Conclusion

Some Positive Thoughts about IP's Negative Space

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To start, let's transport ourselves back to 1995. And let's imagine a conversation about, of all things, the future of encyclopedias. I'll start the conversation with a passage from Daniel Pink's terrific 2009 book, *Drive*,[1] describing two new encyclopedias that are about to hit the market.

> The first encyclopedia comes from Microsoft. As you know, Microsoft is already a large and profitable company. And with this year's introduction of Windows 95, it's about to become an era-defining colossus. Microsoft will fund this encyclopedia. It will pay professional writers and editors to craft articles on thousands of topics. Well-compensated managers will oversee the project to ensure it's completed on budget and on time. Then Microsoft will sell the encyclopedia on CD-ROMs and later online.
>
> The second encyclopedia won't come from a company. It will be created by tens of thousands of people who write and edit articles for fun. These hobbyists won't need any special qualifications to participate. And nobody will be paid a dollar or a euro or a yen to write or edit articles. Participants will have to contribute their labor—sometimes twenty and thirty hours per week—for free. The encyclopedia itself, which will exist online, will also be free—no charge for anyone who wants to use it.[2]

Pink then says that in fifteen years—that is, in 2010—one of these two will be the biggest and most widely used encyclopedia in the world, and the other will no longer exist. Which is which?

You already know the answer. Microsoft shuttered its proprietary encyclopedia in 2009, the same year Pink's book was published. Mean-

while, the all-volunteer, open-source Wikipedia has grown like kudzu. At its peak, Encarta had entries on approximately 62,000 subjects. Wikipedia currently has nearly *35 million* entries in 288 different languages, all of them written and edited collaboratively by more than 69,000 volunteer contributors around the world. It is estimated that Wikipedia receives almost 500 million unique page views every month.[3] It is not just the world's leading encyclopedia. It is, for anyone under thirty, practically the only reference source that matters.

In 1995, of course, virtually no one would have predicted the stunning success of Wikipedia. Most people would have assumed that Microsoft's encyclopedia, backed by millions of dollars of investment from one of the world's largest companies and protected by copyright—facts are outside copyright's domain, but copyright does protect the particular way in which an encyclopedia entry is written—would win out over a start-up enterprise that seemed pretty flaky and even vaguely communist.

Wikipedia doesn't charge for access, doesn't pay contributors, and doesn't take advertising. It relies on voluntary contributions. And, most importantly, Wikipedia invites people to copy and to edit the content that their volunteers create—the Wikimedia Foundation licenses, free of charge, all Wikipedia content to whomever wants it via a Creative Commons license. In exchange, users must agree to give Wikipedia credit if they publish that content, and to allow others to share whatever they take, including any content they've adapted, according to the same conditions.[4] Yet Wikipedia beat one of the world's most successful firms, Microsoft, at a game Microsoft was determined to win. And now Encarta lives on mostly as an entry in Wikipedia that comes across as a bit of Wikipedia triumphalism.

So that's the story of the competition between Microsoft's copyrighted encyclopedia, and Wikipedia's open source alternative. Wikipedia is significant here because it's a big and important example of how a creative activity can be provoked and sustained with very little use of IP.

But when most of us think about intellectual property, we don't think about Wikipedia. We think about books, films, music, and maybe software—creative fields in which IP plays a significant role in shaping creative incentives, and the behavior of market participants generally. For years, when we thought about IP, we didn't think about other creative fields like fashion design, or cuisine, or creative cocktails, or Nol-

lywood movies, or pornography, or surgical procedures, or football, or roller derby, or fan fiction, or financial services, or graffiti, or tattoos, or perfume, or stand-up comedy. Those fields traditionally did not generate much IP-focused discussion, because the creative work done in those fields relied less, if at all, on formal IP rights.

About a decade ago, that began to change.[5] Scholars in law, sociology, anthropology, economics, and other disciplines began to explore what Kal Raustiala and I labeled IP's negative space.[6]

The Concept of IP's "Negative Space"

When we started talking about IP's negative space,[7] Kal and I meant to identify creative activities and industries to which IP rules could apply, but which for some reason entirely or mostly escape this type of regulation. We also meant to launch a claim that these creative spaces had something to teach us about the effect of IP rules on creative incentives.

Kal and I were thinking about the concept of negative space as it exists in art, where part of the impact of an art work is made by the space that the work *does not* fill. Here's a humble but apt example—the logo of the UK Guild of Food Writers.[8] Even without the text, the logo tells a reasonably percipient viewer that both writing and food are referenced; the image's negative space does the work of conveying the second point.

Kal and I used the concept of negative space in art as a way to motivate a related thought about IP—if the space that an art work doesn't fill can tell us something about that work, then perhaps the space that IP law doesn't fill can tell us something about IP. In particular, we were interested in how well IP's incentives story—that restraints on copying are necessary to motivate creativity—holds up in the real world. And we reasoned that one way of knowing whether the story made sense was

Logo of the UK Guild of Food Writers.

to look for areas of creative work that, for some reason—an accident of history, or doctrine, or as a result of the norms of a particular creative community—was removed from IP's focus.

Did we see healthy innovation in that low-IP segment of the creative economy? If so, why? If not, why not? We hoped that by looking at a sufficient number of low-IP creative areas, we would be able to understand the various ways in which innovation incentives can succeed or fail. And perhaps ultimately we could say something more general about the strength and breadth of IP's incentives justification.

As the chapters in this volume illustrate, that work is now well under way, but there is a lot more to do for the negative space scholarship to achieve its potential. The journey will be long in part because we started at the beginning. What falls within and what falls without IP's domain remains largely unexplained in the literature; we have some theories but not a lot of empirical evidence that explains why certain creative endeavors are granted IP rights and others not, and that can tell us where IP rules should be tightened or relaxed. And, to be frank, despite some early attempts,[9] the negative space literature has similarly failed as yet to provide a coherent account of why IP pervades some creative endeavors and barely touches others.

What the negative space literature has given us so far is a clutch of fascinating case studies. Studies of the fashion industry,[10] creative cuisine,[11] fan fiction,[12] pornography,[13] nineteenth-century U.S. commercial publishing,[14] video games featuring significant user-generated content,[15] stand-up comedy,[16] roller derby,[17] software,[18] jam bands,[19] tattoos,[20] magic,[21] and the flu vaccine[22] show the ways in which creative production can flourish with little IP, or with a degree of IP protection far short of the maximal propertization the law can provide.[23] Related studies of scientific innovation document communal practices that emphasize sharing and resist the full potential for propertization of research.[24] And, as Eric von Hippel and others have shown, a lot of innovation is generated by users, in contexts as varied as extreme sports, surgery, library science, and commercial high-tech manufacturing, who work mostly in the absence of IP incentives, and who often share the fruits of their creativity.[25]

Taken together, these studies suggest that IP incentives are not as central to innovation, across a wide range of different sorts of creative

environments, as an enthusiast for the traditional incentives justification would have expected. Some have noted that low-IP equilibria can be unstable, and that they can also lead to a variety of non-optimal outcomes, including inefficient non-IP strategies for maintaining competitive advantage, and exploitation of knowledge workers.[26] But the negative space literature has nonetheless succeeded, I believe, in displacing what previously was far too automatic an association between innovation incentives and intellectual property rules.

The explanations for how low-IP creative communities maintain innovation incentives vary. Sometimes creative incentives coexist relatively easily with copying, because copying sets trends that drive consumption of the creative good. This is the story in the fashion industry, and also, in part, helps explain the dynamic in Nollywood movies. Sometimes social norms step in to regulate appropriation. We see this in stand-up comedy, tattoos, roller derby, surgical procedures, graffiti, fan fiction, and to an extent in creative cuisine. Sometimes creative incentives depend on first-mover advantage. This dynamic is found in many instances; for example, aspects of the financial services industry depend on it, and it also explains part of the story in Nollywood movies.[27] Sometimes creative incentives are established and maintained by firms taking advantage of market power unrelated to formal IP. This also helps to explain the large amount of innovation without IP in the financial services industry, and perhaps also explains part of how innovation happens in creative cocktails.[28] Sometimes industries preserve creative incentives by shifting away from forms of creativity that are easily copied, and focusing business models on other forms of creativity that are resistant to appropriation. Examples can be found in the pornography industry, and in the music industry as well.[29]

All of these mechanisms are interesting in themselves. But are there broader points that we can take away from the negative space scholarship thus far? Yes, there are.

Negative Space Scholarship and the Ellicksonian Pushback Against Legal Centralism

It's important to acknowledge the intellectual foundation of the negative space work. I and many others consider Bob Ellickson's work—and

especially *Order Without Law*, Ellickson's book on the ranchers of Shasta County, California[30]—as the source for much of the work that has been done in the growing negative space literature.

In the most widely read academic work that led to *Order Without Law*, Ellickson showed that Shasta County cattle ranchers, a community that one would predict would be aware of and would rely upon formal rules of property—cattle stray, and, when they do, damage fences and crops—actually didn't behave, for the most part, as if the formal property rules were relevant. Instead, the ranchers developed and enforced a set of social norms regarding responsibility for straying cattle. Some of these norms looked efficient relative to the formal property rules they displaced, some did not. The most important point that I and others took from Ellison's work was that particular communities had achieved order using social norms rather than formal law.

Ellickson's work has guided the negative space scholarship in both a narrow and broad sense. Some of the negative space work is a direct outgrowth of Ellickson's work—that is, the segment of the negative space literature that documents the displacement of formal law by the social norms of a particular creative community. My work with Dotan Oliar on the anti-joke-stealing norms of stand-up comedians is in this vein, as is Dave Fagundes' study of roller derby names, and Aaron Perzanowski's work on tattoo artists. And then there is Bob Spoo's terrific book, *Without Copyrights*. Spoo tells the story of the nineteenth-century American publishing industry, which operated in a legal regime where foreign works essentially didn't get copyright and were free to be copied.

The ideology of copyright predicts that in the low-IP environment Spoo describes, there will be chaos, a kind of free-for-all that provides no return to foreign authors and publishers. What we see instead is quite a bit of order without law. Spoo describes a quite detailed and fluid system of "trade currency" under which American publishers made what looked like purely gratuitous payments to foreign publishers and foreign authors, and agreed among themselves to a sort of "first-among-pirates" rule governing distribution of foreign works in the United States. So the norms of the U.S. publishing industry provided a good deal of order without law—a degree of order which, if you credit the incentive thesis, provided some return to foreign authors for the U.S. publication of their works.

I would note that the low-IP regime in the United States for foreign works coincided with an amazing growth of literacy in the United States. I suspect that the two are related. A recent empirical study about literacy in continental Europe suggests that Germany's comparatively lax copyright regime during the period led to an increase in both literary output and literacy among Germans.[31] So the efficacy of low-IP regimes is not just of academic interest; it has real-life policy implications.

Other work in the emerging negative space literature takes guidance from Ellickson at a higher level of generality. For example, my work with Kal Raustiala on the fashion industry leans on Ellickson in a broader, and, I think particularly crucial, way. Ellickson's work was the first sustained attack that I had experienced within the legal academy on what I'll refer to as legal centralism—the idea (very popular among lawyers and legal academics) that the law that is made by the state, i.e., the formal law of statutes and regulations and court decisions, is the law that matters.[32] And our work on the fashion industry is a story that, like Ellickson's account of the Shasta ranchers, pushes back against legal centralism and reminds lawyers that the world isn't all about them.

Kal and I didn't find the fashion industry to be relying principally on social norms—although I would not be surprised if fashion designers do have norms or at least widely recognized practices that regulate appropriation to some degree, not least because occasionally we have been told as much. Rather, we argue that imitation is not harmful to innovation in fashion—and indeed, might be helpful—because of the way that consumers behave.

The fashion industry is rife with knockoffs. Knockoffs are everywhere; they're part of the ecosystem in fashion. Take the women's clothing store chain Forever 21, which is a multi-billion-dollar retailer that is growing here in the United States and now also in Europe. Forever 21's entire business model is based on knockoffs.

So there's nothing unusual about knocking off. As an empirical matter, that's just how the fashion industry operates—both in the United States and in Europe. What's interesting for lawyers is how rampant knocking off fails—at least visibly—to drive down the level of creativity and creative production in this industry.

Why do fashion knockoffs not destroy the industry's incentives to create new designs? The canonical justification for intellectual property

protection, in the United States at least, is that unless we restrain competition from copyists, creators will not create. If you talk with members of Congress, that's the sort of story you'll always hear. If you check the U.S. Constitution, that's the reason given by the Framers. That's been the reason, throughout American history, for IP protection: to incentivize creative work.

The fashion industry simply doesn't follow that logic. What we found, in looking at this industry, was that the freedom to copy not only did not destroy the creative impulse; it actually incentivized and accelerated it. We found, moreover, that the relatively friendly coexistence of imitation and innovation in fashion was wired into the industry at its deepest level. Copying is, we found, a basic element of the industry's trend-driven business model. We saw that time and again, as designers came up with a new design, those designs were adopted by others as soon as there was some (often very early) evidence of their appeal. What emerges from this process is something that's familiar to all of us—a trend.

Trends are the centerpiece of the fashion world. And what are trends but a series of things that look alike? This ability to copy and to create a trend is really what has fed the fashion industry. We all know that things come into fashion and they go out of fashion. Imitation accelerates that process; it provides a way for consumers who care about fashion to say, "hey, I want that look," or "I want that item." Copying first helps to set or identify trends, and to anchor consumers' expectations about what is in style at a given moment, which benefits the fashion industry by lowering consumers' information costs and easing the decision about what to wear. That, in turn, of course encourages more apparel purchases by lowering the risk of purchase. And then, as copying spreads, it helps to kill the trend that it birthed. As a design becomes very widely copied, its cachet with the fashion-forward falls. Those consumers jump off the aging trend for a new one that copying is helping to establish. Copying is, in short, the engine that drives the fashion cycle.

To be clear, while copyright law doesn't apply to most fashion designs and design patent and trade dress law have, thus far, been at most a sideshow in the industry, trademark law does at least protect brands if not designs. Trademark is very important for the industry, because it helps to maintain the distinctiveness and value of fashion industry brands.

But it plays a minor role, at best, in regulating the copying of fashion designs.

This brings us back to Bob Ellickson's relevance to the negative space literature. There is no formal law preventing the copying of most fashion designs, but it doesn't matter much. The law is not central to the industry's innovation incentives. In contrast, in Europe there is a lot of formal law that, at least nominally, prohibits the copying of most fashion designs. And yet there is in Europe, as in the United States, an awful lot of knocking off. In the United States, the industry thrives with relatively little law. In the European Union, the industry thrives despite the presence of a lot of law, which it largely ignores. In both jurisdictions, law is not central.

What Kal and I found in the fashion industry spurred us to think more about how this kind of economic success and ordering could develop despite the lack of IP protection. One way to think about it is that this negative space that we talked about turns out to be pretty positive from an economic point of view, at least in some industries. The fact that IP protections don't exist for fashion designs doesn't destroy the incentive to make designs; it actually spurs it. That is, itself, an interesting finding, but I think it's also a pretty powerful statement about our IP system, because it gets at the core of this very idea that, but for IP protection, we will not see creative work. That is a thread, or a through line, in the negative space literature thus far.

I'll conclude this section by admitting my surprise, and disappointment (mostly in myself) that the concept of IP's negative space didn't come earlier. The story that IP tells about itself is a legal centralist story writ large. "No one but a blockhead," Samuel Johnson said, "writes but for money." IP has taken that statement to heart. Without property rights, creativity will fail—that is the heart of IP's justification and the motivating force behind IP law.

It's a perfectly sensible theory about how the world works, but like a lot of perfectly sensible theories, when you look at the world, reality is a lot more messy and interesting and subtle. It took a long time, I think, for IP lawyers to start looking around them because the theory was so comforting and sensible and affirming of the importance of what IP lawyers do. IP lawyers were used to presuming that IP laws play a central role in spurring creativity. They were interested mostly in explaining

how IP law accomplished that. They were not particularly interested in looking at places where there was no IP.

That was a mistake. In particular, it was mistaking the means for the end. The means are intellectual property rules; the ends we're seeking are innovation and creativity. IP lawyers should think more like *innovation lawyers*. That is, they should care more about innovation, and treat the tools we are employing to provoke it as sometimes expedient, rather than invariably necessary.

The Negative Space Literature and the Law's Unintended Consequences

The negative space literature has begun to explore another facet of IP's effect on real-world creativity that could turn out to be very important. The principal justification for IP protection, at least in the United States, has to do with the question of "how much?" That is, how much creative work will be produced in a particular setting. In a world without restraints on copying, IP theory tells us to expect too little creativity—i.e., an amount less than the social optimum. A lot of the negative space literature calls into question the idea that IP protection is about how much, because we see creativity occurring seemingly unimpeded in a range of low-IP settings. But in some of the studies we do see a different effect—an effect on *what kind* of creative work is produced. So in other words, legal rules can affect the *type* of innovations we see. We might get certain kinds of creative work versus other kinds depending on whether we have a lot of IP protection, a little bit, or none.

We see this effect in my work with Dotan Oliar on stand-up comedians.[33] In that paper, Dotan and I trace the development of stand-up comedy through two eras: the post-vaudeville era of joke slingers like Henny Youngman, Milton Berle, Jack Benny, Bob Hope, and Phyllis Diller, and the modern age of personalized comedy which started with people like Lenny Bruce and Mort Sahl and Dick Gregory and is today represented by comedians as diverse as Sarah Silverman, Zach Galifianakis, Amy Schumer, Aziz Ansari, Louis C.K., and Trevor Noah.

In the post-vaudeville era when Henny Youngman was young, comedians stole what they could steal. Comedians had no apparent norms, back in the day, against stealing jokes. In fact, they joked about some-

thing that they called the "Corn Exchange," which reflected the fact that jokes were essentially public property; stand-ups bought them, sold them, stole them, adapted them. Jokes were part of a commons that comedians could access. You could see reflections of that fact in a great Milton Berle joke: Berle would come up on stage and say, "You know, the guy who came on before me was so funny I dropped my pad and pencil."

So in the post-vaudeville era, comics operated on a norm of open access to other comedians' jokes. It's important to acknowledge that this situation was never universally beloved; comics did sometimes sling insults at joke thieves—Milton Berle, for example, was sometimes dismissed as the "Thief of Bad Gags." But despite a lot of appropriation, there were no lawsuits among comedians for stealing jokes.

In comedy's second period, which began in the mid- to late 1960s, the situation changed pretty dramatically. Beginning at this time was a generation of comedians—Lenny Bruce, Mort Sahl, Dick Gregory, and others—who took comedy in the direction that so much popular culture was taking through the 1960s; i.e., more individualized, more political. Comedy became less of an enterprise of collecting and slinging jokes at people, and more about self-exploration, individualized narrative, and the development of individualized persona.

At about the same time that comedy changed in this way, the nature of the rules governing joke-stealing also changed. Comedians still did not sue one another over joke theft. You might have occasionally found a comedian suing a t-shirt company, or a book publisher—i.e., a person or firm outside the community who had taken a joke without permission. But if you look for lawsuits between rival comedians during that time, you will not find them.

So what's changed? Starting in the late '60s and very much strengthening in the '80s and continuing today, comedians developed a set of social norms about joke stealing: A norm against stealing jokes; norms about how comedians recognize ownership of jokes that are co-authored; norms about how comedians recognize the transfer of jokes from one comedian to another. And these norms are backed by a stiff regime of community sanctions. Comedians spend a lot of time in each other's company, in comedy clubs around the country, they see each other's material, they have a sense of the pedigree of particular jokes,

bits, and routines, and when they detect stealing, they often report it to the originator.

What happens next is hard to predict in any particular case, but matters tend to follow a few well-trodden paths. The parties often will first try to work things out; but if working out is not in the cards, then the originator and his or her allies will retaliate. Retaliation comes in a few forms. The most common is simple bad-mouthing. That may not sound like much, but keep in mind that comedians are, as a group, pretty good at bad-mouthing. Take the case of the late Robin Williams, who had a really bad reputation as a joke thief. There's an interview with Williams in *Playboy* magazine, where he says, "you know, at a certain point I stopped going into comedy clubs—I stopped doing standup and I stopped going into comedy clubs. Why is that? Because I couldn't stand the bad-mouthing, I couldn't stand the looks that I got from people."

Or take the case of Carlos Mencia, another rather famous alleged joke thief. In 2007, Mencia was confronted angrily by a fellow comedian named Joe Rogan at a comedy club in L.A. The videotaped confrontation where Rogan accused Mencia of joke-stealing, which included threats of violence and eventually audience side-taking, was posted on YouTube, and went viral. Carlos Mencia has since been lampooned by the guys on *South Park*, in an episode where he's beaten to death by a cartoon Kanye West for stealing a joke. Which stands as a pretty extreme form of bad-mouthing—but again, comics are nothing if not inventive.

There are other forms of retaliation. Sometimes comedians will engage cooperatively in group boycotts—i.e., agreements not to work with recalcitrant joke thieves. Sometimes comedians will threaten violence, or even carry out actual physical violence. I don't mean to condone violence. Nor do I mean to uncritically valorize comedians' system of community justice. There's no guarantee that the informal law will reach the right results in joke-stealing disputes that are unclear (of course, the formal law may err as well). And there are aspects of the informal system (the absence of any sort of fair use norm; the lack of an appeal mechanism) that should give us pause. But at a general level, comedians' norms appear to achieve an important end. They restrain joke thievery enough that incentives to invest in the creation of new comedic material remain robust.

What do we take from this? As has been noted above, the typical dialogue about IP protection can be characterized as "more vs. less." That is, if we have more IP, we'll get more creativity, and if we have less IP, we'll get less. Dotan and I didn't really see any evidence for that in the very creative world of stand-up comedians. We don't see any evidence that there was a dearth of comedic production before the norm system took hold in comedy. We see lots of jokes during the era of the Henny Youngman-type joke-slinger. After the norms system takes hold, what we see is not *more* material; what we see is *different* material. We see material that is more personalized, that is more narrative, that is more tailored to individual comedians, that represents a higher level of creative investment.

The idea that IP is not a simple question of more vs. less shouldn't be surprising, but it has profound implications. Seen in this light, IP raises difficult normative questions about what kind of culture we want. You can approach this question using our findings in the comedy paper. In the old comedic community, with its comedic commons, we got the kinds of jokes that were perhaps not amazingly original, but they were the kinds of jokes that you'd tell to your friends. They were the kinds of jokes you'd tell to your mother. If you think of comedy as serving as a social lubricant—the thing that, along with alcohol, makes family gatherings tolerable—then you probably like the kind of comedy that the post–vaudeville era produced, and you probably like the free-appropriation regime that went along with it.

If, on the other hand, you think of comedy as a platform for political statements or individual artistic exploration—i.e., the kind of deeply original, individualized, diverse, richly narrative, and persona-driven comedy we get today—you probably like the informal regime of anti-stealing norms that accompanies this sort of comedic work, that grew up alongside it, that helped to cement it into place.

And, unlike the typical IP discussion about how much creativity we will get, which primarily raises questions that are the terrain of lawyers and economists, questions about what sort of creativity we actually value should involve all of us. These are democratic questions.

We see this effect again in Kate Darling's work on the online pornography industry.[34] Kate's work describes how online piracy, most notably through the ubiquitous porn tube sites,[35] has affected the industry's out-

put. Not primarily by reducing it (although because Kate's study doesn't measure production, that is possible, even if it doesn't appear likely), but by shifting it.

Kate provides evidence, based on interviews of industry participants, that production in the industry has shifted away from pornographic feature films and toward cheaper scenes designed to be viewed on the tube sites, which have entered into deals with many producers to split ad revenue. Kate also documents the rise of the so-called cam girls—i.e., women (and men) who perform live using webcams. Clients pay to join these performances, and the revenue stream that results is resistant to piracy for much the same reason that live music performances are—there is usually no recording, and, even if there is, it's far from a perfect substitute for the live experience. This is true even when the performance is made over an Internet connection, because a feature of these performances is interactivity—ask (and pay) for the performer to engage in a particular sex act, and you might receive it.

What Kate sees in online pornography is a lot like what Kal and I wrote about in *The Knockoff Economy* regarding the music industry's recent history. Online music piracy hasn't reduced the quantity of music produced, or indeed its quality, as a series of studies by Joel Waldfogel demonstrates.[36] But it has reduced revenues from recorded music—according to RIAA figures, revenues are down more than 60%, adjusted for inflation, since 1999, which was Napster's breakout year.

What has happened as the music industry has slipped into low-IP status, involuntarily and with a great deal of kicking and screaming, again raises the question whether the primary real-world effect of IP rights is to regulate "how much?" or "what kind?" The music industry's story suggests it's the latter. Overall output of recorded music doesn't seem to have been affected, perhaps because recorded music is linked to revenues from live musical performances, which are growing smartly. But the industry has shifted its product mix from something that's easily pirated (recordings) to something that is not (concerts). The latter is growing, faster than it probably otherwise would if the former were not comparatively vulnerable to piracy.

The music industry's shift, is, of course, pretty messy. There are winners (the firms that control live performance, such as Live Nation), and losers (the major record companies). And there is the appearance of

crisis, not least because the losers have a big megaphone, and, from their narrow perspective, things have gone straight to hell.

But from a broader social perspective, music seems to be doing pretty well as a low-IP industry. We can argue about whether the industry's renewed focus on live performances is a good thing—especially if it comes at the expense of investment in great recordings. I don't see any evidence yet that the two are opposed in some sort of zero-sum game. Great recordings fill the seats for live performances, and live shows make money. That is the new music industry math. Actually, it's not even that. It's more like a return to traditional music industry math, because the heyday of revenues from recorded music didn't last very long, and, for most of the history of the music industry, live performance loomed large as a revenue source. What's old is new again.

The Negative Space Literature and the Question of What (and Who) Is Innovation For?

I'll end by raising one other sort of unintended consequence of the IP law that the negative space scholarship should explore. When Kal and I wrote our first fashion paper, we spent a lot of time looking through registered designs. Way too much time. And, as it turns out, very few fashion designs are registered. There are lots of t-shirt designs and designs for jeans pocket stitching in the European design registry. But surprisingly few entries exist for designs that anyone would describe as relating to "fashion."

On the other hand, there are a surprisingly large number of designs for the outer casings of portable generators—a product that, prior to my tour through the European design registry, I never considered to be particularly "designy."

I wanted to know why companies would register generator casing designs—remember, these registrations don't cover anything functional about the generators, but rather relate solely to their outward appearance—so I made phone calls to a few Japanese companies that made portable generators and asked. I finally was able to get on the phone with an English-speaking Japanese lawyer at one of the companies. What he told me was very interesting. He said that portable generators were a mature technology. They all basically work the same, they are all about

as good as one another, they all cost about the same per watt of power generated, and it is difficult and expensive to make significant functional improvements. As a result, the market for portable generators is very competitive.

So, the Japanese lawyer said, we have a problem. We have to differentiate our product, or else we'll be stuck competing mostly on price. So how do we differentiate our product? By making it *look* different.

The purpose of the European design protection system, and of the related American design patent system, is to promote "innovation" in design. It's a branch of the canonical IP story. But "innovation" to what end?

Our American picture of IP is that the sort of innovation it provokes is progressive—that is, innovation improves social welfare, and is therefore something we are right to promote. But the link between "innovation" and social welfare isn't simple. There's a lot of innovation that may be privately beneficial, but nonetheless socially wasteful. The portable generator design protection story I just related is an example. The most optimistic take on the story is that these portable generators look different because different generator casing designs are satisfying different consumer preferences for the appearance of generator casings. If that's true, then the heterogeneous tastes of diverse consumers are being satisfied through product differentiation. And that's a version of the story in which design protection is leading to "innovation" that improves social welfare.

The problem is that this optimist's version seems, at least to me, palpably ridiculous. The Japanese lawyer wasn't a naïf about the meaning of the story, and I see no reason why anyone else should be, either. The truth is that portable generators are basically commodity items. There is (or was) sharp price competition in the market for these products, and consumers benefit from that. Design "innovation" is, in this instance, the producers creating meaningless aesthetic distinctions using IP.

The producers' hope is that by introducing aesthetic distinctions, and advertising them, the producers will create consumer demand for aesthetic content in generators where none had existed before. And that allows the producers to escape from sharp textbook competition for the friendlier (to them) terrain of market power–based competition—aka, oligopoly competition. The effect of the producers' design "innovations"

is just to transfer wealth from consumers to producers. That isn't the sort of innovation we think of IP producing. And yet it is often precisely the sort of innovation that IP in fact does produce.

Now, I must acknowledge that a lot of economists will shake their heads at this. To the economics profession as a whole, a preference is a preference, and, if a preference is satisfied, that is unambiguously good. Treating all preferences alike is certainly a very useful simplifying assumption if you're doing economic modeling. And our commitment to free speech likely makes us reluctant to limit producers' attempts to convince consumers that they should value and pay more for aspects of differentiation that were, like the design of portable generator casings, previously meaningless to them. But it's one thing to refrain from interfering, on free speech grounds. It's quite another to *encourage* this process, which is what we're doing when we put design protection systems in place that prevent competitors from imitating these meaningless differentiators.

This is an important set of questions that the negative space literature should explore. How much of the "innovation" produced by IP can be meaningfully characterized as "progressive"? How much cannot? And, in industries where we find less IP, do we find less of both sorts of innovation? Or, perhaps, only less of the meaningless sort?

IP Lawyers → Innovation Lawyers

Let me wrap this up with a more meta observation about what the negative space literature means for people who study and work in the field of IP. Even at this early stage of its development, the negative space literature raises a basic question about what exactly our field is, and what we care about. The negative space literature suggests that the field is *innovation*. And that IP is a sub-field. In other words, that IP is a tool, useful in some instances more than in others. And it is exerting effects that are complex and contingent. The legal centralism story that Bob Ellickson helped undermine in the property context isn't sensible in the intellectual property context, either. This is not to say that the formal law doesn't matter. It appears to matter a lot in pharmaceuticals, and in blockbuster movies. But in a range of other creative industries—some very economically important—it matters far less.

So how do we move away from the ideology that holds that at the root of innovation we invariably should find IP? How do we deal with a culture of IP academics and IP lawyers that imagine there's an IP solution for every innovation problem? This is not just a rhetorical or ideological question; it has real world consequences. We *need* the progressive sort of innovation. It is the single most salient thing that human beings do that over time tends to make life better, and less brutish, nasty, and short. We should care about fostering the conditions that lead to it, and the persistence of legal centralism in this field is likely to lead us astray. Seen in its best light, the negative space scholarship is a call for suspending ideology in favor of opening our eyes, re-engaging in the hard work of empirical study, looking very carefully at the creative communities around us, and getting down and a little bit dirty to figure out how they work.

NOTES

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1 Daniel H. Pink, *Drive: The Surprising Truth About What Motivates Us* (Riverhead, 2009).

2 Ibid., 13–14.

3 See the Wikipedia entry on "Wikipedia," https://en.wikipedia.org.

4 See Wikimedia Foundation, "Wikipedia Terms of Use," https://wikimediafoundation.org.

5 It's important to acknowledge that Jessica Litman was characteristically prescient in identifying low-IP areas of creativity as potentially valuable objects of study. In her excellent 2001 book *Digital Copyright* (Prometheus, 2001), Litman pointed out that copyright's incentives justification was contestable, and that there were apparent counterexamples. "Of course, we don't give copyright protection to fashions or food," Litman wrote. "We never have."

6 See Kal Raustiala and Christopher Jon Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design," 92 *Virginia Law Review* 1687 (2006): 1764.

7 See generally Raustiala and Sprigman, "The Piracy Paradox."

8 http://www.gfw.co.uk/.

9 See, e.g., Kal Raustiala and Christopher Jon Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (Oxford, 2012); Elizabeth Rosenblatt, "A Theory of IP's Negative Space," 34 *Columbia Journal of Law & Arts* 317 (2011).

10 Jonathan Barnett, "Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis," 91 *Virginia Law*

Review 1381 (2005); Raustiala and Sprigman, "The Piracy Paradox"; C. Scott Hemphill and Jeannie Suk, "The Law, Culture, and Economics of Fashion," 61 *Stanford Law Review* 1147 (2009); Kal Raustiala and Christopher Jon Sprigman, "The Piracy Paradox Revisited," 61 *Stanford Law Review* 1201 (2009); Jonathan M. Barnett, Gilles Grolleau, and Sana El Harbi, "The Fashion Lottery: Cooperative Innovation in Stochastic Markets," 39 *Journal of Legal Studies* 159 (2010); C. Scott Hemphill and Jeannie C. Suk, "The Fashion Originators' Guild of America: Self-Help at the Edge of IP and Antitrust," in *Intellectual Property at the Edge*, Rochelle Dreyfuss and Jane Ginsburg, eds. (Oxford, 2014).

11 See chapter 1 of this volume, Emmanuelle Fauchart and Eric von Hippel's "Norms-Based Intellectual Proprty Systems"; Christopher J. Buccafusco, "On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be per se Copyrightable?" 24 *Cardozo Arts & Entertainment Law Journal* 1121 (2007);

12 See Rebecca Tushnet's work in chapter 7 of this volume, "Architecture and Morality"; Rebecca Tushnet, "Economics of Desire: Fair Use and Marketplace Assumptions," 51 *William & Mary Law Review* 513 (2009).

13 See chapter 8 of this volume, "Internet Pornography," by Kate Darling; Kate Darling, "IP Without IP? A Study of the Online Adult Entertainment Industry," 17 *Stanford Technology Law Review* 655 (2014).

14 Robert Spoo, *Without Copyrights: Piracy, Publishing, and the Public Domain* (Oxford, 2013).

15 Greg Lastowka, "Minecraft as Web 2.0: Amateur Creativity & Digital Games" (October 5, 2014), http://papers.ssrn.com.

16 Dotan Oliar and Christopher Jon Sprigman, "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy," 94 *Virginia Law Review* 1787 (2008).

17 See Dave Fagundes' work in chapter 6 of this volume, "Subcultural Change and Dynamic Norms"; David Fagundes, "Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms," 90 *Texas Law Review* 1093 (2012). See also Gerard N. Magliocca, "Patenting the Curve Ball: Business Methods and Industry Norms," *BYU Law Review* 875 (2009) (discussing industry norms against patenting and arguing that business method patents should not be expanded to cover industries where such norms exist).

18 Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale, 2007); Jon M. Garon, "Wiki Authorship, Social Media, and the Curatorial Audience," 1 *Harvard Journal of Sports & Entertainment Law* 95 (2010); Catherine L. Fisk, "Credit Where It's Due: The Law and Norms of Attribution," 95 *Georgetown Law Journal* 49 (2006); Josh Lerner and Jean Tirole, "The Economics of Technology Sharing: Open Source and Beyond," *Journal of Economic Perspectives* 99 (2005).

19 Mark F. Schultz, "Fear and Norms and Rock & Roll: What Jambands Can Teach About Persuading People to Comply with Copyright Law," 21 *Berkeley Technology Law Journal* 651 (2006).

20 See Aaron Perzanowski's work in this volume, chapter 4, "Owning the Body"; Aaron Perzanowski, "Tattoos and IP Norms," 98 *Minnesota Law Review* 511 (2013).

21 Jacob Loshin, "Secrets Revealed: Protecting Magicians' Intellectual Property Without Law," in *Law and Magic: A Collection of Essays* 123, Christine Corcos, ed. (Carolina Academic Press, 2010).

22 Amy Kapczynski, "Order Without Intellectual Property Law: The Flu Network as a Case Study in Open Science" (unpublished working draft on file with author).

23 See also the collection of essays in *Making and Unmaking Intellectual Property*, Mario Biagioli, Peter Jaszi, and Martha Woodmansee, eds. (University of Chicago, 2011).

24 See chapter 3 of this volume, "Derogatory to Professional Character?" by Katherine Strandburg; Katherine J. Strandburg, "Curiosity-Driven Research and University Technology Transfer," in *University Entrepreneurship and Technology Transfer: Process, Design, and Intellectual Property* 93, Advances in the Study of Entrepreneurship, Innovation and Economic Growth, Vol. 16, Gary D. Libecap, ed. (2005); Fiona Murray et al., "Of Mice and Academics: Examining the Effect of Openness on Innovation," *National Bureau of Economic Research*, Working Paper No. 14819 (2009), http://www.nber.org.

25 Eric Von Hippel, *Democratizing Innovation* (2005); Jeroen P.J. de Jong and Eric von Hippel, "Transfers of User Process Innovations to Process Equipment Producers: A Study of Dutch High-Tech Firms," 38 *Research Policy* 1181 (2009); Fred Gault and Eric von Hippel, "The Prevalence of User Innovation and Free Innovation Transfers: Implications for Statistical Indicators and Innovation Policy," MIT Sloan School of Management Research Paper No. 4722–09 (2009), http://papers.ssrn.com.

26 See, e.g., Rochelle Cooper Dreyfuss, "Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm," 31 *Cardozo Law Review* 1437 (2010).

27 See Raustiala and Sprigman, *The Knockoff Economy*, 155–161.

28 Ibid.

29 See Darling, "IP Without IP." See also Raustiala and Sprigman, *The Knockoff Economy*, 179–184.

30 Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard, 1994).

31 See Frank Thadeuscz, "No Copyright Law: The Real Reason for Germany's Industrial Expansion?" *Spiegel Online International* (Aug. 18, 2010), http://www.spiegel.de.

32 See John Griffiths, "What Is Legal Pluralism," 24 *Journal of Legal Pluralism* 1 (1986).

33 Oliar and Sprigman, "There's No Free Laugh."

34 See Darling, "IP Without IP."

35 Websites, such as pornhub.com, redtube.com, and xvideos.com, that offer clips of pornographic content in a format similar to the way non-pornographic content is offered by YouTube.

36 See Joel Waldfogel, "Bye, Bye, Miss American Pie? The Supply of New Recorded Music Since Napster," NBER Working Paper No. w16882 (March 2011), http://papers.ssrn.com; Joel Waldfogel, "And the Bands Played On: Digital Disintermediation and the Quality of New Recorded Music" (July 2012), http://papers.ssrn.com.