" for their strategic investment in the employees who create original works of expression. And contractual assignments of patented inventions are routine in both employment relations and private ordering in much the same way that freedom to contract is a baseline liberty in a free and open market. Defaulting to paradigms of individual agency and independent motives ignores the socio-economic structures that facilitates these practices leaving them and their critical features unexamined (their institutional authority, effects and justifications).

The specific and detailed accounts from everyday creators and innovators challenge this hegemonic tale of aggregated individualism fueling progress and explaining outcomes or expectations. Their accounts describe social structure and context that predictably shapes opportunities and reveals moral preferences. In contrast to a market-determined outcome based on aggregated, independently-determined preferences for creative and innovative work and misdescribed as "objective" or "neutral," everyday creators and innovators describe a system that predictably underperforms according to reasonable measures of fairness, proportionality and quality. Moreover, according to the everyday actors in IP rich fields, the intellectual property system fails to promote progress of science and the useful arts because it provides benefits only to a select few. And, this happens repeatedly. What IP law in its individualistic outlook may consider uncoordinated and random winners and losers in a system that sets a consistent standard for creators and innovators to be IP originators, everyday creators and innovators consider a gambling system where the house invariably wins.

Contrary to the individualist outlook of IP law justifications, everyday creators and innovators describe social organization and patterns of behaviors that cultivate *interdependence* among its actors. This interdependence may be obscured in light of dominant theories of individual agency but it is nonetheless apparent to everyday creators and innovators and described as critical to sustained good work and opportunity within their creative and innovative ecosystems. Invisible interdependence (or hidden structures of organization) hides the basis of normative behavior, for example, practices of sharing and borrowing that form structures of implicit cooperation. But empirical accounts from everyday practice surfaces these norms and ethical concerns. Protests of injustice or system failure resemble complaints about misaligned values or disagreement about basic moral principles – about lying and disrespect, for example – that corrode and render irrational or unfair the systems and social structures in which they are situated. This is consistent with the complaint that the system fails to acknowledge what is most important to its subjects and participants. In so complaining, criteria emerge for ethical action by identifying the array of deep value preferences among creators and innovators and anchoring them to the structure of interdependences they recognize as inevitable and necessary. These criteria, such as wage equity and respect for professional relations, truthfulness and transparency, which they expect to be embedded in the structure of work, optimally defines the conditions of production in art and science in the digital age and therefore promotes the progress of both.

Indictments of value misalignment run throughout the interviews, especially when creators and innovators draw on examples of infringing behavior for which the IP system should (but may not) account. Examples of value misalignment range from failure to pay for copies made (a value of labor argument), to concerns over caring for the work by others who possess or use it in ways that are "humane" and "respect[ful]" (a dignity argument). For example, general counsel for a copyright licensing clearing house explains his company's philosophy of copyright in terms of a pitch to possible customers:

> "It's the right thing to do to respect the fact that people are creating things that you're using. You pay the electric company, you pay the landlord, and you pay your employees, you pay the paper company that delivers the paper you put in the photocopier – why aren't you paying for the stuff that goes on the paper in the photocopier? And people will get that because it's an input and the prices are not absurd."

This explanation resonates with the "if value, then right" argument, which can be problematic for copyright because it ignores crucial copyright limitations and exceptions such as fair use and first sale that make copyrights public goods not private property. But this explanation is nonetheless characteristic of many IP ecosystem members who rely on revenue from usage fees and permissions to continue their work and who reasonably worry about being unable to continue. (We will see more examples of this in the next chapter about digital photography.) A brand manager provides the compromise most creators seeks in terms of copying and compensation in the context of proliferating fan fiction in the digital age.

> "If [a fan] did a carbon copy of the original show – I mean straight from a Xerox machine – [my clients would] … be angry. But there were more people who sat there and said, 'look: [this fan] is respecting [the work], but yet change it in such a way that we all can enjoy it."

The notions of "respecting" the work and "humane" uses of it share qualities of avoiding denigration and preserving the ability to be appreciated by others. This same brand manager further

explains that his clients accept fan fiction from their works as long as fans "adher[e] to the core values of the characters," which I interpreted as preserving the characters' integrity in the manner we might defend ourselves against reputational and dignitary injury.

These are excusably vague behavioral norms, originating as they do from the descriptions of personal, material, and existential transgressions that nonetheless resonate with the explicit values of equality, privacy, and distributive justice in the previous chapters. They return us to values fundamental to contemporary democracies with origins in "ordered liberty," a liberty that necessitates constraints and structure (the rules of law) to offer meaningful opportunities to thrive for its members. As an in-house IP lawyer for a publishing company explains, he counsels his company to refrain from suit except under very limited circumstances when it's "clear infringement, … a no-brainer" because "we need to take a principled stand. We just can't go in there and try to leverage our property rights in a way that's inappropriate." The animating idea behind "principled" restraint is that creators and innovators are invested in the same system. This lawyer, like many clients who do the work rather than those who shepherd it, perceives the whole system of which they are a small part and in which forbearance and mutuality are key to it working well. The articulation of an ethics for engaging with each other generates a culture and sustains communities of creative and innovative practices that are defined by a sense of shared fate in the future of good work. Everyday creators and innovators describe an inevitable dynamism in their relationships with others working as they do. They see structure and relationality where IP law and its dominant explanation for incentives and productivity see isolated individuals. Moral consensus is elusive when the law and social systems are so misaligned. When the law and legal solutions see only individuals and not the structures on which we rely and that we instantiate through patterned behavior and expectations, communities fall apart.

* * *

At the turn of this century, the Supreme Court of the United States was asked to resolve a dispute concerning the ethics of the internet's inherent promiscuity. *Metro-Goldwyn-Mayer Studios v. Grokster* concerns the lawfulness of peer-to-peer file sharing and was born from the disputes starting in the mid-1990s about the legality of user-generated services and platforms that distribute copyrighted works. Uploaders and platform users infrequently own these works. Most users of Grokster, Napster and Aimster in the 1990s (for music) and of YouTube, Pinterest, Twitter, and Facebook in the 2000s (for images, videos and text) are visitors to the sites: they listen, view, share, and repost. The Supreme Court in *Grokster* was asked to decide whether the platform is liable for the users' behavior, e.g., for uploading and sharing copyrighted works without authorization from the copyright owners, assuming doing so was copyright infringement. In other words, the Supreme Court in *Grokster* asked whether these new, thrumming platforms were causing IP harms for which they should be responsible.

The case turned on the principle of "secondary liability," the legal wrong of the platform not the "direct liability" or legal wrong of the user. Metro-Goldwyn-Mayer (MGM) did not sue the people who used the platforms – that would be like suing their fans and consumers. Instead, MGM sued the platforms for facilitating and exacerbating the infringement. Secondary liability claims strategically avoid attacking essential stakeholders (such as consumers) and can be efficient and cost-effective to combat infringement because, when successful, the lawsuits secure the

highways of distribution without having to chase all those who drive on them. Secondary liability is an essential tool in the digital age to combat the whack-a-mole problem networked virality generates. It is used in patent law, trademark law, and copyright law.

The legal problem with secondary liability is assessing blame: not all platforms or manufacturers of devices know or can know what occurs on their vast networks and by their vast consumers. Is it appropriate to hold a platform liable if they are unaware of IP infringements committed by its users? In other areas of law, we consider this problem in terms of premise liability, and vicarious or contributory liability. When should the owner of a building be responsible for what occurs inside? When is a pharmaceutical company liable for the misuse of its drug? When should an employer be responsible for its employees' actions? When should we hold affiliated parties responsible for each other's behavior as collaborators or co-conspirators? These challenging questions often turn on a balance of knowledge, responsibility for acquiring that knowledge, and capacity to avoid harm that is specifically calibrated for a particular context. Landlords may be differently situated than manufacturers, for whom it may be cheapest to stem the harm for the most involved. Employers may be treated differently given their supervisory authority than loosely affiliated partners. What is the appropriate calibration in the context of internet platforms and should they all be treated the same? Related to this complex, normative question is whether too much liability for platforms – making them responsible for everything that occurs on their network – will be cost-prohibitive and shutter too many. Requirements of perfect control may close the highways bringing the 21st century productive eco-system to a grinding halt, or at least leave us with very few options.

The Supreme Court in *Grokster* held the platform liable, but it avoided these hard questions by defaulting to a paradigm of the individual bad actor. This solved absolutely nothing. And it was a surprising outcome because the Court at first seemed to appreciate the nature of the problem as based in connectivity, the characteristics of system functions, and the new institutional structures born through the internet. According to the Court, peer-to-peer systems include benefits of connectedness, sharing, improving public service, efficiency, and increased and de-hierarchized access to information and culture.

> [D]efendants . . . distribute free software products that allow computer users to share electronic files through peer-to-peer networks . . . . The advantage of peer-to-peer networks . . . shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. . . . Given these benefits in security, cost and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries among others.[17]

The Court understood that peer-to-peer systems enhance the capabilities of all users of the system and are based on values such as resource sharing, reciprocity, autonomy and iterative improvement through uncoordinated, collective action. This is a nuanced understanding of digital age technology as the product of complex relations and structures that serve the public good.

There was further hope that the Supreme Court would embrace the new problems of digital

technology by clarifying rules developed in the mid-1980s about copy and play technology, like the video cassette recorder (VCR). Those rules evolved alongside transformative digital age technology, absolving device manufacturers such as the makers of the photocopy machine, the VCR, and MP3 player of copyright infringement when these devices were capable of "commercially significant non noninfringing uses" (a phrase borrowed from patent law). Citing its 1984 case (*Sony Corp. of America v. Universal City Studios*) that effectively freed VCR technology and launched the movie rental (and later streaming) business, the *Grokster* Court twenty years later explained its reasons for that earlier celebrated decision:

> The doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one's products will be misused. It leaves breathing room for innovation and a vigorous commerce.

But instead of clarifying or extending this reasoning from older devices to the new platforms, the *Grokster* Court pivots. It avoids answering the hard question whether these new platforms are a systemic paradigm shift in need of a new analysis and instead holds Grokster liable on the basis of a well-established common law principle prohibiting the intentional inducement of illegal activity.

The Court says that Grokster engaged in "purposeful, culpable expression and conduct" that "foster[ed] infringement." It explained, "where evidence goes beyond a product's characteristics or knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement" – what the court later described as "clear expression or other affirmative steps taken to foster infringement" – the party or platform is liable for resulting acts of infringement by third parties, whether or not those third parties (the users) are held accountable too. Notice how the Court recast the dispute in terms of punishing bad motive or purpose, ascribing these individual features to the platform to address what is essentially a system failure. This recasting of the question presented is particularly disappointing given how well the Court explains that new digital age technologies generate structural complexities that as-of-yet IP law appears unprepared to address. The Court assures readers that it understood the importance that law not "upset[] a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement."[18] And the Court even explains the system's interconnected nature: "The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off."[19] These seem like promising overtures for digging deeply into the new contexts of digital technology to adapt legal rules for use by the newly surfaced and diverse stakeholders and the reevaluated stakes in our unprecedented networked society.

> "The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use filesharing software to download copyrighted works. This very breadth of the software's use may well draw the public directly into the debate over copyright policy … and the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection. As the case has been

> presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies."

This explanation highlights the risks and rewards of the digital age. It raises the specter of disdain for the rule of law and the opportunities from disruptive innovation. It signals an understanding that we seek balance in the system and that this is an issue of public concern as well as of private property. And yet by resorting to theories of moral culpability and "impos[ing] greater responsibility upon a defendant whose conduct was intended to do harm" the Court punted. It did nothing to stem the tide of the copying complained of by MGM and left open the hardest questions that have only grown more complex: about platform control and dominance, user participation and responsibility, and the nature and object of our mutual obligations to sustaining diverse and accessible creative and innovative environments.

Scholars and industry actors have watched and studied how *Grokster* utterly failed to halt peer-to-peer filing sharing of copyrighted works.[20] Whether it has also discouraged innovation is contested.[21] Some say *Grokster* set too high a bar for infringement by inducement. Proving "purposeful, culpable expression and conduct" is difficult.[22] Given this high standard, it is unsurprising that there have been very few findings of liability under the *Grokster* standard. More critically, however, we all rely on and celebrate the myriad benefits of peer-to-peer file sharing; these platforms are irresistible. Who doesn't share with friends a photograph, poem, news article, or song? We all do it through email, cloud storage services, and social media platforms. Another possible explanation for *Grokster's* weak legacy, therefore, is its failure to address the vital nature of the digital age terrain and how it has profoundly transformed human behaviors.

Addressing system-level liability and structural mechanisms of responsibility and power may seem more abstract and complicated than analyzing individual motive and intent. But we understand how to identify and describe practices and norms that coalesce into predictable systems with durable structure. We lack neither appreciation nor the evidence for prescribed ethics within creative and innovative communities, which includes sharing, collaborations, credit, truthfulness and transparency. We can study and explain these practices and expectations. Sometimes the systemic values anchoring the practices are amplified by their breach or absence, as accounts from this chapter reveal. But because they are predictable and desirable constraints on creative and innovative practices, they form the deep structure everyday creators and innovators rely upon and perpetuate with their own actions to do good work. For the IP system to resist engaging with these system values or structural characteristics and for IP law to instead resolve around individual motives and the protection of economic incentives reproduces the very problem the *Grokster* case was brought to solve: it decides the rules of community engagement by resting the decision on a single actor or action. We avoid this unsolvable puzzle by accepting the alternative accounts from everyday creators and innovators who demand an end to precarity-fueled rationales for control and exclusivity over creative and innovative work. We can address the new problems of digital age technology for creators and innovators by affirming the centrality of certain fundamental values in the systems that sustain their work and by dismantling the systems that fail to foster mutuality and interdependence among its members.

[1] Isabel Lorey, State of Insecurity (Verso 2015); Brett Neilson and Ned Rossiter, Precarity as a Political Concept, or Fordism as Exception, Theory, Culture, and Society, Vol 25 (2008) 51-72. See also Acemoglu, How States Fail (??) (extractive economies where elites rule over workers eventually fail).
[2] Ned Rossiter, Precarity/Fordism, 59.
[3] Julie Cohen, Between Truth and Power: The Legal Constructions of Information Capitalism (Oxford UP, 2019).
[4] Public sphere citations.
[5] Lewis Hyde, p. 6.
[6] Beebe, Aesthetic Progress.
[7] Shoshana Zuboff, The Age of Surveillance Capitalism.
[8] Wend Gordon, Of Harms and Benefits: Torts, Restitution, and Intellectual Property, 21 J. Legal Studies 449, 468 (1992) (investigating the nature of interdependence of copyrighted goods and the problem of requirement payment for all benefits reaped as destroying "the synergy on which culture and commerce both rest"). See also Wendy Gordon, Harmless Use: Gleaning from Fields of Copyrighted Works, 77 Fordham L. Rev. 2411 (2009) (exploring the reciprocity inherent in the authorial role as a basis for discerning harmless uses from those for which there should be compensation).
[9] Marc Galanter, Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change, *Law & Society Review.* Vol. 9, No. 1, (Autumn, 1974), pp. 95-160.
[10] Add/discuss: Some recent quantitative empirical work confirming the sense of outsized winners in the IP industry. Cite to Glynn Lunney, Copyright's L Curve Problem (2019) (describing data on the videogame industry whereby copyright overpays superstars, but does very little for the average author and for works at the margins of profitability); Beebe and Fromer, Running out of Trademarks (incumbency). Kristelia, Arbitrage; Patent Inequality papers.
[11] Jessica Silbey, The Eureka Myth: Creators and Innovators of Everyday Intellectual Property (Stanford 2015), Chapter 3 ("Making Do with a Misfit"). See also Promoting Progress.
[12] Case studies on music variability.
[13] Wendy Gordon, Harmless Use: Gleaning from Fields of Copyrighted Works, 77 Fordham L. Rev. 2411 (2009)
[14] Jessica Silbey, Mythical Beginnings of Intellectual Property, 15 Geo. Mason. L. Rev. 319 (2008).
[15] Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 459 (1897).
[16] CITATIONS; of course not all political or scholarly discourses fail on this score. Sociology and anthropology, some versions of political science, and certain schools of welfare economics, are the founding disciplines that interrogate structures and social organization as the essential disciplinary focus on which its disciplinary explanation of variable phenomena is based.
17.Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd., 545 U.S. 913, 918-19 (2005).
[18] Id. at __
[19] Id. at __
[20] Rebecca Giblin, *Physical World Assumptions and Software World Realities (and Why There are More P2P Software Providers than Ever Before)*, 35 COLUM. J.L. & ARTS 57 (2012); Annemarie Bridy, *Why Pirates (Still) Won't Behave Regulating P2P In the Decade after Napster*, 40 RUTGERS L.J. 565 (2009).
[21] See, e.g., Peter S. Menell, *Indirect Copyright Liability and Technological Innovation*, 32 COLUM. J.L. & ARTS 375 (2009).
[22] *Grokster*, 545 U.S. at 915.

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