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Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change

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COMPARATIVE TALES OF ORIGINS AND ACCESS: INTELLECTUAL PROPERTY AND THE RHETORIC OF SOCIAL CHANGE

Jessica Silbey[†]

ABSTRACT

This Article argues that the open-source and antiexpansionist rhetoric of current intellectual-property debates is a revolution of surface rhetoric but not of deep structure. What this Article terms “the Access Movements” are, by now, well-known communities devoted to providing more access to intellectual-property-protected goods, communities such as the Open Source Initiative and Access to Knowledge. This Article engages Movement actors in their critique of the balance struck by recent law (statutes and cases) and asks whether new laws that further restrict access to intellectual property “promote the progress of science and the useful arts.” Relying on cases, statutes and recent policy debates, this Article contrasts the language of traditional intellectual-property law (origins and exclusivity) with the new language of the Access Movements (antiorigins and

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access). The Article compares the language of the Access Movements to that of sociopolitical movements of the past, and it draws lessons for successful and unsuccessful uses of rhetoric to enact social change. The Article concludes by showing how the language of the Access Movements retains certain core elements of the intellectual-property regime to which it is reacting and investigates whether this is an effective strategy (whether or not a conscious one) to stimulate change.

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INTRODUCTION

There is a movement afoot among lawyers and advocates concerning intellectual-property protection. Indeed, there are several related movements afoot. James Boyle is credited with calling out the

Second Enclosure Movement.¹ On his heels (and even before), groups organized to provide open access to innovation and expression.² Without presuming direct causality, it seems fair to say that these related movements, which this Article will collectively call the Access Movements, are a response to the expansion of intellectual-property rights (building fences statutorily or on a case-by-case basis) and a growing digital culture that disseminates information and expression broadly and quickly (breaking down fences). In a networked world where information and expression are only a click away, most users of the Internet recognize how much knowledge and culture (in the form of patented inventions, trademarks, or copyrighted works) are not free to use.³ For the most part, the Access Movements do not advocate dismantling the intellectual-property system. They do, however, advocate preserving a meaningful public domain and creating a robust commons by loosening the boundaries of intellectual-property protection and reshaping the norms of intellectual-property control. The Access Movements do this to serve the purposes of intellectual property—to promote science and the useful arts⁴—and nourish participatory democracy.⁵

¹ See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 33 (2003) (developing the vocabulary and analytic framework necessary to articulate the arguments against the enclosure of the public domain).

² See, e.g., *About EFF*, ELECTRONIC FRONTIER FOUND., <http://www.eff.org/about> (last visited Oct. 30, 2010) (describing the founding of the Electronic Frontier Foundation in 1990); *About FEPP*, FREE EXPRESSION POL'Y PROJECT, <http://fepproject.org/fepp/aboutfepp.html> (last updated Sept. 27, 2010) (describing the founding of the Free Expression Policy Project in 2000); *About FSF*, FREE SOFTWARE FOUND., <http://www.fsf.org/about> (last visited Oct. 30, 2010) (describing the founding of the Free Software Foundation in 1985); *About*, STUDENTS FOR FREE CULTURE, <http://freeculture.org/about> (last visited Oct. 30, 2010) (describing the founding of Students for Free Culture in 2004); BUDAPEST OPEN ACCESS INITIATIVE, <http://www.soros.org/openaccess/index.shtml> (last visited Oct. 30, 2010) (describing the Budapest Open Access Initiative in 2001 sponsored by the Open Society Institute); *History*, CREATIVE COMMONS, <http://wiki.creativecommons.org/History> (last modified Sept. 27, 2010, 9:35 PM) (describing the beginnings of Creative Commons in 2002). This is obviously not an exhaustive list.

³ See LAWRENCE LESSIG, *FREE CULTURE*, at xiv (2004) (“[W]e come from a tradition of ‘free culture’—not ‘free’ as in ‘free beer’ (to borrow a phrase from the founder of the free-software movement), but ‘free’ as in ‘free speech,’ ‘free markets,’ ‘free trade,’ ‘free enterprise,’ ‘free will,’ and ‘free elections.’ A free culture supports and protects creators and innovators. It does this directly by granting intellectual property rights. But it does so indirectly by limiting the reach of those rights, to guarantee that follow-on creators and innovators remain *as free as possible* from the control of the past. A free culture is not a culture without property, just as a free market is not a market in which everything is free. The opposite of a free culture is a ‘permission culture’—a culture in which creators get to create only with the permission of the powerful, or of creators from the past.” (footnote omitted)); see also *id.* at 8–9 (arguing that the protectionist movement against Internet-driven accessibility enhancements has created less of a free culture, and more of a permission culture).

⁴ The argument from the Access Movements, which will be discussed more *infra*, is that overprotection of intellectual property creates a permissions culture in which the essential borrowing from past innovations and creative works is chilled and future innovation and

On the surface, this “countermobilization”—what some have called a “new politics of intellectual property”⁶—is a story about distributive justice. And this makes sense. Much of intellectual-property law is designed to balance the societal benefits with the burdens of monopolizing a good.⁷ Recent Movement memes such as “Access to Knowledge” (A2K) and “biopiracy” critique the balance struck in our current system, and highlight the negative welfare effects of overprotecting intellectual property.⁸ But below the surface, the Access Movements’ tale of distributive justice is more complex. As a story, its moral is not simply “redistribute”—give more to the users who are in need. Instead, it asserts the primacy of certain values

creative works are thereby stifled. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 5–6 (2001) (arguing that a failure to recognize and challenge the protectionist movement will hinder innovation of Internet entrepreneurs, authors, or more generally, artists).

⁵ See, e.g., *About CDD*, CENTER FOR DIGITAL DEMOCRACY (Mar. 2, 2007, 9:27 PM), http://www.democraticmedia.org/about_cdd (describing the Center for Digital Democracy’s commitment to promoting the public interest in digital communications); *About the CDT*, CENTER FOR DEMOCRACY & TECH., <http://cdt.org/about> (last visited Oct. 30, 2010) (describing the CDT’s mission to “conceptualize, develop, and implement public policies that will keep the Internet open, innovative and free”); see also A. Michael Froomkin, *Habermas@Discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 752–53 (2003) (discussing the potential role of Internet-legal discourse in furthering Habermas’s goal of legitimating the rulemaking system through enabling meaningful participation by all those affected by the decisions); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395 (2000) (criticizing a self-regulated cyberspace as harmful to the promotion and protection of democratic ideals).

⁶ E.g., Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008); Pamela Samuelson, *Toward a New Politics of Intellectual Property*, COMMS. OF THE ACM, Mar. 2001, at 98.

⁷ Distributive justice is sometimes defined as “normative principles designed to guide the allocation of the benefits and burdens of economic activity.” *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/justice-distributive> (last revised Mar. 5, 2007). But there are intellectual-property theorists who assert a moral right to ownership of self-derived works of expression and innovation, despite the effect of that ownership on others. See, e.g., Madhavi Sunder, *IP*³, 59 STAN. L. REV. 257, 259 (2006) (“Intellectual property utilitarianism does not ask who makes the goods or whether the goods are fairly distributed to all who need them.”); *id.* at 284 (discussing the flaws of the utilitarian approach to intellectual property).

⁸ See Olufunmilayo B. Arewa, *TRIPs and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 170 (2006) (“The current imbalances in scientific and technological capacity and the distribution of short-term benefits of TRIPs [the Agreement on Trade-Related Aspects of Intellectual Property Rights] have contributed to the opposition to TRIPs in the Third World. Part of the opposition to TRIPs is evident in the development of narratives of appropriation in which the uses of resources of the South are characterized as misappropriation or even ‘biopiracy.’” (footnote omitted)); Kapczynski, *supra* note 6, at 824–28 (discussing how the A2K groups mobilized to contest aspects of the TRIPs Agreement, such as exclusive rights in seed stocks and medicines needed in developing nations); see also Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC’Y U.S.A. 113 (2003) (critiquing overprotection of access to works by copyright owners as out of balance with the rest of copyright law).

over others: the importance of community and of leveling hierarchies. The Access Movements' mantra is not a facile reaction to the expansion of intellectual-property protection by saying, "let the intellectual property be free." The Access Movements, in their reconstitution of intellectual-property norms, still embrace ownership and exclusion, but they also challenge fundamental baselines of intellectual property—such as the defaults of market freedom, exclusivity of title, and individual ownership—as being in need of updating for our new digital world. This Article excavates this more complex story by analyzing the community that the Access Movements create through their critiques and proposals concerning the division of property and power in our networked world.

To this end, this Article is descriptive. It uncovers and then compares the narrative justification for traditional intellectual-property rights with the counternarrative of the Access Movements. The Article is also normative. At its conclusion, the Article will question the efficacy of the Access Movements' rhetoric as insufficiently self-conscious of its failure to discard the language of the past. It will show how, in the main, the Access Movements do fundamentally change the language and distributional values of intellectual property. But it will also show how even the most radical voices in the Access Movements reinscribe into their narrative justifications for property the liberal legal commitments of idealized autonomy and consent. The upshot will be that, for all the reactionary rhetoric, the Access Movements do not go as far as other revolutionary movements have gone in transforming the discourse of legal entitlements from exclusion to access. A close reading of the Access Movements' rhetoric and recent case law demonstrates, on the one hand, an ambiguity that threatens the Access Movements' coherence and, on the other hand, a reinscription of core features of traditional intellectual-property law. In its conclusion, this Article explores whether, in light of past social-reform movements, discarding or revolutionizing the language of traditional intellectual-property law is necessary to facilitate a sea change in our intellectual-property relations.

The Article proceeds in four parts. Part I briefly discusses the range of voices employed by the Access Movements; it defines the varying meanings of "access" to which the Movements are dedicated. It will then move to an exposition of the most radical positions on the spectrum within the Movements. It does so to investigate whether the antidote to the Second Enclosure Movement tells a different story

than (and therefore enacts a different politics from) the traditional justification for intellectual property.

After mapping the various meanings of “access,” Part II introduces the narrative structure of the dominant explanations for intellectual-property protection. These narratives are origin stories, an identifiable story genre that glorifies and valorizes enchanted moments of individual creation, discovery or identity in order to justify exclusivity and monopoly.⁹ As Part II will show, these origin stories of intellectual property serve as heuristics, explaining the political, economic, and social hierarchies that result from the legal ordering affected by intellectual property protection. These heuristics sound in liberal legal politics (possessive individualism).¹⁰ Unconscious or unspoken, these origin stories hide the manner in which repeat players and higher-status innovators disparately benefit from intellectual-property law.¹¹ And because these narratives are compelling (they are such good stories), they persuade us that the difference between the haves and have-nots regarding intellectual-property protection are “natural” or inevitable. As such, the origin stories justify the continued disparity in access to wealth and power stemming from intellectual-property law that is built upon concepts of individual ownership and the productive power of excludability.¹²

Part III investigates the rhetoric and substantive goals of the Access Movements. If our dominant intellectual-property regimes are modeled on origin stories to justify exclusion, and the Access Movements are fairly defined as countermobilizations to the expansion of intellectual-property entitlements, the Access

⁹ See Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008) (explaining how intellectual-property protection is grounded, in part, in narrative theory).

¹⁰ See Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1027–28 (2009) (describing property law’s “ownership model” as the “paradigm of liberal individualism” and an alternative as a “focus on peoplehood vis-à-vis personhood inspire[ing] us to look beyond the static forbearance of possessive individualism that finds such forceful expression in traditional models of property”).

¹¹ In this way, they function ideologically by hiding their contingent nature. See Susan S. Silbey, *Ideology, Power, and Justice* (“Studies of legal ideology are analyses of law’s complicity with power. . . . [T]he term ‘ideology’ generally points to the ability of ideas to affect social circumstances. Thus sociologists have sometimes described the function of ideology as the capacity to advance the political and economic interests of groups or classes . . .”), in JUSTICE AND POWER IN SOCIOLEGAL STUDIES 272, 272 (Bryant G. Garth & Austin Sarat eds., 1998).

¹² “The goal of telling stories in law is not to entertain, or to terrify, or to illuminate life, as it usually is with storytelling outside the legal culture. The goal of storytelling in law is to persuade an official decisionmaker that one’s story is true, to win the case, and thus to invoke the coercive force of the state on one’s behalf.” Paul Gewirtz, *Narrative and Rhetoric in the Law*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2, 5 (Peter Brooks & Paul Gewirtz eds., 1996).

Movements should rehearse antiorigin rhetoric that instantiates contrary values of sharing and equality. The question is whether they do. To what extent is this countermobilization a revolution in form and substance? How much change are the Access Movements proposing, and is there any evidence that the new language is working to change outcomes in actual cases? Part III will answer these questions by further elucidating the meaning of “access” in light of its corollaries and opposites (e.g., “openness” and “exclusivity”). It does so in the context of recently litigated disputes, emerging and novel property relations, and newly founded organizations devoted to access and innovation. These examples will show how both the language and substantive agenda of the Access Movements reject some parts of the origin stories described in Part II. A new language of property emerges, built on the old one, that values relation over exclusivity, group-oriented productivity over individual creation, and equality of access over uninhibited alienability.

Part IV shows how, despite this change in surface rhetoric and shift in narrative focus from origin to community, the Access Movements remain committed to core principles of liberal political theory. Idealizations of autonomy and consent play central roles in the origin stories of intellectual property, and they continue to feature prominently in the Access Movements’ discourse. In light of this, Part IV questions whether the Access Movements can convincingly differentiate their proposals and politics (through the stories they tell) from the intellectual-property regimes they critique. Simply put, can the Access Movements effect change if they fail to modulate these central features of the origin myths of intellectual property?

By drawing on other socio-legal reform movements of the twentieth century, Part IV explores the connection between changing rhetoric and changing socio-legal relations. In particular, it poses three possible outcomes to the Access Movements’ rhetoric of change. The first is that changing the language we use can effect change. On this theory, language is constitutive of our community and changing our language from one of individuality to community, from exclusivity to sharing, can successfully alter the way we think and act towards each other and property. This might require expunging the Access Movements of vestigial values of liberal legalism. Part IV discusses historical examples of failed attempts at this kind of total and abrupt change. The second outcome is to change the stories we tell, but still retain core principles from the past. New stories that reinscribe a few traditional values, while discarding others, allow for incremental change that may be more sustainable

over the long run. But, they may not lead to change sufficient to achieve the redistribution the Access Movements seek. This appears to be the way of the Access Movements, whether conscious or unconscious. Again, this Part describes historical examples of social movements that took this form and have been deemed successful by some and incomplete by others. What we can learn from these two different ways—and whether there is a third way—is the final question this Article raises.

Excavating the complex stories of distributive justice told by the Access Movements accomplishes several goals. A narrative approach to understanding the law tends to be liberating and freedom enhancing. Scrutinizing deep narrative structure unlocks assumptions embedded in abstract schemes and unsettles established relations of power.¹³ In light of the Access Movements' claims to maximize freedom,¹⁴ a narrative approach to better understand the Access Movements makes sense. Moreover, the study of narrative is the study of culture.¹⁵ Insofar as we seek a better understanding of the culture that is sought and constituted by these countermobilizations, discovering the narratives therein will clarify the Movements' contours.¹⁶ Finally, this Article shows that particular features of intellectual-property origin stories still shape the Access Movements' rhetoric and substantive agenda. Despite their claims of difference from traditional intellectual-property law, this Article illuminates some of the stumbling blocks to the Access Movements' success,

¹³ See Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197, 199 (1995) (arguing that narrative scholarship is liberatory and that it can unsettle power).

¹⁴ See Boyle, *supra* note 1, at 57–58 (defining freedom in the information age); LESSIG, *supra* note 4, at 12 (describing the debate between controlled and free access to resources).

¹⁵ See Hayden White, *The Value of Narrativity in the Representation of Reality* (“To raise the question of the nature of narrative is to invite reflection on the very nature of culture . . .”), in ON NARRATIVE 1, 1 (W. J. T. Mitchell ed., 1980).

¹⁶ Professor Julie Cohen has written that the success of a political movement requires at least two things: “do the science” (produce detailed descriptions of cultural environment the movement seeks to obtain) and “generate a normative theory[,] . . . a story about what makes th[e cultural] environment [that this movement creates] good.” Julie E. Cohen, *Network Stories*, LAW & CONTEMP. PROBS., Spring 2007, at 91, 91. Feminist inquiry does both by excavating the stories (e.g., testimonies) of women's lives to discern what has gone wrong and based on those stories propose what should be done to do right. See CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 241 (1989) (“The first task of a movement for social change is to face one's situation and name it. . . . Feminism on its own terms has begun to give voice to and describe the collective condition of women as such”); Catherine A. MacKinnon, *Law's Stories as Reality and Politics* (“[S]torytelling—bearing witness, giving account as we know and practice it—took shape within civil rights movements. Since 1968 the women's liberation movement has contributed distinctively to this tradition through its speakouts and consciousness-raising.”), in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 232, 233 (Peter Brooks & Paul Gewirtz eds., 1996).

insofar as success is defined as materially altering basic default rules in our current intellectual-property system.¹⁷

I. VARIATIONS ON THE THEME OF “ACCESS”

“Access” is what the Access Movements seek, and yet the meaning of “access” may be as contested as is the proper balance for protecting intellectual property. Access Movements are plural because although a coherent story exists about the problem of expanding intellectual-property protection, not all Access Movement actors agree on the severity of, or solutions to, the problem. This is to be expected because the Movements have multiple narrators. For some advocates of legal reform, access simply may mean perceiving the work. With copyright, for example, “[e]very act of perception or of materialization of a digital copy requires a prior act of access. . . . Thus ‘access to the work’ becomes a repeated operation; each act of hearing the song or reading the document becomes an act of ‘access.’”¹⁸ This is consistent with the scheme set forth in the Digital Millennium Copyright Act¹⁹ (DMCA) that distinguishes access controls from right controls.²⁰ Generally speaking, intellectual-property law does not prohibit this kind of access. Copyright, patent, and trademark law provide exclusivity of certain *uses* for the owner.²¹

¹⁷ For another recent analysis of intellectual-property rhetoric and the power of social change, see David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652 (2010). In this article, Fagundes embraces the centrality of rhetoric in law to help transform intellectual-property policy. *Id.* at 660. Fagundes does not locate the differences in the rhetoric of Access Movements and what he calls the “ownership discourse” of those seeking to embolden property rights. *Id.* at 677. Instead, and as a serendipitous complement to the current Article, Fagundes argues that embracing ownership language of traditional property rights (what he calls “property romance” of the “high protectionists”), but doing so in regards to claiming public ownership over public goods, may further the agenda of the Access Movements. *Id.* at 692 (“Instead of responding with . . . ‘information wants to be free,’ it would be more effective to say ‘certainly some information is yours, but some is not, and the latter belongs to all of us as shared property that you are free to use.’”). Essentially, Fagundes argues that speaking the language of ownership is the most persuasive way to have one’s voice heard and position accepted. And so the Access Movements must co-opt that language for the benefit of the commons. *Id.* at 694 (“By using the language of possession in a full-blooded manner and stressing that the public’s claim to shared cultural resources is an enforceable property interest that merits much the same kind of respect that private entitlements do, low-protectionists can capture some of the rhetorical thunder of property romance that is now monopolized by high-protectionists and restore balance to what is now a skewed dialogue.”).

¹⁸ Ginsburg, *supra* note 8, at 115, 126.

¹⁹ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

²⁰ See R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619, 635–36 (2003) (discussing the distinction made in the DMCA between access controls and rights controls).

²¹ See 15 U.S.C. §§ 1114(1), 1125(a) (2006) (imposing civil liability on anyone who reproduces, counterfeits, copies, or colorably imitates a registered mark for a commercial use without the registrant’s consent and on anyone who uses false designations of origin or

Ownership does not confer control over access, when defined as a form of perceptual experience. This is literally true with regard to trademarks, where ownership requires use in commerce, which per se requires public access.²² Patent law works similarly insofar as the quid pro quo for the patent monopoly is the public disclosure of the invention.²³ The public has “access” to the invention—we can know of it and learn from it—within eighteen months of the patent filing.²⁴ And although copyright law does not require publication for protection (which would grant de facto public access), its “theory of the consumer,” as Professor Joe Liu has said, is of one who watches, reads, or listens: the “couch potato” whose experience of copyrighted works is saturated access.²⁵ When access is defined in this way, criticism of expanding intellectual-property rights is aimed mostly at copyright law, which restricts perception of works through the DMCA antiaccess measures. These measures are amendments to the Copyright Act²⁶; some have said that they run counter to its original structure that aims to control only certain kinds of uses.²⁷

When “access” means more than perception and includes use, the Access Movement voices grow louder and cover more terrain. There has been a call to immunize private, noncommercial copying from infringement liability because, in our digital age, access to copyright often requires making digital copies.²⁸ Similarly, the Access

misleading descriptions in connection with goods, services, or containers for goods); 17 U.S.C. §§ 106–107 (2006) (providing that the copyright holder has the exclusive right to make copies, make derivative works, distribute, perform, and display, but also placing a fair-use limitation on that exclusivity); 35 U.S.C. § 271 (2006) (providing that it is patent infringement to make, use, offer to sell, or sell a patented invention without authority).

²² See 15 U.S.C. § 1051(b) (2006) (requiring that trademark applicants specify a bona fide intention to use the mark in commerce).

²³ See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974) (citing *Universal Oil Co. v. Globe Co.*, 322 U.S. 471, 484 (1944)) (discussing disclosure as the quid pro quo of the right to exclude in patent law).

²⁴ 35 U.S.C. § 122(b) (2006).

²⁵ Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 402 (2003).

²⁶ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

²⁷ See Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM.-VLA J.L. & ARTS 137, 143 (1999) (“In theory, copyright does not reach ‘use’; it prohibits unauthorized reproduction, adaptation, distribution, and public performance or display Not all ‘uses’ correspond to these acts.”); Reese, *supra* note 20, at 626–27 (explaining copyright law’s tolerance for certain end-user circumvention of certain access-control measures); see also Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 434–37 (2003) (critiquing recent developments in copyright law as overprotecting access in part because of its misuse of the metaphor of the Internet as a “space” or “place”).

²⁸ See Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 351–52 (2005) (discussing flaws in the application of the economic user theory to private copiers); Liu, *supra* note 25, at 409–11 (describing the effects of technology on consumer

Movements argue for broader applications of the fair-use doctrines because increasingly the benefit of copyrighted works and trademarks includes their derivative expressivity (as they are reused to convey new messages).²⁹ First principles ground these critiques of the expansion of copyright and trademark law (e.g., fair use as a default of nonprotection instead of an exception to protection). They tend to argue for restricting infringement liability to those uses that strike at the core of the ownership right, such as limiting copyright protection to public, commercial exploitation failing any transformation of content and limiting trademark protection to point-of-sale consumer confusion.³⁰ In other words, more “access” seeks an expansion of traditional categories of “noninfringing use.” Similarly, the Access Movements’ patent-law reform calls for strengthening existing infringement exemptions³¹ or carving out new ones.³² These proposals for more access to intellectual property require ceding some control over the property to users under specified conditions, which would

autonomy in access and consumption); R. Anthony Reese, *The Public Display Right: The Copyright Act’s Neglected Solution to the Controversy over RAM Copies*, 2001 U. ILL. L. REV. 83, 138 (2001) (describing the RAM copy doctrine, under which some courts have held that every transmission of copyrighted material involves the making of copies by means of temporary storage in the RAM of the computers involved in the transmission).

²⁹ See Deborah Gerhardt & Madelyn Wessel, *Fair Use and Fairness on Campus*, 11 N.C. J.L. & TECH. 461 (2010) (examining the importance of a broad fair-use doctrine in the context of education); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002) (arguing that copyright fair use should grow with time); William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49 (2008) (suggesting a broad simplification of the nuanced and complex limitations used in applying the fair-use doctrine); Molly Shaffer Van Houweling, *Distributive Values and Copyright*, 83 TEX. L. REV. 1535, 1567 (2005) (proposing a presumption that a defendant’s use is fair).

³⁰ See Laura A. Heymann, *The Public’s Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 710–711 (2009) (critiquing the doctrine of initial interest confusion from the perspective of overexpansionist trademark law as failing to protect trademark’s core interests); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1698–99 (1999) (critiquing expansion of dilution doctrine as failing to protect trademark law’s central policy concerns); Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. TELECOMM. & HIGH TECH. L. 317 (2009) (limiting copyright liability to those uses that reduce incentives to produce more copyrighted works).

³¹ See Janice M. Mueller, *The Evanescent Experimental Use Exemption from U.S. Patent Infringement Liability: Implications for University and Nonprofit Research and Development*, 56 BAYLOR L. REV. 917 (2004) (analyzing the Federal Circuit’s diminishing reliance on the experimental-use exemption); Matthew Rimmer, *The Race to Patent the SARS Virus: The TRIPS Agreement and Access to Essential Medicines*, 5 MELB. J. INT’L L. 335–74 (2004) (critiquing the access-to-essential-medicines doctrine as insufficiently broad).

³² See Katherine J. Strandburg, *What if There Were a Business Method User Exemption to Patent Infringement?*, 2008 MICH. ST. L. REV. 245, 248 (2008) (“[S]ome business methods are part of a larger category of *user innovation* . . . for the inventor’s own use.”); see also Julie E. Cohen & Mark A. Lemley, *Patent Scope and Innovation in the Software Industry*, 89 CALIF. L. REV. 1 (2001) (arguing for an infringement exemption for reverse engineering software patents).

leave the owner with exclusivity over more narrowly construed enumerated rights.

In addition to access-as-perception and access-as-broadening noninfringing uses, some Access Movement actors seek to more radically reconfigure intellectual-property rights. The default for these Access Movement actors is not exclusivity but sharing. These Movement voices claim that, because our digital age constitutes our society and ourselves in substantially different ways than before digital media was ubiquitous, intellectual-property exclusivity must also be substantially rethought. Distinctions between private and public are more nuanced—and potentially illusory.³³ Individuals simultaneously feel independent from, and yet more connected to, other people. The form and platforms for self-expression (and the possibility of having a significant audience for that expression) are vast and growing. The development of life-saving and life-altering innovations, be it technological or biomedical, is hope inspiring. In light of these changes in our twenty-first century, “access” to intellectual property—inventions, original works of expression, and trademarks that culturally, socially, economically, and physically sustain us—must include broad grants of use. These bequests may not be legally required under the current regime, but they are urged as morally indispensable.³⁴ These Access Movement voices contend that *practical accessibility—which might include affordable or free use of otherwise-exclusive rights in intellectual property*—is now necessary to promote progress and the useful arts for all, as much as it may also be a matter of dignity and survival for some.

This Article focuses on the last group of access seekers, the most radical insofar as they seek the most change in status quo. As the Article will show, these Movement actors are not as revolutionary in their rhetoric as their opposition perceives.³⁵ This Article concludes by asking whether the reform is therefore doomed or otherwise in need of reform itself, insofar as its message and mechanism are misaligned.

³³ See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 28 (1996) (arguing that contemporary ideas about intellectual property are based on outdated notions of the distinction between private and public space, which is counterproductive in our information-based society); see also Cohen, *supra* note 28, at 367 (arguing that the public domain is not geographically discrete).

³⁴ As will be discussed *infra*, Part III.A.2, such bequests include conveyances via Creative Commons licenses, compulsory licenses for medicines, and free software.

³⁵ See, e.g., James Grimmelman, *The Ethical Visions of Copyright Law*, 77 FORDHAM L. REV. 2005, 2031 (2009) (critiquing the “sharing” ethos of the Access Movements as “deeply ambiguous” and questioning whether it is a radical departure from the default ethical vision of copyright law, which is mutual respect and market exchange).

II. INTELLECTUAL-PROPERTY ORIGIN STORIES

This Part introduces the narrative structure of the “origin story” as a dominant explanation for intellectual-property protection. Further on, the Article will compare this narrative form to the new rhetoric of intellectual-property access in order to discern whether, in fact, discursive shifts are occurring in our culture that may help constitute a new socio-legal order.

Origin stories are a special kind of narrative.³⁶ They are uniquely persuasive as explanations for a society, an individual, or a way of life because they collapse the inquiry of “where did we come from?” with “who are we?” Origin stories are therefore particularly effective heuristics for an individual and a community because they seem to speak to “the essential nature of self and society.”³⁷ Beyond descriptive, origin stories are also political. By explaining how a society began and the subsequent social hierarchies that ensued as inevitably following from those beginnings, origin stories bring order to social relations by explaining the nature of the self and her entitlements, her role in and relation to her society.³⁸

Genesis is an origin story, a political origin myth, and a subgenre of the larger category.³⁹ It establishes the beginning of human civilization with God’s creation of man in His image and the subordination of Eve through her birth (“origin”) in Adam’s rib.⁴⁰ Other political origin stories, such as Plato’s Myth of the Metals or the founding of Rome by Romulus and Remus, are likewise stories of the birth of a society and of that society’s political contours, justifying the relationships of power and dominance (and their eventual evolution) with appeals to the society’s beginnings.⁴¹

³⁶ For a fuller discussion of origin myths, see Silbey, *supra* note 9, at 323–27.

³⁷ David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 LAW & SOC’Y REV. 785, 791 (1993).

³⁸ See JOANNE H. WRIGHT, ORIGIN STORIES IN POLITICAL THOUGHT: DISCOURSES ON GENDER, POWER AND CITIZENSHIP 7–13 (2004) (examining the politics of origin stories).

³⁹ See *id.* at 3 (describing political origin myths as stories that explain how a society or civilization came into existence).

⁴⁰ See *id.* at 8 (explaining the origin story of Genesis from a feminist perspective).

⁴¹ See HENRY TUDOR, POLITICAL MYTH 97, 134–35 (1972) (explaining the Roman Foundation Myth of Romulus and Remus); WRIGHT, *supra* note 38, at 3–4 (explaining Plato’s Myth of the Metals). Plato’s Myth of the Metals justifies the domination of laborers (made of brass) over the intellectuals and royalty (made of gold). The founding of Rome by the sons of the Roman god of war, Mars, glorifies Roman domination over and aggression toward neighboring societies. Similarly, Genesis legitimates the politics of gendered hierarchies.

A. *The Political Structure of Origin Stories*

1. *Authenticity*

Origin stories authorize current political structure in two ways: (1) by appealing to the authenticity of beginnings; and (2) through narratives of consent.⁴² As to the first, we say that which existed in the beginning is essential to our nature, or that the original person or element was first for a reason and should be honored. This paean to being first, a literal origin, materializes in intellectual-property doctrine in terms of being the “first and true inventor” in patent law,⁴³ or the originator of the creative expression in copyright law,⁴⁴ or the first effective source designator in trademark law.⁴⁵

The more subtle connection made between being first and being authentic is no less pervasive in intellectual-property doctrine. In patent law, authenticity is measured through “conception,” the rule of ownership that assigns intellectual property based on the assertion of direct lineage of the invention from the mind of the inventor.⁴⁶ In copyright law, authenticity is assured through, among other doctrines, the fact/expression dichotomy and the low threshold for creativity.⁴⁷ A copyrightable work need not be highly creative or novel, only more than “merely trivial.”⁴⁸ But, it must nonetheless originate from the individual and be “recognizably his own.”⁴⁹ Thus, copyright law protects only expression as created and not facts that are merely

⁴² See Silbey, *supra* note 9, at 323–27 (arguing for intellectual-property protection through a narrative structure of the origin myth).

⁴³ This language comes from the first U.S. patent statute requiring that the subject of the invention was “not before known or used” and the applicant be the “first and true inventor.” Act to Promote the Progress of Useful Arts (Patent Act of 1790), ch. 7, §§ 1, 5, 1 Stat. 109, 109–11.

⁴⁴ An author is “he to whom anything owes its origin ; originator ; maker.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (internal quotations omitted).

⁴⁵ See Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 814 (1927) (explaining that the trademark “was a true mark of origin, designating as it did the actual producer of the goods”); see also Silbey, *supra* note 9, at 362 (in the context of geographically colliding marks that are similar, discussing how trademark law determines property interests based on the relative success of each mark in communicating identity and authenticity to the consumer *first*).

⁴⁶ An inventor is one who “conceived the invention,” who first formed in his mind “a definite and permanent idea of the complete and operative invention.” *Townsend v. Smith*, 36 F.2d 292, 295 (C.C.P.A. 1929).

⁴⁷ See Silbey, *supra* note 9, at 343–45, 350 (arguing that authenticity derives from individuality and control inherent in authorship).

⁴⁸ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (quoting *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951)).

⁴⁹ *Id.* (quoting *Alfred Bell & Co.*, 191 F.2d at 103). The Supreme Court has explained individual authenticity: “Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has something irreducible, which is one man’s alone.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (Holmes, J.).

discovered.⁵⁰ The low creativity threshold assures that nearly anything that springs from the mind will be protected; it appears that the origination from the subjective mind (and almost nothing more) endows the work with value. Trademark law protects authenticity by assuring the integrity of the good, its unadulterated quality. Trademarks guarantee reputational purity through verification of the good's source. Although trademarks come in all valences, trademarks are only valued inasmuch as they distinguish the good of one from the good of another, as if to say "this is the real thing." Authenticity and difference are the dominant currencies in our branding system sustained by trademark law. The existence of an origin (and its superlative value) structures that currency relation.⁵¹

2. *Heroic Actors*

Being first in this way—being authentic—explains the privileges of ownership, including the privilege of denying access and control by others. This privilege is justified not only by lineage but also by status. The owners of intellectual property are described as a certain kind of person. Patent inventors possess "genius";⁵² they are not "mere artisans" or "mechanics."⁵³ Likewise, authors demonstrate a "creative spark" using their "fancy or imagination."⁵⁴ And trademark law assumes a "sovereign consumer[,] . . . a utility-maximizing agent of unbounded rational choice."⁵⁵ And although the consumer is not

⁵⁰ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 347 (1991) (holding that the names and telephone numbers used in the plaintiff's telephone directory were not sufficiently original to warrant copyright protection).

⁵¹ See Silbey, *supra* note 9, at 362 ("Th[e] origin story of trademark's protection . . . assumes . . . a culture that is premised on the value of authenticity and difference. Trademarks stand for the integrity of the good, its authenticity, or its unadulterated quality as if to say, 'this is the real thing' or 'straight from the source.' Trademarks are also only valued inasmuch as they distinguish the good of one from the good of another." (footnote omitted)).

⁵² See, e.g., *Cuno Eng'g Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 91 (1941) (stating that a new device "must reveal the flash of creative genius" in order to be patentable); *Reckendorfer v. Faber*, 92 U.S. 347, 357 (1875) (requiring "inventive genius"); see also Silbey, *supra* note 9, at 334 (discussing the terms used in *Cuno Engineering* and *Reckendorfer*).

⁵³ See, e.g., *Standard Elec. Works v. Manhattan Elec. Supply Co.*, 212 F. 944, 945 (2d Cir. 1914) ("[W]hen [a] need has existed unfulfilled for some time before the inventor filled it[,] that . . . gives strength to the conclusion that to make it took more than mere artisan's skill . . ."); see also Silbey, *supra* note 9, at 334 (discussing the terms used in *Standard Electric Works*).

⁵⁴ See, e.g., *Feist Publ'ns*, 499 U.S. at 345 (explaining that to be copyrightable, a work must be original, that is, it must "possess some creative spark"); *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (distinguishing the creation of a trademark—through the adoption of an existing symbol—from the creation of a copyrightable work, which requires "fancy or imagination"); see also Silbey, *supra* note 9, at 342 (discussing the terms used in *Feist Publications* and *In re Trade-Mark Cases*).

⁵⁵ Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2023 (2005) (internal quotation marks omitted).

the owner of the trademark, it is for her benefit that trademark law exists so that she can shop more efficiently and with more meaningful choice.⁵⁶ These personages of intellectual-property law are heroic actors. The description of their character attests to the importance of independence and resourcefulness as personal qualities.⁵⁷ The stories (or laws) justifying their status resemble those describing the glorified, rugged individuals of American history and political thought, many of whom were inventors or authors themselves.⁵⁸ In this way, intellectual-property law reflects and instantiates the privilege and reward that adorns the archetypical American hero.

Where is the origin story in this description of the high-status intellectual-property owners? The narrative logic of origin stories relies on a belief in core elements of human nature that existed in the beginning and remain consistent over time, thus justifying unequal treatment of people or groups based on these essential, nonchanging differences.⁵⁹ Plato's Myth of the Metals describes "natural" differences among people—those who use reason (made of gold) and those who use brawn (made of brass)—to legitimize dominance of the ruling class over the laborers.⁶⁰ Likewise, Genesis describes "natural" differences between the sexes (one weak, the other strong) to justify hierarchical gender relations that explain the fall from the Garden of Eden and all relations thereafter.⁶¹ Those who existed as powerful "in the beginning" legitimately exercise power into the future because of some inherent and unchanging quality that explains why they were first initially. This rationale is not intellectual property's alone—we see this in other legal canons, such as in U.S. constitutional law and its invocation of "original intent" of the Founding Fathers to justify a particular interpretation of the Constitution.⁶² One might think that

⁵⁶ See Silbey, *supra* note 9, at 361 ("The benefits of trademark protection . . . inure to the consumer, who can shop more efficiently and presumably with more choice . . ."); see also Graeme B. Dinwoodie, *The Rational Limits of Trademark Law* (2000) ("Trademark protection against confusing simulation thus advances the interests of producers and consumers by protecting the integrity of consumer understanding and the producer's investment in creating goodwill."), in U.S. INTELLECTUAL PROPERTY LAW AND POLICY 59, 63 (Hugh Hansen ed., 2006); cf. Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007) (demonstrating that trademark law was not traditionally intended to protect consumers).

⁵⁷ See generally Silbey, *supra* note 9 (discussing the origin story as it relates to individuality and authenticity in patent, copyright, and trademark law).

⁵⁸ See, e.g., Silbey *supra* note 9, at 325 (describing U.S. national heroes intimately tied to the nation's own origin story: Thomas Jefferson, Benjamin Franklin and Abraham Lincoln); *id.* at 321, 336 (discussing rugged individualism and the American dream).

⁵⁹ WRIGHT, *supra* note 38, at 73–75 (discussing the notion of human nature developed through Genesis and Hobbes's theory of human nature).

⁶⁰ See *id.* at 4–7 (exploring Plato's myth of the metals).

⁶¹ See *id.* at 8 (discussing the story of Genesis).

⁶² "[I]n invocation of a political origin, such as the Founding Fathers of the United States

intellectual property's goal of "progress of the useful arts" would eschew a backward-looking explanation for its assertion of privilege. But intellectual-property law does not justify its distribution of rights based on what people said and thought two hundred years ago; instead, it celebrates characteristics of those great inventors, authors and merchants of our past *that remain celebrated today*, characteristics such as self-reliance, imaginativeness, and individuality.

3. Consent

What if we were to protest this arrangement and ask: "What of those who do not have the resources to fully realize their creative potential because of the rising cost of access fees?" To this, the origin stories propose that we have consented to the political structure and our system of rights and privileges.⁶³ Origin stories sanction beginnings and legitimate the ensuing status quo by describing both as products of mutual consent. Mutual consent comes in all forms in origin stories—written and explicit political contracts (constitutions, statutes), oral or civil contracts (the marriage contract), tacit consent or acquiescence.⁶⁴ Sometimes consent is manufactured through repetition of the story in society at large (or in law specifically).⁶⁵ Sometimes consent is made clear from the behavior of the parties "in the beginning" through open deliberations or explicit voting, whatever change of heart or circumstance may affect the nature of the bargain into the future.⁶⁶

Consent and free will are central features of the intellectual-property origin stories as they smooth over troubling and potentially unjust arrangements. The who and how of inventor and invention in patent law is justified by creation stories, declarations made under oath that initiate the patent application and that form the basis of an originary contract binding the inventor and the U.S. government to

and their intent in drafting the Constitution, can justify present circumstances and assertions of right with an appeal to the past." Silbey, *supra* note 9, at 325–26.

⁶³ Statutes may be criticized as wrongheaded, but if they regulate economic matters and are products of open deliberation in a democratic forum, then they tend to survive deferential judicial scrutiny. Here, consent is conjured from the democratic process.

⁶⁴ See WRIGHT, *supra* note 38, at 86–89 (analyzing Hobbes's rhetorical strategy of supporting his notion of tacit consent to political rule with what he characterizes as tacit consent to patriarchal rule).

⁶⁵ "Retelling the mythic narrative assures consent to the arrangement, either explicitly as a form of contract or implicitly through acquiescence." Silbey, *supra* note 9, at 327.

⁶⁶ *Id.* at 326–27.

the terms therein.⁶⁷ In part because of the ethereality of conception in patent law, we accept the assertion of inventorship status on faith when the mutual consent of the collaborators is perceived on the facts.⁶⁸ The whole panoply of collaborators—from the lab technicians to lead scientists—are presumed to agree (consent) to the terms to which they have sworn under oath declaring the correctness of inventorship, which determines ownership.⁶⁹ If individuals or institutions involved in the patent filing later find themselves at a disadvantage because of the scope of, or the named inventors on, the patent, they only have themselves to blame, as the patent is a direct result of the agreed-to relations between the parties. Like any contract, parties who consented to the property arrangement contained therein should be wary to protest later when implied or explicit terms are enforced against them. How are disagreements like these averted or resolved? A persuasive origin story resolves them; one that manufactures consent to, and a belief in, the terms (inventorship) of the original patent contract.⁷⁰

Consent arises in copyright law with works for hire and jointly authored works. As for jointly authored works, the standard for mutual consent requires the intent of *both* parties, demands certainty, and disregards the amount or quality of the putative coauthor's creative contribution to the original work.⁷¹ As an esteemed value in a

⁶⁷ *Id.* at 330.

⁶⁸ "Given the ethereality of conception, substantiating it requires a persuasive creation story describing in words, more often than proving through tangible evidence, how the inventor originated the invention . . . first." *Id.* at 327; *see also* Bd. of Educ. *ex rel* Bd. of Trs. of Fla. State Univ. v. Am. Bioscience Inc., 333 F.3d 1330, 1344 (Fed. Cir. 2003) ("[I]t is the responsibility of the applicants and their attorneys to ensure that the inventors named in a patent application are the only true inventors."); 37 C.F.R. § 1.63(a) (2009) ("An oath or declaration filed under § 1.51(b)(2) as part of a nonprovisional application must . . . [s]tate that the person making the oath or declaration believes the named inventor or inventors to be the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought."). Patent examiners in the United States normally do not review the correctness of inventor naming, but rely on the solemn inventor declaration or oath that is a required part of a patent application. *Am. Bioscience Inc.*, 333 F.3d at 1344.

⁶⁹ *See* Silbey, *supra* note 9, at 329–30 (discussing the PTO's reliance on sworn declarations to determine inventorship).

⁷⁰ On the seduction of storytelling, *see* ROSS CHAMBERS, *STORY AND SITUATION: NARRATIVE SEDUCTION AND THE POWER OF FICTION* (1984). "[T]he further claim is now made that such [narrative] seduction, producing authority where there is no power, is a means of converting (historical) weakness into (discursive) strength." *Id.* at 212. Certainly, most successful litigation requires persuasive and seductive story tellers. My assertion here is that the touchstone of patent protection (conception) depends on a good origin story above most else, especially when inventorship and nonobviousness are at issue. For storytelling and property relations, *see generally* CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP* (1994).

⁷¹ *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000) (finding no objective manifestations of a shared intent to be coauthors, despite the plaintiff's "very valuable contributions"). *See generally* Peter Jaszi, *On the Author Effect: Contemporary Copyright and*

democracy, consent would seem to work to the benefit of the governed. But in copyright law, the standard “creates a great deal of mischief, for it allows one collaborator—the dominant party—to lure others into contributing material to a unitary work, all the while withholding the intent to share in its economic and reputational benefits.”⁷² In this context, true consent is an ideal often left unrealized. With the work-for-hire doctrine, the default rule that employees do not own the creative fruits of their labor wreaks a similar injustice. The doctrine assumes implied consent to transfer authorship from the employee to the employer when a work is produced within the scope of employment.⁷³ Consent is fictional. It assumes facts that are not likely true (that employees or potential employees have any meaningful control over the scope of their employment, or that frank discussions of authorship occur regularly and honestly in the workplace).⁷⁴ More often, the work-for-hire and joint-authorship doctrines confer the privilege of copyright only on an author who has the capacity to originate creative work (through property ownership or influence). In these copyright contexts, the origin myth of copyright expressly embodies the story of rugged American individualism, glorifying the person with the wherewithal to rise to the top of the economic or social ladder and conferring upon him legal protection as owner.⁷⁵

Consent also arises in trademark law, under the rubric of free will and choice. The trademark consumer is made to believe that, through her choices of branded products, she has some control over the nature of the goods she consumes, and thus over the identity she creates for

Collective Creativity, 10 CARDOZO ARTS & ENT. L.J. 293, 314–16 (1992) (criticizing the doctrine of joint authorship and its reliance on an individualistic notion of authorship); Gregory Mandel, *Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 U.C. DAVIS L. REV. (forthcoming 2010) (giving a more recent critique of the joint-authorship doctrine).

⁷² Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1206 (2000).

⁷³ See 17 U.S.C. §§ 101–102, 201(b) (2006) (providing that a work made for hire can also be created explicitly through contract if such a work falls into specific categories designated by the statute).

⁷⁴ See Dreyfuss, *supra* note 72, at 1203 (describing how the work-for-hire doctrine works poorly in a research-university setting); see also CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY 89–90 (2001) (reporting how discussions of authorship on collaborations are described by subjects as “embarrassing” and “uneasy” and thus often avoided altogether or resolved without attention to original contribution but human relation).

⁷⁵ The laborers at the bottom of the rung (as opposed to originators at the top) are felled by the “sweat of the brow” doctrine in copyright. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (“The primary objective is not to reward the labor of authors, but ‘[t]o promote the Progress of the Science and useful Arts.’” (quoting U.S. CONST. art. I, § 8, cl. 8)).

herself through consumption. Branding is as much about market share and consumer identification as it is about personal-identity politics in today's society. We buy goods for what they are *and* for what they say about each of us.⁷⁶ Part of the trademark origin myth is that each of us is (or can be) unique and different in ways that we can foster and control through our purchasing power. In a democratic society that celebrates difference and free choice, this vision is fundamental to national success.

The trademark origin story values autonomy and sovereignty as if both are uncontroversial and straightforward in our complex web of commercial relations. It is based on a theory of rational choice that depends on a meaningful distinction between freedom and coercion in advertising.⁷⁷ Although the consumer is not the originator of the mark, she is the originator of its meaning. Without the consumer's clearheadedness, and because of the consumer's confusion, the mark will be strong or weak, valid or infringed. It is her consent to engage in branding culture that keeps trademarks alive.

B. The Myth, a Disconnect

Is any of this really a problem? "So what?" we might say in response to this description of origin stories justifying intellectual-property arrangements. A problem exists if the description herein of the inventor, author, or consumer is false, or if it has become less true in light of the changed contexts of innovation, creativity, and consumerism in our twenty-first century. As this subsection will discuss, a disconnect exists between the intellectual-property origin stories and contemporary ways of generating intellectual property (such as through user innovation, derivative works, and expressive consumerism).⁷⁸ Where traditional intellectual-property law depends

⁷⁶ Silbey, *supra* note 9, at 364, 366.

⁷⁷ See, e.g., Richard Elliott, *Existential Consumption and Irrational Desire*, 31 EUR. J. MARKETING 285, 289–92 (1997) (describing the dichotomy between creativity and constraint); see also JUDITH WILLIAMSON, *CONSUMING PASSIONS: THE DYNAMICS OF POPULAR CULTURE* (1986) (arguing that advertising unconsciously effects consumers' desire in their exercise of purchasing choices).

⁷⁸ See, e.g., Cohen, *supra* note 28 (discussing the increasing importance of users of copyrighted works and juxtaposing it with the absence of the user from copyright doctrine); see also Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. Rev. 960 (1993) (noting that trademarks have moved beyond their original function as brand identifiers and have become commodities themselves and discussing whether the law should protect trademarks when they are used as separate products); Liu, *supra* note 25 (recognizing that copyright law lacks a well-developed theory of the consumer and exploring the consumer's interests in autonomy, communication, and creative self-expression); Fred Gault & Eric von Hippel, *The Prevalence of User Innovation and Free Innovation Transfers: Implications for Statistical Indicators and Innovative Policy* (MIT Sloan Sch. of Mgmt. Working Paper Series, Paper No. 4722-09, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337232 (suggesting that the

on the creator or user as independent and free—*autonomous*, to use the lingo of individual liberty—both are unattainable ideals and, in some circumstances, undesirable in light of the competing social value of equality.

Who is this inventor at the heart of patent law who reaps the benefits of his genius? He is isolated and unspoiled, an expert who might be part of a community of scientists or technologists, but who invents freshly, thinking “out of the box.” He is an entrepreneur of sorts. As many before have noted, the “heroic inventor” of patent law is not the norm in the twenty-first century, but the statutory and case law have only recently acknowledged as much.⁷⁹ The inventor is not described in law or culture as a member of a collaborative community, his work and ideas inextricably bound up with that of his colleagues. The theory of scientist as cyborg—asserting a blurred boundary between making discoveries and being remade by them—is far from our legal imagination.⁸⁰ Where everyday experience might enlighten us as to the effect of institutions on people and vice versa, the reigning ideology in patent law remains mostly blind to the material effects of culture and context on innovation. In conventional patent doctrine, inventors and their inventions are born, not made.⁸¹

The problem of essentializing looms large here. The messy corporeality and contingencies of people’s lives and work drive the desire for predictability. Legal clarity reinforces a myth of creative genius arising from “heroic isolation” rather than through “an extended system of production.”⁸² Autonomy and separateness are prerequisites for being an inventor, and neither reflects the reality of how we live today.⁸³ The connectivity that is hailed as a benefit of our

government’s policy of subsidizing the process of obtaining intellectual-property rights as a way of encouraging innovation should be reexamined in light of the fact that many user-innovators already transfer their innovations to others at no charge).

⁷⁹ See Dan L. Burk, *Feminism and Dualism in Intellectual Property Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 183, 190–91 (2006) (“Th[e] focus on the mental part of inventive activity . . . has its roots in nineteenth century notions of the solitary creative genius. . . . Multiple contributions to the invention resulting in multiple claimants to ownership, as is the common practice in modern corporate research settings, has created ongoing problems within patent law and has only been very slowly accommodated within the statute.”).

⁸⁰ See generally DONNA J. HARAWAY, *A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century* (in support of feminist politics and moving beyond traditional dualisms, suggesting that there is little difference between who we are and what we make), in SIMIANS, CYBORGS AND WOMEN: THE REINVENTION OF NATURE 149–81 (1991).

⁸¹ For a recent popular critique of this view, see MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* (2008).

⁸² Burk, *supra* note 79, at 193.

⁸³ If it ever did reflect our reality. See JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (forthcoming 2011) (manuscript ch.

Internet Age may disadvantage those in the patent race who are most fully networked, who deemphasize origin, and instead glorify community.⁸⁴ Would we say that the developers of Apache or Linux or of the mountain bike are not worthy of the lofty title of inventor?⁸⁵

Is the personage of the author similarly misaligned with twenty-first-century norms of creativity? Who is the author at the heart of traditional copyright law? Copyright ownership does not run to laborers⁸⁶ or collaborators who lack permission or perfect consent. Copyright law instantiates the myth of the autonomous, unique individual and ignores the “dialogic” nature of copyright.⁸⁷ When law protects only the authentic or original works of authorship and not the products of collage, collaboration, or derivations, it reflects a hierarchy of values: uniqueness and private ownership over commonalities and sharing. “We embrace this story of human originality because we want to believe we are each unique and thus each capable of creating copyright-protected expression.”⁸⁸ But if these dynamics hold fast, those who control employment relations, or who hold property in their institutional position, are the beneficiaries

5 at 93–97) (on file with author) (tracing the development and demise of the autonomous individual in contemporary philosophy and political theory); Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 188 (2008) (suggesting that liberal legal theory’s attachment to individual autonomy is one explanation for intellectual property’s uncomfortable fit with privacy law); see also Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 22 (1988) (describing this phenomenon in the context of feminist legal theory); cf. Mandel, *supra* note 71 (arguing that despite new research showing how to effectively promote creativity, intellectual-property law clings to outdated stereotypes about creativity, particularly in the realm of joint-inventor law).

⁸⁴ See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331 (2004) (outlining the argument that existing circumstances, such as wealth, power, and access, will continue to give some individuals an advantage, even if property rights in intellectual property are vested in “the commons”).

⁸⁵ See Virginia Postrel, *Innovation Moves from the Laboratory to the Bike Trail and the Kitchen*, N.Y. TIMES, Apr. 21, 2005, at C2 (citing examples as diverse as open-source software and mountain biking to illustrate the phenomenon of users developing and sharing their own innovations).

⁸⁶ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’” (alteration in original) (quoting U.S. CONST. art 1, § 8, cl. 8)); see also *id.* at 353 (describing the flaws of the “sweat of the brow” doctrine).

⁸⁷ See Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 207, 233 (2007) (“The societal function of copyright is to encourage participation in cultural dialogue. Where the author is a worthy producer of something from nothing and the work is an owned object of fixed meaning, the dialogic and communicative nature of cultural creativity is hidden from view. The result is a copyright regime which proprietizes and over-protects the works of some authors while dismissing others as copiers and trespassers; which encourages some kinds of creativity while condemning others as unlawful appropriation; which values so-called original contributions but silences responses in the cultural conversation.”).

⁸⁸ Silbey, *supra* note 9, at 348.

of this system and truly isolated individuals will suffer.⁸⁹ This makes less sense in a world where new, writerly innovations of the digital age, such as hypertext, collaborative novels, and online journaling, dominate creative consumption. Today, more than ever, “users” and “authors” meld. Privileging the fiction of “author,” as originator, and forcing payment from “readers,” as users/consumers, may tip the balance in the copyright system from incentivizing creation to frustrating it.⁹⁰

The subject of trademark law suffers a similar fate when brought into the twenty-first-century context. We have already called the trademark consumer “sovereign”—autonomy in regal clothing. Indeed, trademark law relies on the truth of the trademark’s *modus operandi*: that there exist essential differences between uniquely branded goods that form a reasonable basis from which our freely made purchasing choices flow. But these assumptions are wrong if even some of the literature on, and the purpose behind, advertising is right.⁹¹ The literature exposes how trademarks reify the ideal of free choice for consumers and hide the fact of their manufactured desire. We, consumers, are influenced by brands as much as we might hope to influence branding strategy. There may be less difference between brands or goods than the difference in the signal each sends.⁹² Do we think there is a material difference between Nike® and Reebok®, or do

⁸⁹ See generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993) (discussing the development of the originality standard that is perceived to benefit authors but was motivated in part by the publishers who would own the works).

⁹⁰ See Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER SOC. POL’Y & L. 519, 535–37, 544 (2006) (“Feminist commentators’ observations suggest that the ‘writerly’ characteristics of hypertext constitute a medium that may be conducive to learning, writing, and thinking outside the established linear and hierarchical structures of traditional media. However, feminist thinking also predicts that the dominant culture will resist such subversion of authority. Unsurprisingly, there is already evidence that this is the case. In particular, the current legal milieu may not be conducive to the development of such feminist or other non-traditional readings of digital texts. Rather, the exclusive rights conferred by copyright, specifically the right of adaptation, lend themselves to authorial control over not only the text, but also to a reader’s use of the text.”); see also Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 461, 475 (2006) (demonstrating how, in the context of fan fiction, copyright law can inhibit and does prohibit certain valuable expression); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL’Y & L. 273, 304 (2007) (describing the gendered nature of the fair-use calculation: it systematically undervalues nonmarket production at the expense of women’s creativity).

⁹¹ Beebe, *supra* note 55, at 2023 (explaining the debating sides of the trademark consumer as the sovereign and the fool); see also Elliott, *supra* note 77 (surveying advertising literature that explains how consumers succumb to persuasion of advertising and how consumers exercise some agency in their purchasing choices).

⁹² We can assert a difference between a generic and the designer equivalent, but the difference that is likely to matter to most people is what we think it *means* to buy generic over the designer brand (the social significance), not that the designer good is of higher quality or better looking.

we only prefer the message of one over the other? Because trademarks serve expressive functions, we construct identities through our purchasing choices. As the saying goes, we are what we buy.⁹³ The irony is that as we construct our identities, claiming we are each unique, we do so in the mass market where desire follows the herd. Contrary to the theory of the liberal legal subject, individual and free, we are not autonomous market actors, independent of outside influence. Our choices and motives are inextricably intertwined with the ex ante development and marketing of goods and services that shape our identities.⁹⁴ The origin story of trademarks makes us think we are coequal actors with the producers and manufacturers in a marketplace of choice. It perpetuates the notion of the consumer as both freely engaged in, and gratefully protected by, transparent commercial relations, choosing products of our own freewill rather than being chosen by them.⁹⁵ Uncovering the origin myth of trademarks (the sovereign consumer) reveals its submerged twin (the duped consumer protected by law from confusing and manipulative advertising).⁹⁶ It also demonstrates how the persuasive narrative of the sovereign consumer can hide (or justify) the inequality and violence caused by twenty-first-century capitalism in the form of intensified social and class hierarchies, environmental dangers, and undifferentiated mass culture.⁹⁷

⁹³ See ZYGMUNT BAUMAN & TIM MAY, *THINKING SOCIOLOGICALLY* 156 (2d ed. 2001) (describing “neo-tribes” as social affiliations based on the construction of identity through consumption).

⁹⁴ Product manufacturers and service providers are not necessarily guided solely by the question “What do consumers want?” Instead, product manufacturers and service providers also ask “How can we make the consumer want what we sell?”

⁹⁵ Douglas Kysar has argued that producers, manufacturers and legislators may underestimate the important intersection between consumer preferences for certain products and the ways in which consumer-citizens shape civil society through their purchasing choices.

[T]he already heroic conceptual role of the consumer within market liberalism seems poised to become even more heroic. Long expected to help raise collective welfare through constant material accumulation, consumers also now are being charged with determining the outcome of important policy disputes by revealing—again through private market behavior—their true level of support for human safety, the environment, and a host of other public goods. Although proponents of this valuation methodology expect market choices to reveal purely private preferences, individuals acting on process preferences instead seem to regard consumption at least partially as an act of public significance.

Douglas A. Kysar, *Preferences for Process: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 533 (2004).

⁹⁶ Beebe, *supra* note 55, at 2023.

⁹⁷ See, e.g., Nicholas Bayard, *Valuing Nature in Environmental Education*, GREEN TCHR., Summer 2006, at 27, 28, available at 2006 WLNR 15517646 (“The goal of the activity is to demonstrate the catastrophes (both environmental and economic) that can arise when individuals pursue their own economic self-interest without regard for natural cycles and limits and without controls to mitigate their impact on the environment. Ironically, this is the very

In response to a perceived expansion of intellectual-property rights over the second half of the twentieth century, today new voices challenge the assumptions and the balance struck by intellectual-property legislation and case law. Consciously or not, the origin myth is being busted. The advocates of access are not speaking against property; rather, they are speaking against origins. A close look at their rhetoric and recent case law reveals, ironically enough, a potential new beginning, a new future for intellectual-property relations, based not on origins, but on something else. Part III of this Article evaluates the chorus of these voices that make up the Access Movements and the stories they tell. It asks, in particular, whether they perpetuate the origin stories of intellectual property or whether they instead expose the myth of origins. As they embark on a new politics of intellectual property, in what way do the Access Movements reconfigure the reasons for and the values of legal protection for intellectual property in our digital future? Can they (must they?) shed the old protagonists—the heroic inventor, the romantic author, and the sovereign consumer? Can they evolve the values of autonomy and consent from their idealistic incarnations to something more contextual, more real, in order to undo the hierarchies of propertied relations of the origins stories of intellectual property?

III. INTELLECTUAL PROPERTY AND THE RHETORIC OF SOCIAL CHANGE

This Part highlights a new way of talking about intellectual property. In contrast to the origin stories of Part II, the Access Movements appear to tell a different story. The Access Movements are not against intellectual property. But they are, generally speaking, antiexpansionist. And some of the voices in the Movements are also antioriginists.

The Access Movements do not focus on protecting beginnings—be it conception, fixed original expression, or the virtues of branding—but instead on nurturing the creative community from within which socially beneficial intangibles are made. These Access Movement voices interrogate the theory that more intellectual-property commodification creates positive monetary and cultural value, by arguing that strong exclusive rights limit access to (and thereby stifle) innovation and creativity. The Access Movements also

system on which capitalism is predicated: free markets and competition in the pursuit of individual self-interest.”).

question the governing incentive model that anchors U.S. intellectual-property law.⁹⁸ By questioning these central premises of intellectual-property protection and exposing others as wrongheaded, the Access Movements seek to transform attitudes, behavior, and law. In so doing, the Access Movements discard the hierarchical rhetoric and consequences of the dominant intellectual-property regimes and embrace (intentionally or not) a new model of politico-legal practice. The story that the Access Movements tell purports to be a new future for intellectual property. But, as will become clear, it is built on some of the same old foundations. This may, however, be good for legal reform. In fact, it is possible that sustainable change can only occur if the old ways are folded into the new ones. A closer look at these new stories, and how they compare to similar rhetorical shifts from recent history, may help predict intellectual property's future.

This Part proceeds in two sections. Section A highlights the antiorigin language of the countermobilization and argues that this rhetoric, based on a fundamentally different understanding of how and why people work and innovate, displaces the myth of beginnings and replaces it with the power of peopled networks. Section B shows how the antiorigin language of Section A discards the hierarchical language of customary intellectual-property law and instead recognizes an antisubordination principle that, when applied to intellectual-property law, requires a reexamination of the property relations that stem from the conventional legal analysis of intellectual-property entitlements. Part IV, then, explains how, despite advocating for a future for intellectual property that embraces antiorigin and antisubordination principles, the Access Movements remain committed to idealized core values of liberal legal politics. Whether this continued commitment frustrates the possibility of legal reform that secures practical access to intellectual property will be the final question this Article raises.

A. The Antiorigins of the Countermobilization

1. The Private/Public Breakdown

The countermobilization against the expansion of intellectual property emphasizes the importance of a commons, a space neither wholly public nor wholly private. This commons reimagines the role of the marketplace by merging private interests with public values.

⁹⁸ See Ben Depoorter et al., *Copyright Abolition and Attribution*, 5 REV. L. & ECON. 1063, 1063–64 (2009) (exploring the effect of abolition of copyright on author's incentives in light of other non-legal forms of remuneration).

Driven by a perception of a “common interest which cuts across traditional oppositions,”⁹⁹ the Access Movements discard the traditional public/private dichotomy.¹⁰⁰ Whether speaking about the public domain or a commons,¹⁰¹ public space and private lives are inextricably entwined.¹⁰² As such, we must rethink how and why we protect privacy and how and why we preserve the commons (and whether the answers to these questions are meaningfully distinct).¹⁰³ Although there is a healthy debate about the shape of the public domain and/or the commons,¹⁰⁴ the debate is ongoing because of a concern that neither as presently constituted through our intellectual-property regime is sufficient to support the development of diverse and sustainable cultures, as well as to preserve human rights.

Breaking down barriers between public and private spaces and reconstituting a robust, accessible commons is important to the Access Movements. This is because practical access to cultural goods is necessary for selfhood as much as it is important for the social, political, and economic progress of the community.¹⁰⁵ This is not to assert the primacy of self in our political organization. To the contrary, it recognizes the “mutually constitutive relationships between and among the self, community, and culture.”¹⁰⁶ With the

⁹⁹ James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 108 (1997).

¹⁰⁰ See, e.g., BOYLE, *supra* note 33, at 28–30 (describing how the private and public divide is an ever shifting landscape in our information age).

¹⁰¹ The public domain is free for everyone without strings attached. Most commons are not based on underlying property rights, but on broad grants of use privileges and mutual commitments to follow the rules of use. See James Boyle, *Cultural Environmentalism and Beyond*, LAW & CONTEMP. PROBS., Spring 2007, at 5, 8–9 (making just this distinction).

¹⁰² See BOYLE, *supra* note 33, at 32 (describing various contradictions relation to the false dichotomy of private/public).

¹⁰³ See BOYLE, *supra* note 33, at 32–33 (discussing what is considered private and how we protect privacy); Cohen, *supra* note 28, at 367 (discussing what is considered the public domain); see also DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008) (defining privacy and criticizing and suggesting different theories of privacy)). See generally Jerry Kang & Benedikt Buchner, *Privacy in Atlantis*, 18 HARV. J.L. & TECH. 229 (2004) (discussing law and policy issues concerning privacy).

¹⁰⁴ The Winter/Spring 2003 issue of *Law & Contemporary Problems*, for example, is devoted to the public domain and the information age.

¹⁰⁵ See Cohen, *supra* note 28, at 370 (describing need for practical access to expressive works for self-development and creative play).

¹⁰⁶ *Id.* at 372. The theory that identity is constituted by context has a pedigree much older than the Access Movements. See Michel Foucault, *Technologies of the Self*, (exploring the ancient origins of “technologies of the self”), in TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT 16, 19–22 (Luther H. Martin et al. eds., 1988); see also Susan Scafidi, *F.I.T.: Fashion as Information Technology*, 59 SYR. L. REV. 69, 74 (2008) (“As [Marshall] McLuhan observes, technology programs how people relate to their environment—it is, in short, a *techne*, or craft, in the fullest sense of the word, shaping not just the material out of which it is fashioned, but the users themselves.”).

breakdown of discrete notions of the public and the private comes the breakdown of discrete notions of the individual and the community.

In *In re Application of Cellco Partnership*,¹⁰⁷ the U.S. District Court for the Southern District of New York held that Verizon customers who use copyrighted musical compositions as ringtones on their cellular phones do not violate the composer's exclusive right to public performance.¹⁰⁸ Thus, Verizon is not contributorily liable for copyright infringement.¹⁰⁹ The court explained that the Copyright Act exempts from section 106(4) infringement "those performances of a musical work that occur within the 'normal circle of a family and its social acquaintances' and . . . '[any] performance of a . . . musical work . . . without any purpose of direct or indirect commercial advantage.'" ¹¹⁰ It then goes on to conclude that "[t]he playing of ringtones fits comfortably within these statutory exemptions."¹¹¹

No doubt, cellular customers have no intent to profit from the ringtones. But the court's conclusion that cellular phones are heard more often in circumscribed private setting than on the street, on public transportation or in restaurants is puzzling. Indeed, when pushed on the issue, the court invokes a gestalt of deliberative democracy and reasonableness. "[O]ne may search the Copyright Act in vain for any sign that the elected representatives of the millions of people' who own cellular telephones 'have made it unlawful' to allow that telephone to ring in a public setting."¹¹² Here, the commercial download of a copyrighted musical composition that is made to be heard in public is exempted from copyright liability. The public space of the public phone call becomes a private space; and the private choice of ring tone is free to be disseminated in public. It is not surprising given the ubiquity of cellular phones and the complex boundary problems they create—When are public phone conversations inappropriately private? Which public spaces are cell-phone friendly and which are not?—that this court collapses the distinction between the public and private sphere to enable more conversations (and more public ringing!). Although it is possible to read this case as suggesting that public phone conversations should be respected as private, it is equally plausible to understand this case as saying that this kind of public activity—a new and widely embraced

¹⁰⁷ 663 F. Supp. 2d 363 (S.D.N.Y. 2009).

¹⁰⁸ *Id.* at 374–75.

¹⁰⁹ *Id.* at 374–76.

¹¹⁰ *Id.* at 374–75 (alteration in original) (citation omitted) (quoting 17 U.S.C. §§ 101, 110(4) (2006)).

¹¹¹ *Id.* at 375.

¹¹² *Id.* (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984)).

form of engagement in our digital world—must be off-limits to copyright liability for the connectivity and expressivity cellular phones provides to continue.

2. A Community “Sharing Nicely”

These blurred boundaries of an evolving intellectual-property discourse suggest a form of communal ownership.¹¹³ Whether this devolution of property takes the form of a “noncommercial” term in a Creative Commons license or the conveyance of property to a communal trust, the argument from the Access Movements is that we should abandon “whether or not to commodify . . . [and instead] focus[] on . . . creat[ing] differentiated interpersonal ties that are just, equal, socially beneficial, and satisfying to participants.”¹¹⁴ As James Boyle wrote:

Because there is, in fact, no intelligible geography of public and private, I suggest that our decisions should focus on a different set of criteria. The first is egalitarian—having to do with the relative powerlessness of the group seeking information access or protection. The second is the familiar radical republican goal of creating and reinforcing a vigorous public sphere of democracy and debate.¹¹⁵

The seed of growth for this new society lies not in any singular individual or baseline market principle, but, as the language of the commons emphasizes, in the commitment to a specific kind of community. The focus on a commons changes the conversation from individual ownership to shared values.¹¹⁶ Rather than drawing a distinction between author and audience, for example, the Access Movements assert that without a community organized around a commons, there is no value (personal or otherwise) to build or protect through property rights.¹¹⁷ And although we might say that the Access

¹¹³ See Carpenter et al., *supra* note 10, at 1022 (advocating a trust version of property and tracing its long history as a form of property relations). See generally Madhavi Sunder, *Property in Personhood*, (discussing how intellectual-property law applies to cultural commodities that would ordinarily be considered common property), in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 164 (Martha M. Ertman & Joan C. Williams eds., 2005).

¹¹⁴ Victoria F. Phillips, *Commodification, Intellectual Property and the Quilters of Gee’s Bend*, 15 AM. U. J. GENDER SOC. POL’Y & L. 359, 374 (2007).

¹¹⁵ BOYLE, *supra* note 33, at 28.

¹¹⁶ Boyle goes on to say, “These two criteria are not neutral or descriptive—they represent a value choice.” *Id.*

¹¹⁷ See Boyle, *supra* note 101, at 9–10 (discussing the increased amount of literature on the commons); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1544–47 (1989) (rethinking the public interest for which the concept of community is central to

Movements conceive of the community as the origin of creativity and innovation, the notion of origin simply does not work here.¹¹⁸ The importance of the community's beginning is dwarfed—if it exists at all—by its role in nurturing its members now so that they may give back to the community and strengthen their commitments to each other.

The language of community (as opposed to an aggregate of individual interests) and of shared values (as opposed to individual beliefs or incentives) appears in recent cases, especially those concerning international intellectual property and the United States' relations with our foreign friends. Consider *Golan v. Holder*,¹¹⁹ a district court case holding that section 514 of the Uruguay Round Agreements Act (as amending the Copyright Act at 17 USC §104A) violates the First Amendment of the United States Constitution because it restores copyright to foreign works that lost protection for failure to comply with U.S. copyright formalities.¹²⁰ The *Golan* court stated that the plaintiffs had vested First Amendment interests in the formerly copyrighted works because they had fallen into the public domain. "In the United States, [our copyright law] includes the bedrock principle that works in the public domain remain in the public domain."¹²¹ The court reasoned from reliance interests as well from the value of a robust public domain.¹²² The district court embraces communal property (once owned by an individual, now shared by all) as so vital to the First Amendment's purposes that it facilitates judicial redistribution of property from the private sphere to the public. The court accomplishes this contrary to explicit congressional mandate and at the cost of aggravating our foreign relations. But it does so because our community grows richer with each addition to the public domain.¹²³

human fulfillment).

¹¹⁸ Cf. Karl Marx, *Introduction to the Grundrisse*, ("All production is appropriation of nature by the individual within and through a definite form of society. In that sense it is a tautology to say that property (appropriation) is a condition of production. But it becomes ridiculous, when from that one jumps at once to a definite form of property, e.g. private property (which implies, besides, as a prerequisite the existence of an opposite form, viz. absence of property). History points rather to common property . . . as the primitive form, which still plays an important part at a much later period as communal property."), in *KARL MARX: A READER* 7 (Jon Elster ed., 1986).

¹¹⁹ 611 F. Supp. 2d 1165 (D. Colo. 2009), *rev'd*, 609 F.3d 1076 (10th Cir. 2010).

¹²⁰ *Id.* at 1172–77.

¹²¹ *Id.* at 1177.

¹²² *Id.* at 1173 (internal quotation marks omitted) (quoting *Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007)).

¹²³ The district court decision was reversed on appeal. See *Golan*, 609 F.3d at 1076. In June 2010, the Court of Appeals for the Tenth Circuit held that Section 514 of the Uruguay

Sharing is the operative form of ownership in the commons. It is neither an activity nor a value we discard when we begin to acquire property and retreat from reliance on the commons. Indeed, the Access Movements reclaim sharing as a central virtue of our advancing civilization. “Sharing nicely” has become a theory of economic production.¹²⁴ Forms of sharing vary in openness: from the GPL,¹²⁵ F/OSS,¹²⁶ various open educational platforms,¹²⁷ and online scholarship and data banks,¹²⁸ to the different iterations of Creative Commons licenses,¹²⁹ robust theories of trademark fair use,¹³⁰ proposals for more widespread compulsory license schemes,¹³¹ and

Rounds Agreement Act, which restored U.S. copyright to some foreign copyright holders, served substantial governmental interests in advancing the expressive and economic interests of authors and was narrowly tailored to address cognizable harm. *Id.* at 1084. As between reliance parties and authors, the court of appeals sided with the authors saying that the “First Amendment . . . protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.” *Id.* (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)). This reasoning retreats from the language of community and the importance of the commons as expressed by the district court.

¹²⁴ Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004); see also Debora Halbert, *Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures* (suggesting that we “emphasize a framework focused on sharing and exchange instead of personal ownership”), in *PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD* 111, 118 (Lise Buranen & Alice M. Roy eds., 1999).

¹²⁵ See *Licenses*, GNU OPERATING SYS., <http://www.gnu.org/licenses/licenses.html> (last updated Apr. 27, 2010) (providing information about the GNU General Public License for free software).

¹²⁶ See *What Is F/OSS?*, FREE / OPEN SOURCE RES. COMMUNITY, http://opensource.mit.edu/what_is_os.html (last visited Oct. 30, 2010) (explaining what free/open source software is).

¹²⁷ See, e.g., MIT OPENCOURSEWARE, <http://ocw.mit.edu/index.htm> (last visited Oct. 30, 2010) (providing free course materials from MIT).

¹²⁸ See, e.g., SOCIAL SCIENCE RESEARCH NETWORK, <http://www.ssrn.com> (last visited Oct. 30, 2010) (declaring that SSRN is “devoted to the rapid worldwide dissemination of social science research”). The Open Access Chemistry Data Bank is another example. See Richard Van Noorden, *Microsoft Ventures into Open Access Chemistry*, ROYAL SOC’Y CHEMISTRY (Jan. 29, 2008), <http://www.rsc.org/chemistryworld/News/2008/January/29010803.asp> (discussing research into creating an open-access chemistry data bank). These kinds of web-based platforms are growing rapidly and are too numerous to list here. For a directory of open-access journals, see DIRECTORY OPEN ACCESS JOURNALS, <http://www.doaj.org> (last visited Oct. 30, 2010).

¹²⁹ See *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited Oct. 30, 2010) (providing “free licenses and other legal tools to mark creative work with the freedom the creator wants it to carry”).

¹³⁰ See, e.g., Wendy J. Gordon, *Render Copyright Unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 81–87 (2004) (discussing the ramifications of free use); Katyal, *supra* note 90 (exploring the effect of intellectual-property laws on gender equality in the context of fan fiction); McGeeveran, *supra* note 29 (suggesting a broad simplification of the nuanced and complex limitations used in applying the fair-use doctrine); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (arguing that even nontransformative copying, such as for research or educational purposes, can be good and that we should be wary of the fair-use doctrine’s exclusion of these activities).

¹³¹ See, e.g., WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE*

equitable benefit sharing of plant genetic resources.¹³² Widespread sharing of this kind promotes transparency and participation (both democratic virtues), as well as increased production.¹³³ It also promotes connectivity and intimacy, which are emotional experiences most people seek and cherish¹³⁴ but which few people consider central to promoting the progress of science and the useful arts. The features of sharing—transparency, participation, connectivity and intimacy—are building blocks for a sustainable community.¹³⁵ In this community, the *origin* of the shared objects is significantly less important (if important at all) than the fact that they are made and shared.¹³⁶

Recent cases concerning the first-sale doctrine in both trademark and copyright law exemplify this tendency. In *Vernor v. Autodesk, Inc.*,¹³⁷ for example, the plaintiff, Timothy Vernor, (who supports himself selling merchandise on eBay¹³⁸) was held not to infringe the defendant, Autodesk's exclusive right to distribute its copyrighted

FUTURE OF ENTERTAINMENT 202–03 (2004) (suggesting a “governmentally administered reward system” which would benefit consumers and artists).

¹³² Keith Aoki & Kennedy Luvai, *Reclaiming “Common Heritage” Treatment in the International Plant Genetic Resources Regime Complex*, 2007 MICH. ST. L. REV. 35, 52–55 (2007) (discussing the 2004 International Treaty on Plant Genetic Resources).

¹³³ Craig, *supra* note 87, at 234 (“Employing the notions of dialogism and the relational self that have emerged from feminist scholarship, I hope to show how we can re-imagine the author not as source, origin, or authority, but rather as participant and citizen. We can re-imagine authorship as the formation of individual identity and the development of self and community through discourse. These ideas illuminate the nature of authorship as a social and formative process, but they also offer the foundation for a coherent justification of copyright. If speech/dialogue makes us social beings, copyright law, which aims to encourage creativity and exchange, thereby encourages meaningful relations of communication and participation with others.”); *see also* Aoki & Luvai, *supra* note 132, at 64–66 (discussing the advantages of an open-source model for plant genetic resources); Boyle, *supra* note 101, at 10 (asserting that one goal of cultural environmentalism is to render things visible).

¹³⁴ *See* West, *supra* note 83, at 18 (“[I]ntimacy is . . . something human beings *ought* to do. Intimacy is a source of value, not a private hobby.”); *see also id.* at 65 (describing one goal of a reconstructive feminist jurisprudence as showing “the value of intimacy—not just to women, but to the community—and the damage done—again, not just to women, but to the community—by the law’s refusal to reflect that value”).

¹³⁵ *See* Pamela Samuelson, *Enriching Discourses on Public Domains*, 55 DUKE L.J. 783, 803 (2006) (discussing Professor Lange’s conception of the public domain as “‘a status that arises from the exercise of the creative imagination . . . confer[ring] [on authors] entitlements, privileges and immunities’ to appropriate from other works in the course of creating new ones” (omission and alterations in original) (quoting David Lange, *Reimagining the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 463, 474)).

¹³⁶ *See, e.g.,* Daniel B. Smith, *What is Art For?*, N.Y. TIMES MAG., Nov. 16, 2008, at 39, 41 (“Unlike a commodity, whose value begins to decline the moment it changes hands, an artwork gains in value from the act of being circulated—published, shown, written about, passed from generation to generation—from being, at its core, an offering.”).

¹³⁷ No. C07-1189RAJ, 2009 WL 3187613 (W.D. Wash. Sept. 30, 2009), *vacated*, 621 F.3d 1102 (9th Cir. 2010).

¹³⁸ *Id.* at *1.

software despite a license to the contrary. Vernor acquired the software from an architectural firm, who had purchased it from Autodesk. Vernor claimed that despite language in the software license that allegedly retained ownership title in the software with Autodesk, the initial purchase of the software and its subsequent transfer were sufficient to trigger the first-sale doctrine under 17 U.S.C. § 109(a). That section provides, “Notwithstanding the provisions of section 106(3), the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy”¹³⁹ Canvassing a variety of district and appellate court cases on the subject, the U.S. District Court for the Western District of Washington considered the transaction “holistically” and determined that, because Autodesk had no intention of ever retrieving the software from the original licensor, ownership was transferred despite contract language to the contrary. The court dismissed Autodesk’s attempt to define “ownership” as “unrestricted ownership” and instead embraced an industry standard tailored to the software business.¹⁴⁰

On appeal, the district court’s decision was reversed but not its holistic approach: evaluating the transaction in context to ascertain whether or not ownership was established in the purchaser of the software. Central to both decisions in *Vernor* was the concern over the harms and benefits that flow from secondary markets in software. Autodesk argued that interpreting “owner” in section 109(a) as anything less than “unrestricted ownership” would send retail prices skyrocketing because software producers would raise prices to compensate for the resale market. Vernor argued that interpreting section 109(a) to favor the copyright owner would destroy all secondary markets and therefore hurt consumers further, reduce competition, and eviscerate the first-sale doctrine via contract.¹⁴¹ The district court’s ruling in favor of Vernor recognized the changing nature of ownership with regard to software—a kind of shared or overlapping ownership. The ruling facilitates more markets for the sale of software and thus, explicitly increases access. The appellate ruling does not dispute this changing landscape, but held that

¹³⁹ 17 U.S.C. § 109(a) (2006).

¹⁴⁰ *Vernor*, 2009 WL 3187613, at *8.

¹⁴¹ *Id.* at *14. To this the court said, “These contentions make for an interesting debate. Autodesk’s suggestion that consumers will be harmed by rising retail prices . . . does not address the concomitant price benefit in the form of reduced resale prices. Although Autodesk would no doubt prefer that consumers’ money reaches its pockets, that preference is not a basis for policy.” *Id.*

Autodesk had not relinquished control over the software sufficient to transform the software licensee into an owner per the language of the Copyright Act.

The court in *UMG Recordings, Inc. v. Augusto*¹⁴² applied similar reasoning to the sale of promotional compact disks that purport to restrict resale with the language “Promotion Use Only—Not for Sale.” This case also resulted in a ruling favoring the secondary retailer and not the copyright holder.¹⁴³ Noting that: (1) the only apparent benefit to the alleged license prohibiting resale is to restrain trade and (2) the “economic realities” of the situation illuminate no intention by UMG to regain possession of the compact disks, the court held that UMG transferred ownership of the compact disks and thus exhausted their exclusive right to distribute the copyrighted materials contained therein. Like the district court decision in *Vernor*, *Augusto* favors the small business person and facilitates the secondary market, expanding access to the copyrighted material at lower prices. It also recognizes that, in the digital age, exclusivity may be impracticable and the “economic realities” of our more fluid marketplace demand that we adjust our expectations of property relations to include less than absolute ownership.

Copyright is not alone in the shifting of the ownership paradigm to accommodate broader access and sharing among varied markets and users. In *Tiffany (NJ) Inc. v. eBay, Inc.*,¹⁴⁴ both the U.S. District Court for the Southern District of New York and the Court of Appeals for the Second Circuit (affirming) squarely sided with the consumer (and not the mark holder) in absolving eBay of contributory liability.¹⁴⁵ This case begins with the unremarkable proposition that a trademark owner cannot impede the sale of a genuine good bearing a true mark, even if the sale is unauthorized by the mark owner.¹⁴⁶ The first sale of the trademarked good exhausts the exclusive rights in controlling future sales. The holding then broadens its reach to conclude that, although eBay may have been aware that counterfeit Tiffany products were being sold on its site, absent particularized knowledge of

¹⁴² 558 F. Supp. 2d 1055 (C.D. Cal. 2008). As this article is going to press, the Ninth Circuit affirmed the lower court’s ruling and reasoning. See *UMB Recordings, Inc. v. Troy Augusto*, 628 F.3d 1175 (9th Cir. 2011).

¹⁴³ *Id.* at 1065.

¹⁴⁴ 576 F. Supp. 2d 463 (S.D.N.Y. 2008), (disputing eBay’s liability for sales of counterfeit Tiffany products on its website), *aff’d in part and rev’d in part*, 600 F.3d 93 (2d Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3129 (U.S. Aug. 27, 2010) (No. 10-300).

¹⁴⁵ *Id.* at 511. This decision was affirmed on appeal on all issues except false advertisement, for which the court of appeals remanded. See *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d. 93, 112–14 (2d Cir. 2010).

¹⁴⁶ *Tiffany*, 576 F. Supp. 2d at 473.

specific counterfeit goods, eBay cannot be held liable for their sale on its site.¹⁴⁷ Upholding a defendant-friendly interpretation of the contributory-liability test from *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*,¹⁴⁸ the district court and the court of appeals blessed the business practices of one of the largest and most successful internet marketplaces to date. Prudentially avoiding the likelihood that a liability determination would chill continued activity in a vibrant marketplace, this case encourages ongoing access to, and participation by, large-scale intermediaries who are the engines of our new digital world.¹⁴⁹ Although not a shift in trademark law per se, the leeway this court granted eBay (and, by consequence, other similar marketplaces and UGC sites, such as YouTube¹⁵⁰) weakens the exclusivity that intellectual-property-rights holders once enjoyed.

The district court could have found Tiffany liable for contributory infringement, given that eBay admitted it had some knowledge that counterfeit Tiffany products were being sold on its site.¹⁵¹ The court could have forced eBay into a more costly liability structure by limiting the scope of access to secondhand goods and requiring stricter monitoring of potentially fraudulent behavior, turning eBay into a kind of trademark police on behalf of Tiffany and other product manufacturers. But it did not. As the law stands, since the court's holding was affirmed on appeal, Tiffany has, in essence, been forced to share its mark with eBay and other resellers and advertisers of Tiffany's products on more generous terms. The court shifted focus from a determination about the actual origin of the marked good (whether it is a genuine article or not) to whether eBay had sufficient knowledge about the product's origin to determine whether the market should remain open. Assuming the absence of false advertising or sponsorship, this is a win for consumers and users. As long as eBay is not misleading as to the good's source and it remains unaware of particular fraudulent offers for sale, the distribution channels grow unfettered benefiting those seeking access.

¹⁴⁷ *Id.* at 509–10.

¹⁴⁸ 456 U.S. 844 (1982).

¹⁴⁹ *See Tiffany*, 600 F.3d at 103 (“To impose liability because eBay cannot guarantee the genuineness of all of the purported Tiffany products offered on its website would unduly inhibit the lawful resale of genuine Tiffany goods.”).

¹⁵⁰ *See Viacom Int'l Inc. v. YouTube, Inc.*, 718 F.Supp.2d 514 (S.D.N.Y. June 23, 2010) (granting defendants' motion for summary judgment because they fell within the Digital Millennium Copyright Act's safe harbor provision and holding that they were not deprived of protection merely because they required that copyright holders manually request that videos be removed from their websites or because they removed only specific clips identified in DMCA notices).

¹⁵¹ *Tiffany*, 600 F.3d at 106.

3. *A New Incentive Story*

The Access Movements claim that sharing promotes the progress of science and the useful arts. This is in contrast to the traditional claim that exclusivity (private ownership) incentivizes creativity and innovation and that strong property rights are necessary for a robust marketplace. By disputing this foundational claim, the Access Movements challenge us to rethink how and why people work and innovate. “[N]ew forms of creative output, from the advent of open source collaborative networks to garage bands, remix culture, and the World Wide Web itself, undermine utilitarian intellectual property law’s very premise: that intellectual property rights are necessary to incentivize creation.”¹⁵² The best manufacturing may no longer occur in assembly-line fashion.¹⁵³ Nonlinear production is touted as some of the most innovative today. Examples include open-source software, weblogs and wikis that collapse previously assumed stable distinctions between maker and user,¹⁵⁴ or writer and reader.¹⁵⁵

The value of these new innovations is not necessarily understood in a traditional economic way.¹⁵⁶ The Access Movements recognize that “many artists care more about protection of the fundamental integrity of their work than the financial gain the work will realize.”¹⁵⁷ People create for audiences and for their own satisfaction—for people and community, not necessarily for money.¹⁵⁸ Many people create for no reason but to play;¹⁵⁹ ubiquitous

¹⁵²Sunder, *supra* note 7, at 260–61 (footnotes omitted); see also Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563, 631 (2004) (positing that the open-source movement’s “energizing, volunteer-capturing force is a fighting response against power and control of proprietary, traditional software”).

¹⁵³See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 3 (2006) (arguing that these new methods of production “will emerge . . . at the core, rather than the periphery of the most advanced economies”).

¹⁵⁴See ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* (2005) (discussing the rise of the user-innovator); see also Aoki & Luvai, *supra* note 132, at 63 (describing the indistinguishability of users and developers of software and of plant genetic resources).

¹⁵⁵See generally Burk, *supra* note 90 (describing hypertexting).

¹⁵⁶See Boyle, *supra* note 101, at 12 (stating that traditional economic theory assumes a reductionist definition of innovation).

¹⁵⁷Lacey, *supra* note 117, at 1584; cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (discussing the problem as it relates to fair use and citing to Samuel Johnson’s famous saying, “[N]o man but a blockhead ever wrote, except for money.” (internal quotation marks omitted)).

¹⁵⁸See Lacey, *supra* note 117, at 1536 (“I also question the validity of the universal assumption that financial incentives are the only reason artists create works of art.”).

¹⁵⁹See Boyle, *supra* note 101, at 21 (describing the institutional ecology of commons-based production as laborious and having the “features of the intensely satisfying, self-directed, play characteristic of the work of the artist and academic”); see also Cohen, *supra* note 16, at 93 (describing group-based activity on the Internet where “meaning emerges through . . . opportunities for play”).

behavior that Rebecca Tushnet describes as “excessive, beyond rationality.”¹⁶⁰ Crowded fan-sites and globally networked virtual worlds are further evidence of this behavior. From this “play” comes beloved avatars as well as path-breaking developments in science and technology that are valued for fulfilling personal desire or public need. The incentive to produce such things, according to the Access Movements, comes from the pleasure of participation¹⁶¹ in a network of volunteers more than any promise of recompense.¹⁶² Focusing on these motivations, the Access Movements squarely challenge certain assumptions about market capitalism, including the public-goods problem that has shaped intellectual-property law for centuries.¹⁶³ Numerous examples of this volunteer economy populate the Internet. Jonathan Zittrain of the Berkman Center for Internet and Society at Harvard University recently described such behavior in a talk called “Minds for Sale,” in which he canvasses activities ranging from “turking” (for free or for pennies) to online contests whose prizes range from mere accolades to modest monetary awards.¹⁶⁴ Even some court cases discussing the right of publicity touch on the disconnect between intellectual-property law’s incentive theory and a celebrity’s investment in his or her identity and reputation.¹⁶⁵

¹⁶⁰ Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009).

¹⁶¹ Sunder, *supra* note 7, at 263 (borrowing Sun Microsystems’s slogan the “Participation Age” to describe a feature of the countermobilization).

¹⁶² See BENKLER, *supra* note 153, at 59–90 (describing peer production and sharing).

¹⁶³ For a description of the public-goods problem, see FISHER, *supra* note 131, at 199. For challenges to theoretical underpinnings of market capitalism for intellectual property rights, see, for example, Aoki & Luvai, *supra* note 132, at 59; Cohen, *supra* note 28, at 351; Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

¹⁶⁴ For a video of the talk in which Zittrain describes the range of activities as pyramid-shaped, with the high-value awards appearing infrequently at the top, and the voluntary contributions (or working for free) at the wide bottom, see Jonathan Zittrain, *Minds for Sale*, YOUTUBE, 10:00–21:00 (Nov. 29, 2009), <http://www.youtube.com/watch?v=Dw3h-rae3uo>. “Turking” is the activity sponsored by Mechanical Turk, a crowdsourcing marketplace from Amazon Web Services that uses computers to coordinate humans to do work that computers cannot do. See AMAZON MECHANICAL TURK, <http://www.mturk.com> (last visited Oct. 30, 2010). For a description of “turking,” see Jason Pontin, *Artificial Intelligence, with Help from the Humans*, N.Y. TIMES, Mar. 25, 2001, at B5.

¹⁶⁵ In *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003), Tiger Woods complained that the unauthorized use of his image in connection with art prints, calendars, and trading cards violates the Lanham Act and his right of publicity under state law. The court questioned whether a property-like right in a celebrity’s identity is necessary given that “the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than ‘adequate’ supply of creative effort and achievement.” *Id.* at 933 (internal quotation marks omitted) (quoting *Cardtoons L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 974 (10th Cir. 1996)); see also *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinsky, J. dissenting from denial of rehearing en banc) (“Overprotecting intellectual property . . . stifles the very creative forces it’s supposed to nurture.”).

4. Community Building and the Public Interest

In contrast to the solo inventor, the romantic author, or the comparison shopper, the agents in this new social and digital economy explicitly build off each other to innovate further.¹⁶⁶ Participation, therefore, requires taking care to maintain the community and its members. It is no surprise, then, that the Access Movements speak more often in terms of responsibility and fairness than of autonomy.¹⁶⁷ The Access Movements undermine the model of isolated, rights-bearing individuals, who, in the aggregate, allegedly form a sustainable community of property owners.¹⁶⁸ Instead, the countermobilization advocates for responsible ownership, which requires contemplating the effects of private ownership on other people.¹⁶⁹ Private ownership is not eschewed; but it is subordinated to the primary value of taking care of others on the assumption that doing so will make everyone better off.¹⁷⁰ This requires a “sense of trust among potential contributors” to the community,¹⁷¹ which generates strong multilateral ties among them. Talking this way, the countermobilization “reimagine[s] the author [or the inventor] not as

¹⁶⁶ See BENKLER, *supra* note 153, at 59–90 (discussing peer production and sharing).

¹⁶⁷ See, e.g., Phillips, *supra* note 114, at 374 (asserting that the focus should not be on private ownership but on “how to create differentiated interpersonal ties that are just, equal, socially beneficial, and satisfying to the participants”); see also BOYLE, *supra* note 33, at 28, 31 (suggesting we focus on egalitarianism in our debate over access to information and discussing how fairness is already in the vocabulary of information regulation).

¹⁶⁸ See Craig, *supra* note 87, at 250 (“The subject matter of copyright is not the independently produced and individually owned work-as-object, but rather a contribution to the continually evolving culture in which the author exists and by which she is constituted.”); Lacey, *supra* note 117, at 1549 (arguing that the aggregation of individual autonomous interests will not add up to a shared interest of the community); see also Carpenter et al., *supra* note 10, at 1027–29 (positing a new theory of property for indigenous cultural property claims that are structured around collective obligations and stewardship (peoplehood) rather than individual rights (personhood)).

¹⁶⁹ See Sunder, *supra* note 7, at 284 (“Utilitarian’s central failure, of course, is its neglect of distribution. . . . The utilitarian approach to intellectual property does not ask: Who makes the goods? Who profits, and at whose expense? . . . A utilitarian calculus that presumes overall welfare in the aggregate ‘doesn’t tell us where the top and the bottom are’” (footnote omitted) (quoting MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 61 (2000))).

¹⁷⁰ See Boyle, *supra* note 101, at 18–19 (praising the Adelphi Charter whereby rights in intellectual property are not created or extended without evidence of their benefits and the burden of proof is on those who propose extensions); see also Cohen, *supra* note 28, at 374 (“First, do no harm.”); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1538 (1993) (arguing that when the public’s claims to property conflict with those of a laborer, the public’s claims should prevail because some part of the laborer’s work should be left for others if the laborer wants to appropriate his or her work).

¹⁷¹ Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 325, 334 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006).

[a] source, origin, or authority, but rather as a participant and citizen”¹⁷² to whom the community owes a duty and by virtue of which the community continues to thrive.¹⁷³

Ironically, patent law (arguably one of the strongest forms of intellectual property) is the area in which this kind of change has been most recent and extensive. In *eBay Inc. v. MercExchange, L.L.C.*¹⁷⁴ the Supreme Court held that patent owners must satisfy the four-factor test traditionally used to determine whether injunctive relief is warranted when seeking permanent injunctions for patent infringement.¹⁷⁵ This decision upset a longstanding practice in patent-infringement cases, in which patent owners were *entitled* to a permanent injunction as a remedy for infringement.¹⁷⁶ Instead, the Supreme Court emphasized the equitable nature of the remedy and the considerable discretion provided to the trial court. The *MercExchange* decision has opened the field of patent practice to the very real possibility that ongoing infringing activity (“access”) may be countenanced if, for example, such use is in the public interest.¹⁷⁷ Indeed, Justice Kennedy’s concurrence makes this point explicitly:

For [some] firms, an injunction . . . can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest

The equitable discretion over injunctions, granted by the Patent Act, is well suited to allow courts to adapt to the rapid technological and legal developments in the patent system.¹⁷⁸

¹⁷² Craig, *supra* note 87, at 234.

¹⁷³ See Kapczynski, *supra* note 6, at 835 (describing the belief held by the open-source-software community that society benefits when it has free access to knowledge).

¹⁷⁴ 547 U.S. 388 (2006).

¹⁷⁵ *Id.* at 391–92.

¹⁷⁶ Andrew Beckerman-Rodau, *The Aftermath of eBay v. MercExchange*, 126 S. Ct. 1837 (2006); A Review of Subsequent Judicial Decisions, 89 J. PAT. & TRADEMARK OFF. SOC’Y 631, 632 (2007).

¹⁷⁷ See *MercExchange*, 547 U.S. at 391 (citing the four-factor test). Of particular import is factor four: “the public interest would not be disserved by a permanent injunction.” *Id.*

¹⁷⁸ *Id.* at 396–97 (Kennedy, J., concurring) (citation omitted).

A survey of cases since the 2006 decision confirms this state of affairs. The majority of cases in which courts deny permanent injunctions are those where the patent owner is a nonpracticing entity. In these cases, in effect, compulsory licenses (court-determined royalty rates) are issued instead of injunctions. These allow future access to the patented product under the auspice of promoting innovative uses.¹⁷⁹ Strengthening the four-factor test weakens the leverage of the patent holder in licensing negotiations, and therefore places patented technology into the marketplace at lower rates, making it more accessible to the public. In other words, where patented products are used by innovators who are not direct competitors of the patent owner, district courts, following the Supreme Court's direction, facilitate use by these various communities.

Another example of the "public trust" function of developing intellectual-property rights arises in the area of geographical indications and cultural property.¹⁸⁰ With regard to cultural property, or what Barton Beebe calls "traditional cultural expressions," indigenous communities assert intellectual-property-like rights to protect their cultural heritages against "dilution" by encroaching communities.¹⁸¹ This is emphatically *not* to incentivize the production of more cultural expression, but instead to preserve the special culture and the community that exists already. Court decisions from Australia are some of the best-known examples of this kind of cultural-property protection for the purpose of "social and religious stability" of certain aboriginal communities.¹⁸² The controversial geographical-indication-of-origin protection (GI) under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is intended to be a protectionist measure for local (native) community-based cultural products that facilitates trade, rather than inhibits it.¹⁸³ The various

¹⁷⁹ Beckerman-Rodau, *supra* note 176, at 654–55.

¹⁸⁰ See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 869 (2010) (discussing an "emerging element of international development" in which traditional producers seek to emphasize "the precise geographical, historical, and human circumstances of their goods' manufacture").

¹⁸¹ *Id.*

¹⁸² *Foster v Mountford* (1976) 29 FLR 233, 236 (Austl.); see also *Milpururru v Indofurn Proprietary Ltd.* (1994) 54 FCR 240, 280 (Austl.) (levying damages for infringement that partially reflected the "harm suffered" to some of the aboriginal applicants "in their cultural environment"). For a discussion of this practice, see, for example, Peter J. Chalk & Alexander Dunlop, *Indigenous Trade Marks and Human Rights: An Australian and New Zealand Perspective*, 99 TRADEMARK REP. 956 (2009); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997).

¹⁸³ See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 22.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 22.1, 108 Stat. 4809, 869 U.N.T.S. 299, 308. GI protection under TRIPS became effective in

national GI laws that comport with TRIPS are intended to “allow cultural diversity to thrive and artisans to remain in their villages, resisting the pull of city industry.”¹⁸⁴ This trademark-like protection is neither consumer-oriented nor antidilutive in scope. It is based on deeply held concerns over community sustainability and cultural diversity. As Madhavi Sunder has explained, “[P]oor people’s turn to property is . . . about social and cultural values People, rich and poor alike, want recognition of their creativity and contributions to science and culture. This capacity for innovation, work, and cultural sharing is part of what makes us human.”¹⁸⁵

Be it through injunctive relief or geographic indications, the Access Movements’ vocabulary structures new relations for the role of culture in law-making and law-enforcing, recognizing the mutual constitution of the two. As Julie Cohen has written, “If the network is us, then it isn’t a separate entity.”¹⁸⁶ Of course, the idea that law is constitutive of culture and vice versa is not new.¹⁸⁷ But these notions, for example, that the community and not the individual is the origin of value and that property by default should be communally held appear to be sea changes in intellectual-property policy. They put cultural sustainability on par with legal precedent. And they remind us that our rights and responsibilities toward each other (our laws) reflect and constitute the erasures, possibilities and power that structure our social relations. There is no way to designate an outside of culture by which to judge the law as separate. Similarly, there is no means outside of the law to assess its neutral effect on cultural production.¹⁸⁸ Origins designating a center or a beginning or a predicate cause, have no place in this future for intellectual property.

B. Questioning Hierarchies

The above Section described how the countermobilization speaks not of origins, but instead, of communities. Indeed, the Access

1996 for developed countries and in 2006 for the least developed countries. Irene Calboli, *Expanding the Protection of Geographical Indications of Origin Under TRIPS: “Old” Debate or “New” Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181, 190 (2006). For a discussion of the controversy over GIs, see Kal Raustiala & Stephen R. Munzer, *The Global Struggle Over Geographic Indications*, 18 EUR. J. INT’L L. 337 (2007).

¹⁸⁴ Sunder, *supra* note 7, at 300.

¹⁸⁵ *Id.* at 301.

¹⁸⁶ Cohen, *supra* note 16, at 92.

¹⁸⁷ See ROGER B. M. COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 24–25 (2006) (citing nineteenth- and twentieth-century theorists).

¹⁸⁸ See Sunder, *supra* note 7, at 320–21 (contesting a binary view of culture, inside and outside).

Movements seem to speak a different language than that of the origin stories of intellectual property. The Access Movements discard common dualities that populate intellectual-property talk, such as public versus private, individual versus group, culture versus nature, maker versus user, monetized versus free, autonomous versus interconnected.¹⁸⁹ The lack of these dualities and the devaluation of origins *deflates the hierarchies* embedded in the stories of the how and why of intellectual-property protection. As such, the Access Movements speak in terms of antisubordination (dismantling unjust hierarchy) and substantive equality. By focusing on the importance of practical access, the Access Movements value private ownership only insofar as it does not interfere with self-actualization, sustainability and community well-being. By talking this way, the Access Movements infuse the debates over intellectual-property protection with a more focused attention on, and complex understanding of, how and why people work and innovate in communities.¹⁹⁰ Exposing the traditional heuristics of intellectual-property law around which the origin stories are structured as a mistake provides the countermobilization with the further opportunity to invent new, clear directives.¹⁹¹ This Section describes these directives and their organization around an antisubordination principle with examples from recent court decisions and advocacy.

1. Reversing Default Rules of Exclusivity

The Access Movements proceed with a presumption *against* enforcing and extending exclusive rights in intellectual property. As James Boyle has written, “[R]ights should not be created or extended without evidence of their benefits, and . . . the burden of proof is on those who propose extensions . . .”¹⁹² Boyle and others call for

¹⁸⁹ See, e.g., Burk, *supra* note 79, at 183 (discussing mind/body and nature/culture dualities).

¹⁹⁰ See, e.g., Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 438–39 (2003) (showing how “the language of legal doctrine makes a significant difference with respect to the organization and the application of the doctrine” and explaining how language has a normative power).

¹⁹¹ See Séverine Dusollier, *The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 285 (2006) (“Exercising copyright differently from what has become the usual, and almost normative, way might prove that the control/remuneration rhetoric that tends to dominate the copyright discourse of today is in fact not natural but rather comes from constructed habits, due to the copyright industry’s efforts. If that rhetoric is revealed as merely one choice, the imperative of making copyright an increasingly stronger instrument of control may well be undermined. Such a discovery could resignify the meaning of copyright. The subversive strategy of Creative Commons would then be successful.”).

¹⁹² Boyle, *supra* note 101, at 19.

shifting the burden in the traditional analysis of intellectual-property protection from one where exclusive rights are presumed necessary to incentivize individuals to invent or create, to one where exclusive rights must be justified by more than an appeal to human nature or a cost/benefit analysis.¹⁹³ This shifts the focus from enclosure to access, on the understanding that the traditional economic model of intellectual property is either outdated in light of the technological revolution or inherently flawed given our better appreciation of the mechanisms of creativity and the public domain.¹⁹⁴ The revitalization of the four-factor test for an injunction in the patent context is a case in point. The fallout from the Supreme Court's *MercExchange* decision has been that, absent direct competition, the patent holder is not likely to retain exclusive control over the use of the invention, but will be entitled to compulsory license fees instead. The lower courts' emphasis on the public interest (presumably taking their cue from Kennedy's concurrence) further underscores the shifting of the burden to the property holder to justify exclusivity.¹⁹⁵

Another recent patent case, *Quanta Computer, Inc. v. LG Electronics, Inc.*,¹⁹⁶ hints at this shifting of rights from the patent holder to the patent users.¹⁹⁷ Relying on "longstanding doctrine of patent exhaustion,"¹⁹⁸ the Supreme Court reversed the Federal Circuit's limitations on the doctrine and affirmed the rule that patent exclusivity is exhausted upon the first sale of an object embodying the patent.¹⁹⁹ Key to the decision in *Quanta* was the fact that a License Agreement and Master Agreement between LG Electronics and Intel purported to limit the exhaustion of LG's patent rights to Intel's customers, including to its manufacturing partners such as Quanta. But the Court held that the license failed to limit LG's patent rights

¹⁹³ See, e.g., Boyle, *supra* note 99, at 105–07 (discussing problems with the government's rationale in its White Paper entitled "Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights").

¹⁹⁴ See, e.g., Rebecca Tushnet, *Gone in 60 Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008) (arguing that justification for trademark dilution lacks foundation in light evidence from cognitive science); see also BENKLER, *supra* note 153, at 25 (canvassing the access movement literature that responds to the second enclosure movement); see *id.* at 59 (describing the evolving model of peer production that challenges traditional theories of economic behavior).

¹⁹⁵ See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (stating that one of the factors in the four-factor test is that "the public interest would not be disserved by a permanent injunction"); see also Beckerman-Rodau, *supra* note 176, at 632 (discussing *eBay Inc. v. MercExchange*).

¹⁹⁶ 128 S. Ct. 2109 (2008).

¹⁹⁷ See e.g., *id.* at 2118 (describing dangers of the "end-run around exhaustion" one of which is the restriction of the patented products' use by the putative purchaser).

¹⁹⁸ *Id.* at 2115.

¹⁹⁹ *Id.* at 2117–18.

and the Master Agreement provided ineffective notice to third parties—no implied license was created by the agreement. The Court considered its decision a return to first principles, citing the 1917 case *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*²⁰⁰ But to some it may also be understood as warning to patent holders that, in light of the more complex contracting and manufacturing in the twenty-first century and the importance of facilitating networks in today's economy (as opposed to strengthening enclosures), contracts purporting to limit exhaustion will be construed narrowly. This principle facilitates use as much as it demeans the private property right.²⁰¹

2. Substantive Equality Evaluations

Putting a thumb on the scale for access and shifting the burden to the intellectual-property rights holder in order to demonstrate a need for exclusivity has the benefit of requiring critical evaluation of the effects of conventional intellectual-property protection. It also focuses attention on the relations of power that such protection perpetuates. For some participants in the countermobilization, this evaluation demands restructuring intellectual-property protection to accommodate serving the underserved and meeting identified needs with a response of access.²⁰²

Questions of power imbalances and sustainable culture are apparent in recent high-profile intellectual-property disputes. A patent case argued in February 2010 in the U.S. District Court for the Southern District of New York combined such diverse actors as the ACLU, the Public Patent Foundation, the Association for Molecular Genetics, and the American Society for Clinical Pathology against the U.S. Patent and Trademark Office and Myriad Genetics.²⁰³ Myriad

²⁰⁰ 243 U.S. 502 (1917). “[T]he right to vend is exhausted by a single, unconditional sale, the article sold being thereby carried outside the monopoly of the patent law and rendered free of every restriction which the vendor may attempt to put upon it.” *Quanta*, 128 S. Ct. at 2116 (internal quotation marks omitted) (quoting *Motion Picture Patent Co.*, 243 U.S. at 516).

²⁰¹ *Quanta*'s rule might be easily worked around by careful contract drafting. See *infra* pp. 54–55. Nonetheless, the case stands as another example of an evolving default in intellectual-property law whereby property owners cannot assume exclusivity is the status quo.

²⁰² See, e.g., BOYLE, *supra* note 33, at 28 (proposing a focus on equality rather than private ownership, the former being described as “having to do with the relative powerlessness of the group seeing information access or protection”); Aoki & Luvai, *supra* note 132, at 57 (proposing an open-source movement for plant genetic resources to facilitate necessary access to them for biodiversity and community sustainability); Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 756 (2006) (explaining why the law and legal scholarship should be freely available on the Internet and how copyright law and copyright-licensing practices should facilitate the achievement of this goal).

²⁰³ *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 669 F. Supp. 2d 365 (S.D.N.Y. 2009).

Genetics owns patents that cover two breast cancer gene sequences called BRCA1 and BRCA2. Myriad therefore controls the genetic testing for these cancer genes and has prevented nonlicensed entities (doctors, scientists, and hospitals) from testing for these genes to determine courses of treatment and possible cures.

Before the district court, the attorneys argued that the “law of nature” doctrine barred the patentability of the gene sequences.²⁰⁴ But the rhetoric surrounding the lawsuit—the dominant story being told about this dispute—is that needed access to medicine and scientific research is being barred.²⁰⁵ The image evoked (albeit an exaggerated one) is one of predatory pharmaceutical companies that fail to distinguish between price gouging and sustainable profits, preventing sick women from benefiting from the scientific successes of our era. While the court’s rhetoric is not this stark, its denial of the defendants’ motion to dismiss alludes to concerns of access to medicine and the intellectual-property balance as an issue of health and welfare of women.

The widespread use of gene sequence information as the foundation for biomedical research means that resolution of these issues will have far-reaching implications, not only for gene-based health care and the health of millions of women facing the specter of breast cancer, but also for the future course of biomedical research. . . .

The novel circumstances presented by this action against the USPTO, the absence of any remedy provided in the Patent Act, and the important constitutional rights the Plaintiffs seek to vindicate establish subject matter jurisdiction over the Plaintiffs’ claim against the USPTO.²⁰⁶

²⁰⁴ See Complaint at 3–4, *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 669 F. Supp. 2d 365 (S.D.N.Y. 2009) (No. 09 Civ. 04515), 2009 WL 1343027 (“[The Association for Molecular Pathology] supports attaching intellectual property rights to true acts of invention such as new therapeutics, diagnostics or technology platforms, but believes a single gene or a sequence of the genome is a product of nature and should not be patentable.”); see also Mark Fass, “*Law of Nature*” or “*Invention*”? *Court Mulls Patentability of Genes*, N.Y. L.J., Feb. 3, 2010 (reporting that during a hearing regarding the parties’ motions for summary judgment, the plaintiffs’ attorney argued that the defendants had “patented the human body and ‘a law of nature’”).

²⁰⁵ Am. Civil Liberties Union of Utah Found., Inc., ACLU of Utah Statement (May 12, 2009), available at <http://www.acluutah.org/UtahStatementOnGenePatentLawsuit.pdf> (“Myriad’s monopoly on the BRCA genes makes it impossible for women to obtain other tests or get a second opinion about their results, and allows Myriad to charge a high rate for their tests over—\$3,000, which is too expensive for some women to afford.”).

²⁰⁶ *Ass’n for Molecular Pathology*, 669 F. Supp. 2d at 370, 383. The Court granted summary judgment against the patent holder and held the patents invalid under Section 101 of

Shifting the burden of proofs to those who seek to expand exclusivity in intellectual-property holdings is a matter of putting the sustainability of certain communities and their cultural practices first.²⁰⁷ This does not have to mean that exclusivity is disfavored, only that it is one of many tools used to attain cultural recognition of underprivileged groups and the redistribution of wealth and power between developed and developing nations.²⁰⁸ As Madhavi Sunder reports when describing a “cultural heritage license” drafted by various Access Movement organizations who recognize the unpalatable choices faced by many indigenous peoples:

“We currently face a binary decision between extremes,” . . . “either leaving culture vulnerable to exploitation and appropriation or creating legal and technical barriers that hermetically seal bodies of knowledge.” The [cultural heritage] license seeks to offer a “third option” facilitating communication under terms reasonably acceptable to both open knowledge and traditional knowledge constituencies.²⁰⁹

Sunder explains that “[t]he turn to intellectual property and contract . . . is spurred out of concerns for respect, community, and cultural participation, not just efficiency.”²¹⁰ Where efficiency would play a major role in the analysis of whether and how to protect intellectual property under a traditional analysis,²¹¹ the

the Patent Act on March 29, 2010. *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181 (S.D.N.Y. 2010).

²⁰⁷ See Arewa, *supra* note 8, at 167 (discussing “narratives of appropriation” and international intellectual property’s response to them); Boyle, *supra* note 101, at 6–7 (critiquing the economic model of intellectual property as built on the flawed assumption of perpetual growth); Cohen, *supra* note 28, at 374 (asserting that the first principle of the future of copyright law should be: “First, do no harm.”); Michael J. Madison, *Intellectual Property and Americana, or Why IP Gets the Blues*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 677, 702 (2008) (demonstrating how law “serves an important but indirect role in constructing sustainable cultural practices”); Samuelson, *supra* note 135, at 783, 803 (discussing the importance of an open public domain).

²⁰⁸ See Sunder, *supra* note 7, at 273 (discussing “new intellectual property claims by the poor”); see also Siva Vaidhyanathan, *The Anarchist in the Coffee House: A Brief Consideration of Local Culture, the Free Culture Movement, and Prospects for a Global Public Sphere*, LAW & CONTEMP. PROBS., Spring 2007, at 205, 210 (“Attempts at forging a global public sphere discount the importance of cultural recognition in favor of procedural equality . . .”).

²⁰⁹ Sunder, *supra* note 7, at 326 (footnote omitted) (quoting Eric C. Kansa et al., *Protecting Traditional Knowledge and Expanding Access to Scientific Data: Juxtaposing Intellectual Property Agendas via a “Some Rights Reserved” Model*, 12 INT’L J. CULTURAL PROP. 285, 305 (2005)).

²¹⁰ *Id.*

²¹¹ See Boyle, *supra* note 99, at 96–97 (discussing Joseph Stiglitz and Sanford Grossman’s

countermobilization replaces efficiency with substantive equality. And substantive equality—or the antisubordination of people and their culture through redistribution of or access to use social goods—is a theme that motivates the Access Movements.²¹²

The lawsuit against Google alleging that its book search project infringes U.S. copyrights is yet another example of a recent intellectual-property dispute where the rhetoric of equality and access overwhelms the usual discussions of incentive and individual rights.²¹³ In the process of negotiating a class-action settlement, the parties must respond to objectors who, although appreciative of Google's "mission of increasing access to all the world's books,"²¹⁴ believe Google's attempt to control access through its corporate structure undermines the core principles on which copyright law is based. Certain French and German parties object to the "uncontrolled, autocratic concentration of power in a single corporate entity," which threaten[s] the 'free exchange of ideas through literature.'²¹⁵ Academic authors call attention to the possibility of future price gouging for works that would otherwise be in the public domain, available through Creative Commons licensing, or free under fair use.²¹⁶ Other objecting parties decry Google's recommercialization of creative works that were dedicated to the public domain, creating new cost barriers to access where the authors had intended to level them.²¹⁷

article about the tension between incentive and efficiency in the market to create and spread information).

²¹² See, e.g., Craig, *supra* note 87, at 248 ("The notion of the dialogic therefore calls for an investigation into copyright, the power relations that it sustains and perpetuates, and the discourses of value and authority that it informs and replicates. . . [by] silencing counter discourses, attributing authority to speakers, and allocating power over speech."); see also COHEN, *supra* note 83 (manuscript ch. 9, at 192) (suggesting that Martha Nussbaum's "capabilities approach" to equality and social justice be a guide to restructuring intellectual property rights in our digital age); Aoki & Luvai, *supra* note 132, at 69 (in proposing an open-source network for plant genetic resources, cautioning to recognize the relative wealth and power disparity in the reordering that will occur among developing nations and rights holders).

²¹³ See *Authors Guild v. Google, Inc.*, 93 U.S.P.Q.2d (BNA) 1159 (S.D.N.Y. 2009).

²¹⁴ Robert Darnton, *Google and the New Digital Future*, N.Y. REV. BOOKS, Dec. 17, 2009, at 82, 82 (internal quotation omitted).

²¹⁵ *Id.* at 83.

²¹⁶ See *Objection of Academic Authors to the Google Book Settlement*, at 2, *Authors Guild v. Google, Inc.*, 93 U.S.P.Q.2d (BNA) 1159 (S.D.N.Y. 2009) (No. 05 Civ. 8136(DC)), available at <http://thepublicindex.org/docs/letters/samuelsan.pdf> (giving "numerous examples of terms in the Settlement Agreement that are antithetical to academic author interests"); *Objection of Free Software Foundation, Inc. & Karl Fogel to Proposed Settlement* at 1–2, *Authors Guild v. Google, Inc.*, 93 U.S.P.Q.2d (BNA) 1159 (S.D.N.Y. 2009) (No. 05 Civ. 8136(DC)), available at <http://thepublicindex.org/docs/letters/fsf.pdf> (discussing reasons why books should be published freely through the Free Software Foundation).

²¹⁷ *Objection of Free Software Foundation*, at 2.

These examples highlight a rhetoric that privileges equality and access over incentives for ownership and exclusivity. Rather than asserting that there would be nothing of value to share absent intellectual-property protection, these examples focus on the value of substantively equal access as a health and welfare maximizing principle.

3. *Constrained Freedom*

In both the patent and copyright contexts, the appeal to substantive equality (a just balance of wealth) requires reexamining the notion of freedom in the analysis of the whether and how to protect exclusive rights to intellectual property. Rejecting a purely utilitarian approach to maximizing freedom, the countermobilization recognizes that absolute freedom through trickle-down effects is unlikely, if not impossible.²¹⁸ The present system of intellectual-property protection has produced a world in which none of us are entirely free and some of us are significantly less free than others.²¹⁹ The relative inequities in ownership and access to intellectual property that these cases discuss arise because the freedom to create is not exercised in a vacuum. Being “free” can mean only “free within preexisting constraints.”²²⁰ For freedom to be meaningful, it must be compromised (i.e. regulated), so as to maximize practical access for use and safeguard social goods.²²¹

The notion of compromising freedom for access is central to many of the trademark “use” cases²²² and to the copyright search-engine

²¹⁸ See Sunder, *supra* note 7, at 284 (discussing the shortcomings of the utilitarian approach); see also Boyle, *supra* note 1, at 34, 66 (“[S]ome of the theorists of the e-commons do not see restraints on use as anathematic to the goal of freedom; indeed, they may see the successful commons as defined by its restraints.”).

²¹⁹ See Sunder, *supra* note 7, at 313–14 (citing Martha Nussbaum’s capabilities critique of utilitarianism as pointing to the latter’s failure to account for the provision of basic human freedoms, such as “the right to life and health, to more expansive freedoms of movement, creative work, and participation in social, economic, and cultural institutions”).

²²⁰ *Id.* at 305 (describing this phenomenon with regard to cultural signification as “the exercise of cultural agency within a context of discursive hegemony”).

²²¹ See Boyle, *supra* note 101, at 9 n.12 (describing this commons as a “mutually reinforcing zone of freedom”); Séverine Dusollier, *Sharing Access to Intellectual Property Through Private Ordering*, 82 CHI-KENT L. REV. 1391, 1407 (2007) (“[C]ommons-based initiatives ‘create a self-binding commons rather than an unrestricted public domain.’” (quoting Amy Kapczynski et al., *Addressing Global Health Inequities: An Open Licensing Approach for University Innovations*, 20 BERKELEY TECH. L.J. 1031, 1072 (2005))); cf. Ann Bartow, *Open Access, Law, Knowledge, Copyrights, Dominance and Subordination*, 10 LEWIS & CLARK L. REV. 869, 884 (2006) (asserting that open access itself does little to empower access to legal information and that intermediaries are still necessary); Elkin-Koren, *supra* note 171, at 326 (critiquing Creative Commons’ core perception of freedom as ideologically fuzzy and potentially unworkable given the reliance on volunteerism).

²²² For trademark “use” cases, see *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 129 (2d

cases, such as *Perfect 10, Inc. v. Amazon.com, Inc.*²²³ In the trademark cases, the weight of case law facilitates unauthorized use of trademarks for the purposes of pop-up advertising because the use in question (to generate search results) is not the kind of “trademark use” the Lanham Act requires to trigger an infringement action.²²⁴ These decisions arguably permit much more crowded, diverse, and overlapping Internet traffic around commonly used terms, be they brand names or not. The widening of access to “information,” broadly construed, prevails over a mark owner’s putative right to exclude others from using their marks. Similarly, in *Perfect 10, Inc.*, the court held that Google’s use of thumbnail images in the image search results does not infringe the copyright of the underlying webpage because Google’s use is “highly transformative.”²²⁵

[A] search engine transforms the image into a pointer directing a user to a source of information. . . . [Like a parody,] a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.²²⁶

In both of these contexts of trademark use on the Internet and reproduction of copyrighted work online, the freedom provided to intellectual-property owners to exclude yields to the policy preference of access (which is also judicially emphasized) when it serves the

Cir. 2009) (“Google . . . argues . . . that the inclusion of a trademark in an internal computer directory cannot constitute trademark use.”); *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400, 409 (2d Cir. 2005) (“The primary issue . . . is whether the placement of pop-up ads . . . constitutes a ‘use’ under the Lanham Act.”); *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 764 (E.D. Mich. 2003) (“[T]he inclusion of plaintiffs’ marks in defendant’s Directory is not a use in commerce.”); *U-Haul Int’l, Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723, 727 (E.D. Va. 2003) (granting WhenU.com’s motion for summary judgment “because Plaintiff fail[ed] to show how a pop-up advertisement . . . is a ‘use’ of U-Haul’s trademarks”).

²²³ 508 F.3d 1146 (9th Cir. 2007).

²²⁴ See, e.g., *1-800 Contacts*, 414 F.3d at 401 (holding that no Lanham Act use exists where (a) the defendant does not place the mark on any product, good, or service; (b) the mark is not used in any way that would indicate source of origin; and (c) where the defendant’s use of the plaintiff’s mark is internal and not communicated to the public).

²²⁵ *Perfect 10*, 508 F.3d at 1165.

²²⁶ *Id.*

interests of developing and disseminating information for the public benefit.²²⁷

The Access Movements advocate “development as freedom,”²²⁸ asking: What kind of development do we seek through intellectual property? The answer: “Development must entail not only economic growth, but also a life that is culturally fulfilling.”²²⁹ The countermobilization provides substance to the constitutional mandate of “progress.” The ability to own one’s creations is only a *means* through which individuals may demand, and communities may provide, the more fundamental of human rights. Some have suggested that the recent expansion of intellectual-property rights is like a ship off course, and that the countermobilization returns the focus of the intellectual-property balance to the public interest, including human health, dignity, liberty, fairness, and distributive justice.²³⁰ Some say this rhetoric is simply a return to first principles of intellectual property that have gone awry because of changing technological contexts. Others will argue that it is a genuine revolution of those first principles. Both angles make sense, as does the benefit of straddling *both* poles when arguing on behalf of clients.²³¹ But insofar as the Access Movements seek to address the “disparate social effects of intellectual property on local and global social relations,”²³² they appeal to substantive equality above individual rights, which requires dialing back the liberal value of *freedom from regulation* to make room for a more robust *freedom to access and use*. In light of our liberal legal culture, this is a paradigm shift. It is what some have called “a new socialism.”²³³

²²⁷ See *id.* at 1166 (“The Supreme Court . . . has directed us to be mindful of the extent to which a use promotes the purposes of copyright and serves the interests of the public.”).

²²⁸ See AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) (arguing that open dialogue, civil freedoms, and political liberties are prerequisites for sustainable development).

²²⁹ Sunder, *supra* note 7, at 314; see also Amartya Sen, *How Does Culture Matter?*, (“The freedom and opportunity for cultural activities are among the basic freedoms the enhancement of which can be seen to be constitutive of development.”), in CULTURE AND PUBLIC ACTION 37, 39 (Vijayendra Rao & Michael Walton eds., 2004).

²³⁰ See, e.g., Sunder, *supra* note 7, at 315–16 (“[I]ntellectual property is being re-envisioned as limited by the property and personal rights of others, not just by economic incentive theory alone. *Intellectual property rights are increasingly being understood as property rights that structure social relations.*”).

²³¹ See *infra* discussion in Part IV.

²³² *Id.* at 311; see also Katyal, *supra* note 90, at 466, 468 (discussing how permitting slash fiction as a noninfringing use of underlying copyrighted works would “equalize the authorial monopoly of the creator in favor of a more dialogic and dynamic relationship between producers and consumers in the process”); *id.* at 470 (suggesting that the protection of copyrighted works from their use in slash fiction “perpetuate[s], rather than disable[s], the current state of gender inequity in the content industries”).

²³³ For evidence of a paradigm shift, see Kevin Kelly, *The New Socialism*, WIRED MAG., Apr. 2009, at 116, 118 (“We’re not talking about your grandfather’s socialism. In fact, there is a

4. New Forms and New Relations

The variety of new forms of intellectual property birthed from the Access Movements evidences the value of substantive equality and antisubordination, eschewing freedom from regulation in exchange for freedom to use and share. Wikis, noncommercial weblogs, art that uses trademarked fashions or goods,²³⁴ and fan fiction are just a few examples of nonmarket productivity that also generate significant value, albeit measured in nontraditional economic fashion.²³⁵ Their existence depends on a high level of tolerance for using (or donating) intellectual property to a common cause. Freedom to use a Wiki or enjoy a fan site exists only because someone else donated their resources or liberated their proprietary content.

The developing-nations license from Creative Commons (or the “DevNat”) is another new form of intellectual property that balances exclusivity with substantive equality. The DevNat allows persons in developing nations to have “a wide range of royalty-free uses of [the copyrighted work] . . . while retaining their full copyright in the developed world.”²³⁶ The DevNat “recognizes a variety of impulses among licensors that: many refuse to make money off the backs of the world’s poorest people; they believe that the poorest peoples have a human right to access knowledge materials; and intellectual-property rights can be a tool for restructuring social relations.”²³⁷ The GPL and other Creative Commons licenses are further examples of new forms of property relations that attempt to take stock of twenty-first-century digital culture and expectations for a more global and connected world where resources may be scarce, hierarchical stratifications

long list of past movements this new socialism is not. It is not class warfare. It is not anti-American; indeed, digital socialism may be the newest American innovation. While old-school socialism was an arm of the state, digital socialism is socialism without the state. This new brand of socialism currently operates in the realm of culture and economics, rather than government—for now.”).

²³⁴ See, e.g., *Gimme 5... Art Prints That Include Registered Trademarks*, VISUAL BLAST GALLERY (Oct. 14, 2008, 12:02 AM), <http://www.fatbombers.com/?p=877> (posting art made with trademarks); Susan Scafidi, *All's Well that Ends Well: LV v. Nadia Plesner*, COUNTERFEIT CHIC (Aug. 28, 2008, 9:08 AM), http://www.counterfeitchic.com/2008/08/all_s_well_that_ends_well_louis.php (discussing the artwork of Nadia Plesner, who is dedicated to remixing and sampling).

²³⁵ See BENKLER, *supra* note 153, at 59–127 (2006) (discussing nonmarket production, especially as it relates to internet technology).

²³⁶ Press Release, Matt Haughey, Creative Commons, Developing Nations Copyright License Frees Creativity Across the Digital Divide (Sept. 13, 2004), *available at* <http://creativecommons.org/press-releases/entry/4397>. For specific terms of license grant, see Creative Commons Developing Nations 2.0 License Legal Code, CREATIVE COMMONS, <http://creativecommons.org/licenses/devnations/2.0/legalcode> (last visited Oct. 30, 2010).

²³⁷ Sunder, *supra* note 7, at 289.

more intense, and therefore finding an equilibrium to achieve a measure of equality imperative may be more difficult.²³⁸

And of course, there are plenty of user-generated innovations and content platforms that are commercial enterprises built on the back of other people's intellectual property. These new items of commerce are made not with the permission of the owner of the underlying work (be it a patented invention, copyrighted expression, or trademarked good); they are made and distributed on the assumption that their work does or should fall within an exemption to exclusivity. Examples in this vein are ubiquitous once you begin searching. Some include Google's AdWords²³⁹ and image-search capabilities.²⁴⁰ Open-source software development is another common example.²⁴¹ And user-generated devices (USG)—medical devices or sports equipment—are another.²⁴² For a contemporary and controversial example, consider the company RiffTrax, a website merchandiser that sells parodic audio commentaries of well-known films that, when synchronized with the playing of the spoofed film, arguably create a new work (and arguably an infringing derivative work). RiffTrax also sells "RiffTrax On Demand," downloadable films that are free of DRM (digital rights management) with the parodic audio commentary already embedded. RiffTrax's popular feature, the iRiff, is a third-generation user-generated product. It allows fans to create their own "riffs" and sell them on RiffTrax's website for a fifty-percent profit share.²⁴³

Each of these developing forms of intellectual property is spun from a growing tolerance born of the Access Movements for more porous intellectual-property boundaries. It is key to the ongoing success of these new forms of intellectual-property relations that contributors recuperate their investment of time and energy, not necessarily with money but by experiencing an enrichment of their

²³⁸ At the same time, the GPL and Creative Commons licenses do not forsake a measure of control over both downstream and upstream uses of the underlying property, but they retain control in order to prioritize values such as attribution, choice, and transparency. For more on any apparent inconsistency in this position, see *infra* Part IV.

²³⁹ See *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123 (2d Cir. 2009) (vacating the district court's grant of Google's 12(b)(6) motion because Google's AdWords activity is a "use in commerce" of Rescuecom's trademark within the meaning of the Lanham Act).

²⁴⁰ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (holding that the display of thumbnail images of copyrighted photographs, in response to users' image searches, is a fair use).

²⁴¹ Mozilla Firefox and Google Chrome are two successful examples.

²⁴² See Aaron K. Chatterji et al., *Physician-Industry Cooperation in the Medical Device Industry*, 27 HEALTH AFFAIRS 1532 (2008) (discussing medical devices); Eric von Hippel, *Horizontal Innovation Networks—by and for Users*, 16 INDUS. & CORP. CHANGE 293 (2007) (discussing rodeo-kayaking products).

²⁴³ See RIFFTRAX, <http://www.rifftrax.com> (last visited Oct. 30, 2010).

community by continued and dedicated participation. Rather than writing for or manufacturing goods within a specific community, writing and manufacturing constitutes the community.²⁴⁴

This is certainly true with regard to Wikis and weblogs. It is equally true of the DevNat. For business models based on open-source or user-generated products, the community of participants is essential to their livelihood. There is little incentive to create hierarchies within these communities, which might effectively exclude participants or restrict the generative nature of them.²⁴⁵ Openness defines these communities and makes them work as well as they do.²⁴⁶ To differentiate users, or subordinate access to the preferred participation by others, would undermine the purpose and effectiveness of these projects.²⁴⁷

5. *The Value of Diversity*

The last value animating the Access Movements' antissubordination rhetoric and property relations is diversity: valuing differences among community members. The Peer-to-Patent project, begun in 2007 by the PTO, exemplifies this principle.

This project opened the U.S. patent examination process to the public. According to its one-year-anniversary review, the Peer-to-Patent system "involves enabling and integrating citizen participation to identify and assess critical prior art. This system is . . . the first governmental 'social networking' website designed to solicit public participation in the patent examination process."²⁴⁸ Its primary innovation is in sharing information between the public and the patent examiners, recognizing that each does not have perfect information and that neither is necessarily better at searching prior art references.

²⁴⁴ See Burk, *supra* note 90, at 527 (describing how blurred distinctions between authors and readers create shared textual interpretations that can constitute "collaborative and collective modes of understanding"); see also JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* 9 (2006) (describing how the language of law has direct public consequences because it is "where public power is given shape and reality"). This is, of course, the way law works as a discursive practice, generally, and it is what a constitution does specifically.

²⁴⁵ See Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1975, 1980–82 (2006) (describing the generativity of the Internet); *id.* at 1975–77 (sketching concerns that stability and security will trump openness that characterizes the Internet).

²⁴⁶ See *id.* at 1975–80 (describing how the openness of the Internet is an essential feature on which to build and the glue that holds it together).

²⁴⁷ See *id.* at 1979–80 (proposing that regulation of Internet and PC architecture ("affirmative technology policy") is necessary to keep the Internet meaningfully open and to thwart misuse of the Internet by authoritarian regimes).

²⁴⁸ CTR. FOR PATENT INNOVATIONS, N.Y. LAW SCH., *PEER-TO-PATENT: FIRST ANNIVERSARY REPORT* 3 (2008), available at <http://dotank.nyls.edu/communitypatent/P2Panniversaryreport.pdf>.

This system encourages the public to research and upload publications—known in patent law as “prior art”—that inform the patent examiner about the novelty and obviousness of a pending application While patent examiners have ready access to prior art in the form of issued patents, they do not have the same ready access to non-patent prior art literature, such as published articles, software code, and conference presentations. It is in identifying this non-patent prior art that public participants can add the greatest value.²⁴⁹

Crucial to the ethos of this project is recognizing the value of diverse areas of expertise beyond the USPTO and keeping the lines of communication open between these diverse communities. A mutual deference and respect for the diverse ideas of the public participants (“citizen-experts”)²⁵⁰ and the patent examiners is necessary for the Peer-to-Patent project to succeed.

Another such example, and one that has endured much longer, is the Creative Commons licensing scheme. One impetus behind the Creative Commons was to correct the assumption behind modern copyright that one size of exclusivity fits all.²⁵¹ Where the Access Movements assert that the incentive model behind intellectual property does not reflect the reasons why, nor the manner in which, people innovate, the Movement actors have also asserted that each person has his or her own incentive.²⁵²

The appeal to diversity is on several levels: diverse incentives, diverse permitted uses, diverse actors and agendas, diverse reasons for protection or donation, diverse products and cultures.²⁵³ This is

²⁴⁹ *Id.* at 4.

²⁵⁰ *Id.* at 5. The Peer-to-Patent project was halted in June 2009 for lack of funding due to the 2008–2009 recession. See CTR. FOR PATENT INNOVATIONS, N.Y. LAW SCH., PEER-TO-PATENT: SECOND ANNIVERSARY REPORT 3 (2009), available at http://dotank.nyls.edu/communitypatent/CPI_P2P_YearTwo_lo.pdf (“[D]ue to the broad economic downturn of the past year we find that we are unable to continue the Peer-to-Patent project at this time.”). The USPTO recently announced a second launch of this program in October 2010. See Press Release, U.S. Patent & Trademark Office, USPTO Launches Second Peer to Patent Pilot in Collaboration with New York Law School (Oct. 18, 2010), available at http://www.uspto.gov/news/pr/2010/10_50.jsp.

²⁵¹ See Michael W. Carroll, *Creative Commons as Conversational Copyright*, (arguing that copyright’s one-size-fits-all approach is simplistic because creators produce new works for a variety of reasons and, therefore, they want different protections from the law) in INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 445, 447 (Peter K. Yu ed., 2007).

²⁵² See, e.g., Boyle, *supra* note 1, at 46 (“Each person has his own reserve price, the point at which he says, ‘Now I will turn off *Survivor* and go and create something.’”).

²⁵³ For example, the impetus behind compulsory licenses for patented medicines in the case of need recognizes that some communities can afford to pay the rent on the patent while

not a model of individuality (“everyone is their unique person”), but a model based on the value of aggregated and communal efforts (“the more diversity, the better the whole”). It is a model that resonates with theories of participatory democracy and the processes that safeguard it.²⁵⁴ For example, some suggest that the “digital architecture” of the Internet Age “enhances [our] ability to dissent and to participate in making culture. . . . [I]t assists us as we seek ‘to think for [ourselves].’”²⁵⁵ Others assert that “ideological diversity” will be “crucial for the success” of the Access Movements.²⁵⁶ Still others hope that the future of intellectual property can help promote biodiversity.²⁵⁷ Formal features of the Movements (“many-to-many interactivity,”²⁵⁸ peer-to-peer networks, authoring software) and its content (wikis, blogs, fan fiction) are examples of connectivity and dialogue fueled by diverse participants and ideas. Each of these examples requires that we loosen the reigns of exclusivity and embrace the ethos of sharing, which, in turn, requires tolerating, if not also harnessing, the differences among us.

By appealing to the value of diversity to upend entrenched and unproductive hierarchies, the Access Movements signal the fact intensiveness of their proposal for change.²⁵⁹ This may come as

others cannot; some community circumstances demand access to use on practical terms (immediately and at low cost) while others’ circumstances are less dire. See Christopher A. Cotropia, *Compulsory Licensing Under TRIPS and the Supreme Court of the United States’ Decision in eBay v. MercExchange*, (describing TRIPS compulsory licensing scheme), in *PATENT LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 557 (Toshiko Takenaka ed., 2008). For a recent dispute regarding compulsory licenses for essential medicines, see News Release, Essential Action, International Coalition of Public Health Advocacy Groups Sends Letter to Colombian Government Supporting Kaletra Compulsory License Request from Civil Society (Aug. 6, 2008), available at <http://www.essentialaction.org/access/index.php?archives/170-Health-Groups-Worldwide-Support-Colombian-Call-for-Compulsory-License-on-Kaletra.html#extended> (“On 16 July, 2008, an alliance of Colombian civil society groups filed a request for their government to issue an open compulsory license on the life-saving anti-retroviral drug lopinavir/ritonavir[, which is manufactured by Abbott Laboratories,] in order to enable access to generic versions of the drug, which will create competition and lead to more affordable prices.”).

²⁵⁴ See, e.g., Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 683 (1997) (“Copyright disclaimers [on fan-fiction sites] are manifestations of democracy in action; articulating norms about justice in the shadow of formal law.”).

²⁵⁵ Sunder, *supra* note 7, at 276 (last alteration in original) (quoting IMMANUEL KANT, *Answer to the Question: What Is Enlightenment?*, in *BASIC WRITINGS OF KANT* 133, 136 (Allen W. Wood ed., Thomas K. Abbott trans., 2001) (1784)).

²⁵⁶ Elkin-Koren, *supra* note 171, at 326.

²⁵⁷ Aoki & Luvai, *supra* note 132, at 53.

²⁵⁸ ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 15 (1999).

²⁵⁹ This is what James Boyle calls determining “the placement of the line.” Boyle, *supra* note 1, at 64; see also Cohen, *supra* note 28, at 374 (describing how copyright policy should

unwelcome news to some. Certainly the cases concerning the first-sale doctrine in copyright law or trademark law,²⁶⁰ along with patent exhaustion and equitable remedies in patent-infringement cases,²⁶¹ will require much more fact intensity at the trial level to withstand appellate review. Courts describe the “economic realities of the transaction” to cue an advocate’s attention to particular facts in light of the doctrine.²⁶² Indeed, all of these court decisions are keen to bind the doctrinal holdings to the particular facts of the case. But considering and applying those facts in a learned and nuanced manner in the trial court, where facts are best considered, is what law and justice have always required. Surely, we do not seek bright lines be it in intellectual property or elsewhere—especially those that fail to reflect the growing appreciation for our complex reality—at the expense of justice.²⁶³

To be clear, not all Access Movement voices explicitly call for equality (or antisubordination) in the proposed rebalancing of intellectual-property entitlements through changes in our law and social customs. But the Access Movements do uncover flaws or paradoxes in law and culture, the basis of which is a mistaken belief (or a myth,²⁶⁴ or, perhaps, an irrational prejudice) about how people are or should be living and progressing together. In so doing, whether consciously or not, the Access Movements discourse advocates a redistribution of wealth and power in the form of more intellectual-property access.

IV. THE LAST STAND

The Access Movements advocate for an intellectual-property future that embraces antiorigin and antisubordination principles. Nonetheless, they also appear committed to certain core values of liberal legal politics. This last Part describes how, despite the Access

consider the “context-dependent character of both consumption and creativity”).

²⁶⁰ *E.g.*, *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055 (C.D. Cal. 2008); *Vernor v. Autodesk, Inc.*, 555 F. Supp. 2d 1164 (W.D. Wash. 2008), *vacated*, 621 F.3d 1102 (9th Cir. 2010). For a trademark case analyzing the contextual nature of trademark’s first-sale doctrine in light of consumer experience and expectation, see *Nitro Leisure Products, L.L.C. v. Acushnet Co.*, 341 F.3d 1356 (Fed. Cir. 2003).

²⁶¹ See discussion *supra* notes 195–201.

²⁶² See *Vernor*, 621 F.3d at 1114.

²⁶³ See Craig, *supra* note 87, at 267 (“[S]implifying dichotomies of liberal thought . . . creates false dilemmas that impede our ability to engage in genuine debate and that obstruct our path toward nuanced solutions.”); see also Zittrain, *supra* note 245, at 1979 (“[D]rawing a bright line against nearly any form of increased Internet regulability is no longer tenable.”).

²⁶⁴ See Silbey, *supra* note 9, at 232 (describing origin myths).

Movements' difference from dominant intellectual-property discourse, some of its law and policy arguments nevertheless contain certain generic markers of the intellectual-property origin story. These markers are the idealized values of autonomy and consent. This Part concludes with a question: Does holding fast to these core ideals of liberal legalism frustrate the Access Movement's goal of renovating intellectual-property relations to accommodate practical and equitable access (either case-by-case or statutorily)? Or, are these ideals necessary for change to be embraced by the broader community? Given that discarding these ideals is improbable in light of their principal role in U.S. law, can these ideals be modified in a way that makes reform likely and successful? This Part compares historical social movements that coalesced around changed legal and cultural discourses as a way to think through these underlying questions.

A. Autonomy and the Rights Revolution

As the above discussions illuminate, much of the Access Movements' appeal to community and antisubordination recognizes the possibility of, and hope for, self-development and fulfillment through expression. Self-development and fulfillment require some measure of control over our lives—where we go, what we do, with whom and what we interact. This is a matter of autonomy: accessing information, expression, and technological innovation to pursue our own version of what is good and what is the public welfare. So herein lies one challenge the Access Movements face: How do the Access Movements embrace the goal of meaningful autonomy—what Julie Cohen has describes as “self-articulation” and “boundary management”²⁶⁵—at the same time as they decry as fiction the autonomous self in the digital age?²⁶⁶ The Access Movements trumpet

²⁶⁵ COHEN, *supra* note 83 (manuscript ch. 6, at 126–27).

²⁶⁶ See Cohen, *supra* note 28, at 371–73 (describing the “situated user” instead of privileging an autonomous subject). Cohen recognizes this puzzle. Indeed, much of her recent work has been devoted to working through it. *E.g.*, COHEN, *supra* note 83 (manuscript ch. 5, at 95). Cohen has ably and insightfully drawn out the internal contradictions of Access Movement themes of autonomy in her forthcoming book, calling attention to her own difficulties with the subject. She writes:

Even as [privacy scholars] highlight the dynamic nature of self-formation, however, these “constitutive privacy” scholars continue to insist on the existence of an autonomous core—an essential self identifiable after the residue of influence has been subtracted. The problem, however, is not simply that “autonomy” is constituted over time and by circumstances; it is that including “autonomy” in the definition of the ultimate good to be achieved invokes a set of presumptions about the separateness of self and society that begs the very question that we are trying to answer.

the good that autonomy achieves (self-development, self-articulation). Indeed, they seem to presume that the greater the practical access to intellectual property, the more fulfilled and expressive we, as members of our communities, will be. But how does this work? Autonomy of the kind described by the Access Movements requires both a freedom *from* regulation (formal or informal) as well as a freedom *to* access and use social goods (legally protected or not).

The cases that focus on copyright's first-sale doctrine (like *Vernor v. Autodesk* and *UMG Recordings v. Augusto*) exemplify the push and pull of idealized autonomy and practical, messy contingencies. These decisions did not dispute traditional conceptions of ownership: possession and control. To be sure, the word "owner" in the Copyright Act is a trigger for the exhaustion principle,²⁶⁷ but ownership need not mean exclusive control to well argue or justly decide these cases. Indeed, if the Access Movements' rhetoric of sharing is to be taken seriously, it crafts a different default for property rights. The Access Movements celebrate the benefit of ownership as bringing people together around possessions in common. Why were *Vernor* and *Augusto* litigated to reify "ownership" into dominion and control? Likely because the defendants believed that it was the least contentious and the most palatable argument on which they might win. That is, reifying ownership as dominion and control is the path of least resistance to advocating a change in the law that would protect the "have nots" (the putative licensees) in these cases.²⁶⁸

This makes sense as a litigation strategy. Small steps have often accumulated to achieve monumental change. Consider the civil rights movement and the oft-told story of the NAACP's campaign to incrementally litigate racial desegregation and eventually overturn *Plessy v. Ferguson*²⁶⁹ in *Brown v. Board of Education*.²⁷⁰ The NAACP did not first file suit to desegregate elementary schools. It began with cases that sought to desegregate graduate schools, a

Id. (citations omitted).

²⁶⁷ 17 U.S.C. § 109(a) (2006) ("Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

²⁶⁸ See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103-04 (1974) (describing the legal system as favoring the "haves" over the "have nots").

²⁶⁹ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁷⁰ 347 U.S. 483 (1954). For one such description of the NAACP's legal campaign, see MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION*, 1925-50 (1987).

conscious choice to seek change incrementally and in ways that at first appeared less threatening to those who might resist. As Thurgood Marshall (one of the architects of *Brown*) put it:

Those racial supremacy boys somehow think that little kids of six or seven are going to get funny ideas about sex and marriage just from going to school together, but for some equally funny reason youngsters in law school aren't supposed to feel that way. We didn't get it but we decided that if that was what the South believed, then the best thing for the moment was to go along.²⁷¹

Likewise, the intellectual-property cases discussed above take incremental steps toward changing our property rights and relations. Certainly, on their face, they are not revolutions in intellectual-property doctrine. Are they simply pointing out different circumstances (complex contracting situations) in which the statutory default rules of first sale do not *yet* apply? Or do they evidence an influence of the Access Movement values? Are these cases speaking a new language or using the old to get to a new result? *Quanta Computer v. LG Electronics*, while similar to the district court decisions in *Vernor* and *Augusto* in favoring the putative licensee (the user), nonetheless built into its holding an escape hatch: more clearly drafted contract terms would save the patent owner who wants to limit patent exhaustion.²⁷² (The Ninth Circuit, in reversing the district court in *Vernor v. Autodesk*, further reified the notion of consenting parties by emphasizing the specificities of the license terms and the benefit of the bargain.²⁷³) If the freedom of contract is an effective antidote to copyright and patent-exhaustion principles, these cases will produce very little change by way of practical access. Clear contracts of adhesion will dominate the intellectual-property landscape and, unless a strict doctrine of privity prevails, users will be said to have knowingly entered into restrictive-use agreements, lest their autonomy and individuality to freely contract be questioned.

In trademark law the ideal of consumer autonomy reclaims whatever extension of access users and consumers achieved through

²⁷¹ PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 895 (5th ed. 2006) (internal quotation marks omitted) (quoting ALFRED KELLY, THE SCHOOL DESEGREGATION CASE, QUARRELS THAT HAVE SHAPE THE CONSTITUTION 253 (John Garraty ed., 1964)).

²⁷² See *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109, 2122 n.7 (2008) (“[W]e express no opinion on whether contract damages might be available even though exhaustion operations to eliminate patent damages.”).

²⁷³ *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

noninfringement rulings. *Dastar Corp. v. Twentieth Century Fox Film Corp.*²⁷⁴ is a good example of this. *Dastar Corp.* held that authors (in this case, a film studio) are precluded from using trademark law to protect against a false designation of origin (misattribution) when the work's copyright has expired. This is because "origin" under the Lanham Act "refers only to the manufacturer or producer of the physical 'goods' that are made available to the public"²⁷⁵ (here the videotape) and "[t]he consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product . . . and typically does not care whether it is."²⁷⁶ In the same breath as the Court limits the reach of trademark rights, it emboldens the consumer as an *über*rational actor who considers the *brand names on videocassettes* when purchasing a documentary film. Who are these filmgoers Justice Scalia is so sure exist? The consumer of film who is well versed in the reputation of videotape manufacturers is a legal fiction, one that resurrects the sovereign consumer of traditional trademark law.²⁷⁷

Where some cases might have proaccess results, they nonetheless exalt individual autonomy, risking the recuperation of exclusivity at the expense of sharing and community. Failing to change this underlying language and rationale could stymie true change. Consider the individual-rights revolution of the 1960s and 1970s. It is considered a disappointment by some for its instantiation of individuals (and individuality) at the expense of groups or community welfare.²⁷⁸ Some think that the failure in the 1960s and 1970s to change the language of individual rights to group rights, and instead to base the rights revolution on the notion of individualism ("treating everyone like an individual"), has led to an insurmountable challenge today.²⁷⁹ The failure to recognize group rights may have doomed the

²⁷⁴ 539 U.S. 23 (2003).

²⁷⁵ *Id.* at 31.

²⁷⁶ *Id.* at 32.

²⁷⁷ See Beebe, *supra* note 55, at 2022–23 ("[T]rademark doctrine has based itself upon a largely mythical 'consumer construct.' . . . [T]he 'sovereign consumer' is a utility-maximizing agent of unbounded rational choice."); see also Silbey, *supra* note 9, at 361 (discussing same).

²⁷⁸ For discussions of the difference between individual and group rights, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 176, 207–08 (1986) and for individual rights specifically, see Lawrence M. Friedman, *American Legal Culture: The Last Thirty-Five Years*, 35 ST. LOUIS U. L.J. 529, 531–32 (1991). For a critique of the civil rights movements in this regard, see WILLIAM A. DONOHUE, *THE NEW FREEDOM: INDIVIDUALISM AND COLLECTIVISM IN THE SOCIAL LIVES OF AMERICANS* 11 (1990). For a critical look at the wisdom of court decisions protecting individual employee choice at the expense of stable collective bargaining relationships see James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 947 (1996) and Frances E. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

²⁷⁹ See Lawrence M. Friedman, *The Shattered Mirror: Identity, Authority and Law*, 58

completion of the civil rights revolution in terms of its goals of equality and antidiscrimination.²⁸⁰

What is to be done? Presumably, the autonomy that the Access Movements call for could be something less sovereign and romantic than the autonomy called for by the origin stories of intellectual property. Indeed, one could argue that *Vernor*, *Augusto*, *Quanta*, and even *Dastar*, do not instantiate the idealized autonomy of liberalism but a more limited form of freedom. Perhaps, then, autonomy is not the right term or concept.²⁸¹ Perhaps modified autonomy—contingent and fluctuating—is what the Access Movements really seek.²⁸² If this is the case, we must start speaking in modified ways. There is little to be gained—and much confusion to be had—by using this old language in our new world.²⁸³

It is possible that talking about autonomy in the idealized way of liberal legalism will not obstruct a broadening access to intellectual-property rights. There is some evidence that discursive shifts and changed social relations can occur by adapting or translating old language for new concepts. For example, in the human-rights arena, some explore how, through the use of the term “slavery” in the context of trafficking in women, the international legal community

WASH. & LEE L. REV. 23, 37 (2001) (describing those challenging the modern culture of individualism as “gallantly swimming upstream, against a mighty, almost irresistible current”).

²⁸⁰ See *id.* (claiming that the civil rights movement erroneously focused on group rights).

²⁸¹ Martha Fineman writes about subordinating autonomy to equality, or at least resisting an “understanding of equality as [a] dependent value, shaped through the dominant lens of autonomy.” Martha Albertson Fineman, *Evolving Images of Gender and Equality: A Feminist Journey*, 43 NEW ENG. L. REV. 437, 453 (2009). She lists questions to ask about tradeoffs between equality and autonomy to assess the justice of certain policy choices against the status quo. See *id.* Her questions resonate with those asked by Access Movement actors regarding the proper balance for intellectual-property protection.

²⁸² See *supra* Part III.B.3 (discussing “constrained freedom”); see also COHEN, *supra* note 83 (manuscript ch. 5, at 92–97). Cohen describes a current dissatisfaction with the replacement of autonomy with the socially constructed subject, in part because of the ontological and epistemological instability that poststructuralism seems to claim is inevitable in our social lives. *Id.* at 96–97. Although I acknowledge the scholarly reformer’s impatience with poststructuralism, I am not entirely sympathetic. The instability of meaning (for and about ourselves in our communities) that poststructuralism says is inevitable is based on the very banal fact of our social lives: that who we think we are and what we think we want can only be understood within the context of social relations. Although some might assert that material and existential desires (for goods and states of being) flow from each individual like lava from the core of the earth, the notion of autonomy (a desired state of being) only makes sense in light of its varying degrees, situated and constructed by diverse influences. The very notion of autonomy depends on a society full of human beings and institutions for it to be recognized as a value at all. The idea that it exists or is meaningful outside of these complex contexts makes no sense. Our sought-after autonomy must be contingent and unstable if we live in a world that is as dynamic as our twenty-first century appears to be.

²⁸³ See Madison, *supra* note 27, at 439 (“Our use of language reflects the way in which we organize the world of our experience.”).

broadens its understanding of systemic violence against women, and redefines war crimes under international law.²⁸⁴ And, over a decade ago, political scientists Margaret Keck and Kathryn Sikkink showed how transnational advocacy networks (international networks of nongovernmental organizations) effect local change by creating alternative channels of international communication.²⁸⁵ Keck and Sikkink wrote that these “networks . . . reframe international and domestic debates, changing their terms When they succeed, advocacy networks are among the most important source of new ideas, norms, and identities in the international system.”²⁸⁶

Importantly, these scholars do not document a wholesale shift in terminology that facilitates the development of a new human rights framework. They do describe a ground-up evolution of shifting norms, based on ideals of civil freedom and equality rooted in earlier social movements, such as abolition and women’s suffrage.²⁸⁷

Perhaps, then, the Access Movements can learn from what Harold Koh calls the “transnational norm entrepreneurs,”²⁸⁸ those that offer more deliberate translations and discursive adoptions for Movement actors. This would require in litigation as well as organizational development that we arrive at a consensus on certain fundamental terms. We are not yet there, but if the cases are any indication, there is a linguistic shift taking place, and perhaps we are moving in the right direction. More deliberate rhetorical and narrative choices by the reform actors may be in order.

B. Consent and the Specter of Choice

Much of the reform sought by the Access Movements takes place against the backdrop of volunteerism and private ordering. As discussed above, some cases could be seen as incrementally adapting intellectual-property doctrine to an access-friendly framework. And

²⁸⁴ See, e.g., Judith Resnik, *Sisterhood, Slavery, and Sovereignty: Transnational Antislavery Work and Women’s Rights Movements in the United States During the Twentieth Century*, (describing how “[d]eployment of nineteenth century terms—‘sisterhood’ and ‘slavery’—remains useful . . . to work powerful transformations of law and practice”), in *WOMEN’S RIGHTS AND TRANSATLANTIC ANTISLAVERY IN THE ERA OF EMANCIPATION* 19 (Kathryn Kish Sklar & James Brewer Stewart eds., 2007).

²⁸⁵ See generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (discussing advocacy networks’ roles in creating local change through international communication).

²⁸⁶ *Id.* at x.

²⁸⁷ For other similar work in the human-rights arena, describing how litigation and court decisions are part of a discursive norm-creative process, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

²⁸⁸ Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1409 (1999) (internal quotation marks omitted).

there are some explicit calls for statutory reform—compulsory licensing and new exemptions to infringement.²⁸⁹ But the fastest growing evolution of intellectual-property norms seems to be via copyleft organizations, such as Creative Commons, and mechanisms such as viral licensing.

The attraction and strength of these contractual aspects of the Access Movements—their optional and private nature—are also their trouble. As Séverine Dusollier has noted, “Creative Commons . . . plays the game of copyright and does not attempt to abolish it.”²⁹⁰ Layering the private contract on top of the private good “is bound to entail a logic of exclusion that seems to contradict the ideology of sharing that the Creative Commons scheme advocates.”²⁹¹ The message of exclusion and control sent through these licensing schemes is potentially contrary to the message of inclusion and access that is intended. Also, these licensing schemes rely on the contracting party’s ability to parse and trace complex licensing trails in order to meaningfully consent to the contract terms and thereafter to put the resources to use.²⁹² The specter of consent looms large here, as it does in the origin stories of intellectual-property law. And as with the notion of autonomy, the Access Movements here appear to depend on a notion of consent that is more an ideal than a reality. This is not to suggest that people are convinced by a false consciousness regarding their own freedom to enter into to Creative Commons licenses to their detriment. It is to suggest that the notion of “contract as assent” is more a metaphor than a descriptive state, whether because of ambiguity, inattention, or complexity. As Michael Madison has persuasively argued, “Contract-as-assent is a fiction in the electronic environment, even when it favors consumers.”²⁹³

²⁸⁹ See, e.g., Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797 (2010) (proposing a framework tailoring fair use specifically for technological cases).

²⁹⁰ Dusollier, *supra* note 191, at 278.

²⁹¹ *Id.* at 283 (discussing Niva Elkin-Koren’s criticism of private ordering in copyright).

²⁹² See Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA 391, 393–94 (2006) (identifying the tension that exists in licensing schemes); see also Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005) (identifying the limits of licensing platforms). Molly Shaffer Van Houweling, quoting Julia Mahoney, has called this problem of layered licensing “the problem of the future.” Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, LAW & CONTEMP. PROBS., Spring 2007, at 23, 36 (internal quotation marks omitted) (quoting Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 739 (2002)). Van Houweling contends that the problem is not with these new “idiosyncratic property rights . . . [that are being] redistributed in novel ways”—what I am calling Access Movement innovations—but with copyright law itself; specifically the relaxed notice requirement. *Id.* at 33.

²⁹³ Madison, *supra* note 27, at 463.

In both case law and organizational development, one can see reliance on consent as a cornerstone of the Access Movements' momentum. The first-sale cases for copyright and patent discussed above are some examples. *Dastar*, in terms of reinscribing the liberal commitment of consumer choice, is another. Some other recent trademark cases that privilege free speech over nonconfusion—particularly in the context of parody—overemphasize intentionality of the speaker and consumer awareness, which is an iteration of the mutual consent paradigm between manufacturer and consumer.

In *Mattel Inc. v. MCA Records*,²⁹⁴ Judge Kozinski held for a panel of the U.S. Court of Appeals for the Ninth Circuit that a parodic song about Mattel's Barbie is not dilutive because it is a noncommercial use and therefore exempt.²⁹⁵ Hailed by many as a welcome limitation on the very broad dilution cause of action under the Lanham Act, the decision rests on the unquestioned conclusion that Aqua's song *Barbie Girl* lampoons Mattel's Barbie, and that its expressive elements are "inextricably entwined" with its commercial purpose.²⁹⁶ Few would doubt that *Barbie Girl* parodies Barbie (or, as the court says: the "song pokes fun at Barbie and the values that Aqua contends she represents.")²⁹⁷ But in a world where the difference between advertising and art, and between corporate branding and political speech, is increasingly fuzzy,²⁹⁸ the court's assertion of clear line drawing overstates the case. It is as if simply choosing to see (or hear) a parodic message in *Barbie Girl* makes it so. The consumer's choice of interpretative framework, combined with artistic intention, controls the outcome.

The same might be said of the more recent *Haute Diggity Dog* case.²⁹⁹ There, a designer of dog toys allegedly spoofed high-end designer Louis Vuitton by making dog toys that imitated Louis Vuitton styles calling them "Chewy Vuiton."³⁰⁰ The court said confidently, "[t]he dog toy irreverently presents haute couture as an object for casual canine destruction. The satire is unmistakable."³⁰¹ In the context of a confusion-based theory of liability and of dilution, the

²⁹⁴ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

²⁹⁵ *Id.* at 906–07.

²⁹⁶ *Id.* at 906 (internal quotation marks omitted).

²⁹⁷ *Id.* at 901 (citing *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group*, 886 F.2d 490, 495–96 (2d Cir. 1989)).

²⁹⁸ See Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 797 (2010) (describing how branding is "simultaneously deeply political and deeply commercial . . . [and] often serve[s] as a powerful organizing principle for political action").

²⁹⁹ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

³⁰⁰ *Id.* at 256 (internal quotation marks omitted).

³⁰¹ *Id.* at 261.

court said that the existence of the parody tilted the case in the defendant's favor. The court discounted the very real possibility that Vuitton could have extended its luxury brand handbags to pet toys, presumably ignoring the superbrands that populate our global markets generally and the market for luxury pet products specifically.³⁰² The court said that the *subtle* differences between the design of the parodic product and the Vuitton handbag designs made a *big* difference in consumer perception.³⁰³ But why? Because the court ascribes to consumers astute perception and keen interpretive faculties and to the defendant a clear intent to send a specific message. The court's perception of an unambiguous back-and-forth between consumer and product manufacturer, a direct conversation devoid of semantic uncertainty, mimics the aspirations for unequivocal contract terms and eyes-wide-open assent to them.

Outside of the case law, we might consider the problem of consent manifesting in organizations that depend on volunteerism. In addition to the Creative Commons conundrum discussed above, there is the phenomenon of cloud labor, where people all over the world provide small, quick tasks online, such as matching words to images or surveilling real spaces through virtual webcams for free or for pennies.³⁰⁴ Some people do these tasks being informed of the extent of their involvement and the reason for the assignment. Many, however, complete these tasks without any understanding of the end result of their work, whether they are contributing to a bona fide database of images or facilitating the identification and capture of political dissidents.³⁰⁵ Jonathan Zittrain of Harvard's Berkman Center for Internet and Society has questioned whether labor standards, Internet behavior, and rules governing disclosure should be considerations in the evolution of our Internet network to prevent against the possibility of nonconsensual transactions online.³⁰⁶ The instinct here is that most people believe themselves to be operating under full knowledge, freely choosing whether or not to work for pennies. Zittrain persuasively suggests that consent could be a myth

³⁰² See *McDonald's Corp. v. Druck & Gerner, DDS., P.C.*, 814 F. Supp. 1127 (N.D.N.Y. 1993) (holding that McDonald's prevails on a confusion-based theory of trademark liability against "McDental" because, in part, it is possible that consumers would believe that the fast food chain would be in the dental services business). For an example of luxury pet products, see *TRIXIE & PEANUT, INC.*, <http://www.trixieandpeanut.com> (last visited Oct. 30, 2010) (selling an "exclusive collection of stylish designer dog clothes, couture dog carriers, unique pet beds, designer collars, harnesses + leads and cool dog + cat toys").

³⁰³ See *Haute Diggity Dog*, 507 F.3d at 268.

³⁰⁴ See *supra* note 164 (describing mechanical turking).

³⁰⁵ See Zittrain, *supra* note 164, at 28:11, 32:09 (lecturing about cloud computing labor and giving examples of laboring without full knowledge of the purpose or end result).

³⁰⁶ *Id.* at 47:14.

that entrepreneurs (or governments) facilitate in the online world to augment their power or wealth to the detriment of those who do not know enough to demand transparency or more equitable terms.

Among his many suggestions, Zittrain calls for more disclosure and for regulatory floors. Theoretically, consent can be perfected through better information and equalizing bargaining positions. But the more consent is demanded—with viral licenses, click agreements, or otherwise—the more information and diverse bargaining platforms become necessary to achieve meaningful consent. There is no end to this race.³⁰⁷ Again, I ask: What is to be done? Giving up on private ordering would require relinquishing a cherished act—the act of consent—that itself nourishes autonomy, contingent or otherwise.³⁰⁸ Giving up on consent is unlikely, especially in light of its deep roots in U.S. jurisprudential theory. Indeed, if our goal as members of the Access Movements is to explore and commit to shared values regarding equality and sustainable welfare levels, establishing consent to those commitments and the means to achieve them might secure their durability. The question therefore remains: how do we assure that the consent achieved today to bind intellectual-property relations in the future is not just a story we tell about those commitments to attain compliance to them? Learning to identify the stories as distinct from or the same as our experience of material reality is a good first step.³⁰⁹

Some lessons may be learned from recent social movements regarding the allure of consent—or “choice”—and how, if left unproblematized by advocates, it can become a double-edged sword. Consider the feminist movement of the 1960s and 1970s in the United States and its success in constitutionalizing reproductive choice.³¹⁰

³⁰⁷ Even Zittrain seems to admit this at the end of the lecture. *See id.* at 50:45.

³⁰⁸ *See* COHEN, *supra* note 83 (manuscript ch. 5, at 95) (“Within the framework of liberal political theory, . . . the autonomous self is definitionally capable of both choice and consent, and so we can say that autonomy subsists both in those choices and in the larger trajectory that they establish.”).

³⁰⁹ “We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.” Oliver Wendell Holmes, *Law and Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899); *see also* CAROL M. ROSE, *supra* note 70, at 37 (“[C]lassic theories of property turned to narrative [functions] at crucial moments . . . [to] explain[] the origin of property regimes, where the need for cooperation is most obvious. Th[ese] narrative stories allowed [property theorists] to slide smoothly over the cooperative gap in their systematic analyses of self-interest.”); *id.* at 38 (“It is the story that fills the gap in the classical theory, and that, as Hayden White might put it, makes property ‘plausible.’ Narrative gives us a smooth tale of property as an institution that could come about through time, effort, and above all, cooperative choices.” (footnote omitted)).

³¹⁰ *See* *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the Due Process Clause of the Fourteenth Amendment protects the right to privacy, which includes the right to terminate a pregnancy).

The feminist movement sustains itself in large part with its rhetoric of choice and consent—that women should be able to choose for themselves the lives they wish to lead, whether as mothers and/or career professionals. The argument is this: becoming a mother has such overwhelming consequences—physiological, psychological and economic—that no woman should be forced into maternity without knowingly accepting its consequences.³¹¹ One problem with this “consent” model is that once motherhood is chosen, women are perceived to have signed up for two shifts, the day shift at the office and the “second shift” at home.³¹² To be sure, it is better for women to choose their paths than to have their paths chosen by others;³¹³ but underneath the rhetoric of choice is the inflexibility of the terms of the deal. “Choice” means working twice as hard as men.

Another problem with this “consent” model in the feminist movement is that it naturalizes the inequality between men and women, such that any choice women realistically have concerns whether or not to become mothers, not the structure of parenting itself.³¹⁴ Why, exactly, is motherhood so difficult psychologically and economically? And why isn’t fatherhood precisely as hard (biological birth aside)?

Admitting to the asymmetry of parenting and building consent onto that asymmetry does little for women’s equality. Why should becoming a mother mean that the mother—and not the father—reduces work hours to accommodate child-care needs? Workplaces that facilitate leave and flextime for mothers and not for fathers perpetuate a double standard. Women are “accommodated” with part-time office schedules, part-time pay, and are nonetheless saddled with a more-than-full-time work load. This is the “reward” women reaped from the feminist movement’s facilitation of women’s choice to be

³¹¹ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (“The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist . . . upon its own vision of the woman’s role . . .”).

³¹² See ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT* (2003 ed. 2003); Edmond L. Andrews, *Survey Confirms It: Women Outjuggle Men*, N.Y. TIMES, Sept. 15, 2004, at A23.

³¹³ But see *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (denying Myra Bradwell the ability to pursue a career as a lawyer because, under Illinois law, women were deemed not competent to enter into contracts and because “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother”).

³¹⁴ The impetus behind *The Second Shift* was Hochschild’s experience as “a new mother in the first flush of the feminist revolution . . . [when, as] a professor of sociology at the University of California, [she] kept her infant in a small box at her Berkeley office, so she could nurse and care for the baby during work hours. As one frustrating meeting with a student was repeatedly interrupted by the squalling baby, Ms. Hochschild recalls wondering, ‘Where, after all, were the children of my male colleagues?’” Robert Kuttner, *She Minds the Child, He Minds the Dog*, N.Y. TIMES, June 25, 1989, at BR3 (reviewing *The Second Shift*).

both mothers and career professionals. But women do not really choose to work two shifts for half the pay; for most, it is an unspoken take-it-or-leave-it deal.

What can we learn from this comparison of the consent myth of intellectual property to the choice rhetoric of the feminist movement? We must learn to dig deeply to expose the terms of the deal. What looks like consent might be accommodation; it might be a lopsided compromise. Though called consent by those who benefit from the deal, it may be more like a contract of adhesion. It must become second nature to question the assertions that terms are inevitable or inflexible (or “natural,” in the language of the antifeminist stance).³¹⁵ This will help make consent more meaningful in the long run because the pressure will succeed at clarifying or even altering the terms themselves.

C. A Third Way

If language is constitutive of community, changing the language from exclusivity to sharing and from individuality to community should alter the way we think and act towards each other in terms of our property relations. The problem is that the Access Movements fail to discard central idealized tenets of the old system in the process of renovation. This may be strategic. Or it may be unconscious. Given the failure of revolutionary movements in the past to succeed when their language of revolution was too far afield from familiar territory, the Access Movements’ holding tight to some aspects of the old makes sense if durable change is sought.³¹⁶

Inscribing core principles from the past into a modified language of intellectual-property access might enable incremental change that is more sustainable over the long run.³¹⁷ But, it may not lead to the change the Access Movements seek: the redistribution of intellectual-property rights and a flexibility of access to them.³¹⁸ Discerning which old values are necessary to retain in order to achieve ample

³¹⁵ See *Bradwell*, 83 U.S. (16 Wall.) at 141.

³¹⁶ Consider the European Revolutions of 1848, after which political anarchists and socialists agitated for control and failed to achieve any lasting power. CHARLES BREUNIG AND MATTHEW LEVINGER, *THE REVOLUTIONARY ERA, 1789–1850* 294–96 (2nd ed. 2002). Some think their failure lies in their near complete opposition to the established order. The political anarchists’ and socialists’ failure to share some common ground with the past from which they were breaking might have been experienced as too wrenching, too unfamiliar to be sustainable. *Id.* at 295 (characterizing the effect of the 1848 revolutions as “realism” that “resulted in a more sober evaluation” of capacity for revolutionary change).

³¹⁷ See generally TUSHNET, *supra* note 270 (discussing the NAACP’s legal strategy leading to *Brown v. Board of Education*).

³¹⁸ See HOCHSCHILD, *supra* note 312, at 280 (discussing the feminist movement and its failure to achieve gender equality in the home).

support for future changes may be a twenty-twenty hindsight problem. Was it possible to know that the language of individual rights in the 1960s and 1970s was going to stall the fight for full equality by precluding a recognition of group rights through constitutional litigation?³¹⁹ The language chosen for retention, which is reflective of the values too precious to discard (be it “individuality” or “choice”), may be precisely that which stalls the Movements or further entrenches opposition.

In both of these examples, judicial decisions were the barometer for gauging linguistic and narrative shifts. Perhaps this is the wrong focus for the Access Movements. Change can happen more decisively through legislative reform. Writing new default rules for intellectual-property access (with broader exemptions or per se fair-use standards, for example)³²⁰ would accomplish the Access Movements’ policies directly and effectively. Toward this end, the Access Movements might want to lobby Congress, rather than litigate cases. But with Congress, as with courts, the language that persuades is the language we already speak; the language which forms the basis of the stories we already tell. Surely, new facts and circumstances may shift the rules slightly—incremental legislative reform is possible, as is incremental common-law evolution—but absent a monumental crisis, legislative sea changes are rare.³²¹

So where does that leave us if change is what we seek and drastic discursive shifts are unlikely to take hold? Scholars of movement-framing and collective-action discourse suggest two paradigms. One is where “activists or social movement organizations (SMOs) . . . [create] frames that provide a compelling sense of injustice and the collective identities for the protagonists and their targets. Frames offer a diagnosis and prognosis of a problem and a call to action for its resolution.”³²² This analysis “focuses on the social construction of meaning by . . . activists and organizations . . . and the reactions between framers and potential supporters.”³²³

³¹⁹ See Friedman, *supra* note 279, at 37 (contrasting the civil rights movement as a movement for groups with the United States’ culture of individualism).

³²⁰ See William McGeeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267, 2303–20 (2010) (proposing a set of per se fair-use standards for trademark law).

³²¹ See, e.g., BREST ET AL., *supra* note 271, at 499 n.1 (describing the New Deal legislation as a reaction to the Great Depression). *But cf. id.* at 933 (describing the passage of the Civil Rights Act of 1964 as a response to the slow pace of desegregation, to President John F. Kennedy’s assassination and to President Lyndon Johnson’s landslide victory).

³²² Marc W. Steinberg, *The Talk and Back Talk of Collective Action: A Dialogic Analysis of Repertoires of Discourse Among Nineteenth-Century English Cotton Spinners*, 105 AM. J. SOC. 736, 737 (1999).

³²³ *Id.* at 736.

Another paradigm is more dialogic. Whereas the first model depicts framing the movement as “relatively stable” and as “a largely uncomplicated process of sending and receiving messages,” the second model describes a “network[] of messages” with “inherent ambiguities” which “themselves impose structured constraints on what can be represented.”³²⁴ Whereas the first model conceives of movement actors as strategic agents, the second model understands “collective action discourse [a]s contextual, public, and emergent.”³²⁵ Compared to the “frames” of the first model, the second model describes the movement discourse as a repertoire: “[L]earned cultural creations . . . [that] do not descend from abstract philosophy . . . [but] emerge in struggle.”³²⁶ Because discourse can never be truly controlled (in terms of its meaning or message) “nor even presumed to have a stable value or utility,” the first model is idealistic.³²⁷ The second model is rooted in practice. And it is where the Access Movements seem to be gaining most traction: in the emerging practices of institutions that are reacting to old ways and new demands. Marc Steinberg calls this “talk and back talk in contentious action.”³²⁸

Consider the successful changes on the side of access in the past ten years that appear to arise within this second model of “talk and back talk.” They are neither case driven nor in the nature of legislative reforms. Instead, they are policy changes within existing institutions, or they are new organizations that link to existing institutions to facilitate systemic change.³²⁹ As to the former, consider the National Institute of Health’s open-access policy, begun controversially in 2008, which requires that scientists provide public access to research funded with federal monies.³³⁰ Consider also the university policies that are moving toward open licensing to provide more access to research results.³³¹ As to the new organizations, consider the burgeoning of open-access archives and institutional

³²⁴ *Id.* at 739–40 (internal quotation marks omitted).

³²⁵ *Id.* at 742.

³²⁶ *Id.* at 750 (internal quotation marks omitted) (quoting CHARLES TILLY, *POPULAR CONTENTION IN GREAT BRITAIN, 1758–1834*, at 42 (1995)).

³²⁷ *Id.* at 754.

³²⁸ *Id.* at 772.

³²⁹ I am grateful to Michael Madison for many of the ideas in this paragraph.

³³⁰ See Soulskill, *New Bill Would Repeal NIH Open Access Policy*, SLASHDOT (Feb. 14, 2009, 9:32 AM), <http://news.slashdot.org/article.pl?sid=09/02/14/1319259>; Peter Suber, *The Conyers Bill is Back*, OPEN ACCESS NEWS (Feb. 4, 2009, 11:54 AM), <http://www.earlham.edu/~peters/fos/2009/02/conyers-bill-is-back.html>.

³³¹ See Kapczynski et al., *supra* note 221, at 1039 (arguing for the potential of public sector institutions, such as universities, to bridge the access and research and development gap through open licensing practices).

repositories, independent archives or those linked to larger institutions that facilitate access of all sorts of research and writing.³³² Consider the growing dominance of Creative Commons and their licensing scheme, which, after only seven years of existence, estimates the numbers of its licenses at 130 million.³³³ Each of these organizational entities is a form of “back talk,” a kind of challenge to the old regime, but one that does not “stand completely outside the meanings imposed by dominant genres and fields.”³³⁴ Perhaps for this reason, these organizations’ in-between status, which is also oppositional, succeeds at establishing a “moral integrity.”³³⁵ Contrary to the court cases, which are often narrow victories and limited to particular circumstances, and legislative reform, which can take decades and require a perfect confluence of political factors, institutional transformation or institutional founding can occur readily with small numbers of individuals and relatively small capital output.³³⁶ The catch is that these changes happen *in situ*—already in relation to an organizational structure or constraint (e.g., the NIH or the University). But when “culture [is] in contention” as it is in terms of the Access Movements and intellectual property’s future, truly engaging with the situation may be the best way to be heard.

CONCLUSION

I have asserted that the traditional intellectual-property analysis instantiates social, political and economic hierarchies, in both form and substance, by appealing to the importance of origins. I have also asserted that the countermobilization to the expansion of our intellectual-property system dismantles these hierarchies by reordering values and discarding certain assumptions embedded in legal narratives of intellectual property (of sacred beginnings, human nature, incentives), which reproduce existing property relations to the benefit of those already empowered.³³⁷ By studying past stories of intellectual-property creation, and comparing those stories to the

³³² For a directory of open access archives, see OPENDOAR: DIRECTORY OPEN ACCESS REPOSITORIES, <http://www.opendoar.org> (last visited Oct. 30, 2010); REGISTRY OPEN ACCESS REPOSITORIES (ROAR), <http://roar.eprints.org/content.html> (last visited Oct. 29, 2010).

³³³ See *History*, CREATIVE COMMONS, <http://creativecommons.org/about/history> (last visited Oct. 30, 2010) (noting that in 2008 there were an “[e]stimated 130 million CC licensed works”).

³³⁴ Steinberg, *supra* note 322, at 753.

³³⁵ *Id.*

³³⁶ For this theory of “structuration,” see ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* (1984).

³³⁷ See, e.g., Katyal, *supra* note 298, at 470 (“[T]he laws of intellectual property are structured to perpetuate, rather than disable, the current state of gender inequity in the content industries.”).

discourse of the Access Movements today, we notice a difference in language pointing to a difference in how we constitute ourselves as creators and innovators in the digital age.

This Article describes the language of the Access Movements as embracing a collective notion of creation and an ethos of sharing that is fueled by a diversity of motives that shape the development and use of intellectual property in order to promote sustainable progress. The Access Movements react to the perceived expansionist intellectual-property law by raising awareness of, and appreciation for, a protected commons and the public domain. When working properly, this public domain promotes optimal levels of progress through the practical access for all, a substantive-equality approach to intellectual-property wealth. For the most part, the Access Movements seek a well-regulated commons,³³⁸ a managed system of individual and collective rights that promotes social welfare as measured by community sustainability and practical opportunities for personal fulfillment.

Despite the Access Movements' devotion to a new future for intellectual-property relations, at least two core concepts from the origin stories of intellectual property remain: idealizations of autonomy and consent. These concepts are not left unquestioned, but they nonetheless play central roles in the countermobilization. The question remains whether these concepts and the liberal legal politics they instantiate will frustrate the Access Movements' goal of reversing the expansion of exclusive rights. In light of past social movements' incremental successes through subtle discursive shifts, relying on a new language to bring a new future may be an effort in vain. Instead, new values may more readily transform the old if we engage within existing institutions or partner with new ones. Retaining the values of autonomy and consent, therefore, may be necessary. But we must be careful to speak of these values in less than idealized forms (as modified, contingent or contextual) in order to shift the debate in the directions the Access Movements seek.

Insofar as law and culture are part and parcel of each other, the future of intellectual-property law is a matter of cultural politics.³³⁹ As it has in the past, intellectual-property law will shape communities (who is in and who is out), their values (what is good and what is

³³⁸ See Boyle, *supra* note 1, at 66 ("To put it bluntly, some of the theorists of the e-commons do not see restraints on use as anathematic to the goal of freedom; indeed, they may see a successful commons as defined by its restraints.").

³³⁹ Sunder, *supra* note 7, at 285 ("Rather than narrowly viewing intellectual property as *incentives-for-creation*, we must understand intellectual property as *social and cultural relations*.").

not), and their capacities to survive and flourish. Attention to the discourse of the Access Movements can help designate the communities and values called into being through their law reform proposals. It also helps identify continuity with past legal orders, continuity that may or may not be intentional and may or may not be productive of progressive change. The comparative tales of origins and access of intellectual property is a dialogue—a “talk and a back talk”—that is forming the basis of new, productive organizations and instigating transformations within existing ones hopefully to our collective benefit. Paying close attention to the words we use and the stories they form is not an exercise in vain. It is how we make sense of our world to choose the right path from the wrong one.