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SYMPOSIUM CREATIVITY AND THE LAW

INTRODUCTION: CREATIVITY AND THE LAW

*Mark P. McKenna**

Creativity is on the American mind. President Obama routinely suggests that creativity and ingenuity are the keys to America's economic future.¹ Bill Gates emphasizes the power of creativity to solve the world's most pressing, and most difficult, problems.² But the creativity story is, of late, usually bleakly told: indeed, a recent Newsweek cover story proclaimed a "Creativity Crisis."³ Last November, a group of twelve academics gathered at the Notre Dame Law School to consider law's role in this story. What is creativity, and how does it map onto legal concepts like originality, novelty, or non-obviousness? What should law, and particularly intellectual property (IP) law, do to promote creativity? What can it do? Whose creativity does the law currently favor? These are big, interdisciplinary questions, and for that reason the symposium brought together experts from several fields: psychologists, an economist, and law professors with backgrounds in a variety of other disciplines, including anthropology, chemistry, comparative literature, and history of science. Each of the contributions in this volume can stand alone as an important contribution to the literature, but collectively they represent perhaps the

* Professor of Law, Notre Dame Law School. Thanks to all the symposium participants, and to Megan Dilloff, whose terrific work made it all happen.

1 See, e.g., Jon Garcia, *Obama and a Dozen Techie Titans: Creativity & Ingenuity Will Double Exports & Create Millions of Jobs*, ABCNEWS BLOG (Feb. 18, 2011, 3:45 AM), <http://blogs.abcnews.com/politicalpunch/2011/02/obama-and-a-dozen-techie-titans-creativity-ingenuity-will-double-exports-create-millions-of-jobs.html>.

2 Bill Gates, *Unleashing the Power of Creativity*, NPR (Sept. 19, 2005), <http://www.npr.org/templates/story/story.php?storyId=4853839>.

3 Po Bronson & Ashley Merryman, *The Creativity Crisis*, NEWSWEEK, July 10, 2010, at 44, available at <http://www.newsweek.com/2010/07/10/the-creativity-crisis.html>.

strongest collection of essays on creativity and the law that has been assembled in one place.

Olufunmilayo Arewa highlights a visual-textual bias that prevents copyright law from fully recognizing the wide range of musical creativity.⁴ As Arewa notes, “music copyright both reflect[s] and ha[s] an impact on sociocultural contexts of musical creation, dissemination, performance, and consumption.”⁵ In particular, Arewa argues that copyright pays insufficient attention to actual musical practices, where improvisation is a core aspect of creativity. “Improvisational practices,” Arewa explains, “are . . . closely associated with innovation and creativity in varied contexts,” yet copyright “largely fails to facilitate the creation of improvised works.”⁶ It fails because copyright overemphasizes written musical texts and fixates on threats to ownership and compensation for creators of those works, ignoring the risk to unwritten creative practices pervasive in jazz and other musical forms. The visual-textual bias, in other words, rewards certain creators, and certain types of creativity, at the expense of other creators and different forms of creativity.

Mario Biagioli takes aim at the foundational myth of the “romantic genius,” arguing that the kind of creativity attributed to the creative genius “can in fact easily undermine the very notion of property it is deemed to have established.”⁷ Biagioli attributes much of the romantic genius notion to Fichte, whose concept of authorial property, Biagioli argues, depends on a “radical a priori argument” that the author’s “form,” as distinct from its physical aspect and even the content of the book (the ideas it presents), is literally unalienable. For Fichte, the physical aspect of the book is fully alienable, and the content is potentially alienable, subject to the reader’s investment of her own labor. But the book’s form, as a reflection of the distinct thought patterns of the author, cannot be alienated, for to understand the author’s form is to assimilate it into your own pattern of thought, which is equally unique and distinct as that of the author.⁸ But so understood, Biagioli argues, the romantic genius conception of

4 Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829 (2011).

5 *Id.* at 1838.

6 *Id.* at 1841.

7 Mario Biagioli, *Genius Against Copyright: Revisiting Fichte’s Proof of the Illegality of Reprinting*, 86 NOTRE DAME L. REV. 1847, 1848 (2011) (“[T]he very same dimensions that make genius into such a powerful tool for establishing copyright are also capable of undermining it. Genius is copyright’s *pharmakon*—simultaneously a cure and a poison.”).

8 *Id.* at 1851.

authorship supports only protection against verbatim copying—for anything less than verbatim copying *must* entail investment of the reader’s own labor and assimilation into her own thoughts.⁹ This creates an interesting paradox for Biagioli: “it is not only that a book or painting does not contain an intangible personal expression”—the tangible object contains only traces of that expression as discerned by the audience—“but that the personal expression is rendered ‘unemployed’ by having done its job so well.”¹⁰ Then it is only by “watering down originality—making it less specific through the doctrine of ‘substantial similarity’ so as to cover more than the literal original instantiation of a work—that the ‘personal expression’ ceases to be an absent or remote principle for the legitimation of the author’s property and the illegality of reprinting.”¹¹

Abraham Drassinower plays the role of skeptic, calling into question the idea—which he argues is “among the most fundamental and most established” in North American copyright discourse—that copyright is, or should be, concerned with promoting creativity.¹² Drassinower notes the irony that copyright minimalists and maximalists argue on the same instrumentalist terrain, all the while copyright has continually expanded. This is no accident, according to Drassinower: “Instrumentalist discourse is . . . part and parcel of the very expansion that minimalism seeks to counter”¹³ because minimalists accept that copyright is to be evaluated along the same incentive and dissemination-function dimensions as maximalists; they simply have a different view of the calculus.

In this vein, the minimalist complaint against copyright expansion is not a complaint against that expansion *per se*. It is rather about the *effects* of that expansion. If copyright expansion were shown to be conducive to the public interest in production and dissemination, then there would be nothing wrong with it, at least from a copyright perspective. The dispute between maximalists and minimalists is in this respect largely empirical.¹⁴

And, of course, given the general unavailability of empirical evidence that could definitely resolve the matter, there is little hope that the minimalist instrumentalist view can constrain copyright. Drassinower’s encouragement to minimalists is therefore to embrace a

9 *Id.* at 1861–63.

10 *Id.* at 1866.

11 *Id.*

12 Abraham Drassinower, *A Note on Incentives, Rights, and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869, 1869 (2011).

13 *Id.* at 1870.

14 *Id.* at 1873.

rights-based account of copyright, which he argues has a constitutive account of the public domain that is lacking in the instrumentalist account.¹⁵

Jeanne Fromer's contribution considers trademark law's encouragement of creativity, which she argues has helped justify expansion of trademark law "in ways unmoored from core trademark theory."¹⁶ Fromer notes that creativity seems, in large measure, incidental to trademark law: trademark rights are a function of use, for example, so creation of a mark is not relevant to the question of ownership, at least in terms of who owns the mark and what actions are necessary to endow someone with rights.¹⁷ But that is to look at creativity too narrowly, according to Fromer, since trademark law does reward a different kind of creativity, even if indirectly, namely creation of the source-designating link between a mark and the goods or services with which it is used.¹⁸ And, as Fromer argues, much of trademark law's modern expansion—from recognition of infringement claims based on non-competing uses to dilution claims¹⁹—reflects its solicitude for more distinctive marks, and ultimately its focus on brand meaning as distinct from the narrower source-related meaning.²⁰ This brand meaning, of course, is primarily creative content developed through advertising and linked to a particular signifier in consumer memory. Thus, whether or not creativity plays a role in trademark theory, in practice modern trademark doctrine promotes creative development of brand personality.

David Galenson offers a unique explanation for the remarkable changes in advanced art over the last century.²¹ Galenson begins with George Heard Hamilton's observation that the theory and practice of

15 *Id.* at 1884 ("To the extent that she is herself an author, the plaintiff cannot consistently deny the legitimacy of the use [of her work for purposes of criticism] because [the critic's] own claim is, after all, an authorship claim.").

16 Jeanne C. Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885, 1887 (2011).

17 As Fromer suggests, trademark law does incentivize creativity in developing a trademark by treating suggestive, arbitrary, and fanciful terms as inherently distinctive, making them protectable without evidence of secondary meaning, and by considering those marks to be stronger marks and therefore entitled to a broader scope of protection. *See id.* at 1907. Indeed, courts often even distinguish among inherently distinctive terms, finding suggestive terms weaker than arbitrary or fanciful terms. *Id.*

18 *Id.* at 1909.

19 To this list I would add post-sale confusion, which aims to protect prestige and image built through advertising. *See id.* at 1917–18.

20 *Id.* at 1920.

21 David W. Galenson, *Market Structure and Innovation: The Case of Modern Art*, 86 NOTRE DAME L. REV. 1921 (2011).

art changed radically in the half century between 1886 and the beginning of the Second World War, and he asks: “[W]hy did this radical transformation begin in the 1880s, and reach its peak in 1907?” Galenson frames his answer with his own insightful distinction between experimental and conceptual innovators.²² Experimental innovators, he explains, “seek to record visual perceptions,” but “[t]heir goals are imprecise, so they proceed tentatively, by trial and error.”²³ Because of their approach, experimental innovators tend to “build their skills gradually, and their innovations generally emerge piecemeal, late in their careers.”²⁴ Conceptual innovators, by contrast, “express ideas or emotions. Their goals can be stated precisely, so they usually plan their works, and execute them systematically.”²⁵ And conceptual innovators’ “innovations appear suddenly, as a new idea . . . produces a result quite different not only from other artists’ work, but also from their own previous work.”²⁶ Moreover, “[r]adical conceptual innovations depend on the ability to make conspicuous departures from existing conventions,” precisely what we observe in art practice during the era of Galenson’s focus.²⁷ Looking through this lens, Galenson observes that the market for art changed dramatically near the end of the nineteenth century when a number of prominent artists, “frustrated at their lack of success in having their paintings accepted by the Salon,” organized an independent exhibition that included the paintings of twenty-nine artists.²⁸ This was the beginning of the end of the Salon’s “monopoly of the ability to present fine art in a setting that critics and the public would accept as legitimate.”²⁹ It was, in other words, the beginning of a more competitive market for advanced art, and one that freed conceptual innovators to bring forward radically new art—“works that would not have been recognized as art in any earlier era.”³⁰ Artists initiated a structural change in the market for art, and the new, more competitive market was more conducive to conceptual innovation.

22 *Id.* at 1922–23. Galenson developed these categories in his fantastic book, *Old Masters and Young Geniuses*. DAVID GALENSON, *OLD MASTERS AND YOUNG GENIUSES* (2006).

23 Galenson, *supra* note 21, at 1923.

24 *Id.*

25 *Id.*

26 *Id.* (alterations and internal quotation marks omitted).

27 *Id.* (internal quotation marks omitted).

28 *Id.* at 1924.

29 *Id.*

30 *Id.* at 1931.

Roberta Kwall explores creativity in Jewish law from a cultural analysis perspective, “argu[ing] that from an early stage in the development of Jewish law, its inherent creativity derive[d] from its confrontation with outside cultural influences.”³¹ More particularly, Kwall investigates the influence of surrounding cultures on Jewish law and “develops the argument that the need for adaptation to the surrounding environment ensured the inherent creativity of Jewish law’s development and application.”³² Yet after reviewing this history and the role of cultural influences, Kwall concludes that “the familiar and successful pattern of acculturation that historically insured a creative Jewish legal system is no longer viable in the sociological milieu in which most American Jews live.”³³ The antidote to this dilemma, Kwall argues, is for American Jews to develop a better “understanding of the process of creativity in the development of Jewish law.”³⁴

Michael Madison, like Drassinower, questions the centrality of creativity in copyright discourse, suggesting that conservation, preservation, and stewardship of knowledge ought to play a more prominent role.³⁵ “A legal framework for durable forms of knowledge is partly baked into the structure of IP law,” Madison notes, “but negatively, and to a limited degree.”³⁶ Knowledge is preserved by excluding some matter from protection and by limiting the duration of those rights (ostensibly, at least). What is lacking is a positive role for law in “preserv[ing] intangible forms of creativity and innovation produced by prior generations.”³⁷ Yet “[s]ociety needs durable, fixed intangible things both because society itself needs to be largely stable and fixed, and because it also needs those durable, fixed things precisely so that it can change them, and change itself.”³⁸ Madison therefore offers “an introductory account of th[e] mechanics [of curating products of the mind]” that is grounded in the idea of cultural commons.³⁹ This framework puts context and institutions at the forefront, for as Madison uses the concept, a commons framework is an institutional approach to knowledge curation that “embraces influences on outcomes that are grounded not only in legal rights and obligations but

31 Roberta Rosenthal Kwall, *Creativity and Cultural Influence in Early Jewish Law*, 86 NOTRE DAME L. REV. 1933, 1935 (2011).

32 *Id.*

33 *Id.*

34 *Id.* at 1954.

35 Michael J. Madison, *Knowledge Curation*, 86 NOTRE DAME L. REV. 1957 (2011).

36 *Id.* at 1958.

37 *Id.* at 1961.

38 *Id.* at 1962.

39 *Id.* at 1961.

also in social and institutional practices as well as individual interests, in patterned and unpatterned activity at the individual level . . . and in intersections between material and intangible form.”⁴⁰

Greg Mandel brings recent learning from psychological research into contact with intellectual property law and notes that, despite the fact it is “the primary area through which the law seeks to motivate and regulate human creativity,” intellectual property law is generally oblivious to, and sometimes inconsistent with, the lessons of the psychological literature.⁴¹ Mandel suggests that this literature offers particularly important insights regarding large-scale collaborative creativity, the most extended form of which may be “open and collaborative peer production.”⁴² Yet because most of the psychological theories of creative motivation were developed in the context of individual and small-group environments, extending the lessons to the large-scale context requires some adaptation. Here Mandel focuses on the need for development of intrinsic motivation in large-scale projects, which might come from participants’ identification with the goals of the project.⁴³ Intellectual property could serve a valuable role in creating appropriate motivation as well, particularly where it can be seen as a reward based on the group’s creativity.⁴⁴

R. Keith Sawyer evaluates ten implicit beliefs about creativity, which he collectively refers to as the “Western cultural model of creativity,” in light of scientific research about creativity.⁴⁵ Each of these beliefs, Sawyer concludes, is false, or at least highly misleading, and he draws on creativity research to propose an alternative view of creativity. Echoing one theme from Greg Mandel’s essay, for example, Sawyer debunks the implicit belief that people are more creative when they work alone, showing instead that groups are critically important to creativity—in fact increasingly so.⁴⁶ Yet the belief that creativity is an individualistic enterprise has significant effect on the structure of patent and copyright law, just as the idea that creativity comes in a “flash” of insight can lead us to minimize the extent to which an author’s work is influenced by what came before or encourage us to

40 *Id.* at 1983.

41 Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 1999 (2011).

42 *Id.* at 2001.

43 *Id.* at 2024.

44 *Id.* at 2025.

45 R. Keith Sawyer, *The Western Cultural Model of Creativity: Its Influence on Intellectual Property Law*, 86 NOTRE DAME L. REV. 2027 (2011).

46 *Id.* at 2040 (showing that collaboration is both widespread and increasing).

search for a single moment at which an invention is conceived.⁴⁷ These beliefs about creativity, however, are not universal; indeed, as Sawyer argues, they are “deeply connected to the individualism of most Western cultures.”⁴⁸ Sawyer pushes us to get beyond these beliefs, which prevent us from structuring the law to optimally promote creativity.

Sean Seymore argues that “atypical” inventions—those in which the inventive process or a technical aspect of the invention does not conform to an established legal standard in patent law (accidental inventions) or the technical underpinnings of the invention depart from well-established paradigms (incredible inventions)—are vulnerable to a disconnect between the patent system and certain technical communities.⁴⁹ Seymore’s particular focus is on chemical and pharmaceutical inventions, which he sees as importantly different from those that were typical during the Industrial Age, when many patent doctrines emerged.⁵⁰ Unlike mechanical inventions, inventions in the chemical and pharmaceutical areas might arise by accident, while patent law constructs the inventive process as one with discrete conception and reduction to practice phases. Similarly, patent law’s operability requirement might pose a significant challenge to inventors who make significant technological breakthroughs that might seem unbelievable at first blush.⁵¹ In the contexts of both accidental and incredible inventions, Seymore argues, the patent system should evolve to better accommodate the actual practices of the communities in which these innovations arise.

Jessica Silbey offers us a preview of her book-length empirical project, in which she relates the creation narratives of artists, scientists, engineers, and their lawyers, agents, and business partners.⁵² These creators’ views allow us to go beyond intellectual property law’s assumptions about incentives and to understand how creators think of their own work. Silbey first “traces the language of beginnings,” relaying how her interviewees describe embarking on a life’s work in art or

47 See *id.* at 2030 (discussing the erroneous belief that “creative people get their great idea in a flash of insight”).

48 *Id.* at 2053.

49 Sean B. Seymore, *Atypical Inventions*, 86 NOTRE DAME L. REV. 2057 (2011).

50 *Id.* at 2060.

51 *Id.* at 2070–71 (noting that the PTO and courts do not keep up with the cutting edge of science, which creates a lag during which patents might be denied on inventions not yet understood).

52 Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and “Work-Makes-Work,” Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091 (2011).

science in terms of “(1) serendipity or luck (taking advantage of a moment); (2) intrinsic or natural forces (inevitability of a discovery); (3) play and pleasure (freedom and joy of exploration); and (4) need or urgency (puzzles or problems to solve).”⁵³ At the point of executing particular creative or innovative works, however, Silbey’s interviewees describe their daily work “as a craft—laborious and painstaking, sometimes mechanical and tiresome, although also rhythmic and comforting.”⁵⁴ Notably absent from most creators’ accounts at either stage are references to commercialization or economic incentives. But this is not to say that intellectual property is completely absent from the overall picture: “those people or entities that control the research and development plans [within firms] are incentivized by the existence of IP rights at the beginning, even if the individual creators are not.”⁵⁵ In this sense, Silbey’s work is more confirmation of the disconnect between the rhetoric of intellectual property, which focuses on incentives to creators, and the reality that IP does most of its work at the firm level (and often more specifically at the intermediary level).⁵⁶

And finally, Rebecca Tushnet focuses on the genre of vidding—the making of “vids,” which consist of “re-edited footage from television shows and movies, set to music that directs viewers’ attention and guides them through the revisioned images.”⁵⁷ Vidding is a species of what more broadly is considered “remix” or “mashup,” and copyright law has struggled to make sense of these works generally because they seem simultaneously to take too much, and threaten too much,⁵⁸ while allegedly offering nothing new. Vids generate particularly acute reactions of this sort, according to Tushnet, since vidders are a largely female community engaged in activities that are associated with femininity. There is “[g]eneral legal discomfort with the unauthorized creativity expressed by vids,” despite the fact that “their critical inter-

53 *Id.* at 2102.

54 *Id.* at 2114.

55 *Id.* at 2123.

56 *Id.*; see also, Sawyer, *supra* note 45, at 2047–48 (quoting Rebecca Tushnet’s response to Sawyer’s inquiry at the symposium: “This [idea that creativity is a personality trait] is part of the mythical romantic authorship that distracts attention from the role of the publisher and the intermediaries (like editors) who are in fact copyright’s greatest beneficiaries, precisely because individuals don’t need copyright’s incentives as much.”).

57 Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 NOTRE DAME L. REV. 2133, 2135 (2011).

58 See *id.* at 2149–50 (“Remix, with its connotations of chopping up, loss of control, and ungovernability, can be seen as a kind of horror, especially since horror also makes very clear the associations between women and monsters.”).

ventions are understandable as transformative.”⁵⁹ This is no accident, as “excessiveness and femininity have been associated in Western culture, as have copying and femininity.”⁶⁰ Indeed, “[a]nxiety about female creativity and denigration of domains where women are active creative forces have a long history.”⁶¹ But vidding takes place within a community of vidders, and it is, in Tushnet’s words, about power.⁶² “Attention to how these very real, very active artists produce and discuss their work would aid us in developing the multiple perspectives on creativity that would reflect more accurately what art is like”—and, I might add, who makes art—“than the current economic, incentive-based conception.”⁶³

Read on—you won’t be disappointed.

59 *Id.* at 2138.

60 *Id.*

61 *Id.*

62 *Id.* at 2154.

63 *Id.* at 2156.