Introduction

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In an economy increasingly sustained by information, creativity and innovation are key drivers of public policy. From immigration to taxation, policymakers evaluate new laws and regulations, in part, on the basis of their power to foster or thwart innovation. In no area are these considerations more salient than in intellectual property (IP) law. Indeed, spurring innovation is at the core of IP policy. But the central narrative of IP law, that legal protection against copying is necessary in order to promote creative behavior, has been subjected to surprisingly little scrutiny. The theory certainly has intuitive appeal, and for many innovators, the conventional wisdom appears to hold true. Without some assurances against widespread copying, for example, it is difficult to imagine sufficient private investment to finance the latest pharmaceutical breakthrough or Hollywood summer blockbuster. But an increasing number of creators challenge the prevailing narrative by thriving outside of traditional IP law. This book collects some of their stories and considers what they mean for the IP system and our innovation economy more generally.

Intellectual property law is not premised on any single theory or justification. The foundations of IP law incorporate both labor theory—the notion that the effort spent inventing, authoring, or composing demands the reward of property rights—and personality theory—the notion that one's creations are a manifestation of the self and control over them is necessary for self-realization. These theoretical underpinnings sometimes play a prominent role in IP systems outside of the United States, particularly in the continental European tradition. But despite the debts it owes to John Locke and Georg Hegel, the dominant justification for IP law in the United States is a utilitarian one. We grant patents and copyrights in order to encourage authors and inventors to

engage in the socially valuable but sometimes costly enterprise of creating something new.

Because information can be copied easily and cheaply, we worry that would-be innovators will be reluctant to invest their time, effort, and capital in creating and disseminating new technologies and expressive works. In a world without IP law—the thinking goes—innovators would be powerless to stop unscrupulous competitors from appropriating their ideas and undercutting their prices. These free-riding competitors, after all, have no up-front investment to recoup. In such a world, policymakers fear that the next great inventor or artist will instead opt for a safe and reliable career in dentistry or accounting, depriving us of their genius.

IP law hopes to avoid this outcome by granting innovators and creators the legal power to exclude others from their work, enabling them to capture the full value of their contributions and secure a tidy return on their investment. But intellectual property rights are not costless; the IP system embodies an unavoidable tradeoff between incentives and access. By creating limited statutory monopolies, IP results in higher prices and decreased public access to creative works. We are willing to tolerate those costs, however, on the assumption that exclusive rights are the unavoidable price we pay to secure a steady supply of creative output.

By revealing the on-the-ground practices of a range of previously ignored creators and innovators, the studies in this book challenge this intellectual property orthodoxy. The communities these studies uncover force us to rethink the assumptions underlying IP law: that creativity cannot thrive without legal rights of exclusion, that widespread copying is inevitable without legal intervention, and that law dictates the way the public interacts with creative works. Collectively, these studies reveal that, despite its deep preoccupation with incentives, IP policy has embraced legal exclusivity without a careful examination of the conditions and motivations that define the creative environment.[1] As a consequence, IP law displays a troubling insensitivity to the specific needs of particular creative communities, and it has historically disregarded non-legal regulatory tools that enable more granular, and potentially more effective, management of creative incentives.

While IP is a crucial tool for maintaining creative incentives in some industries, scholars of creativity already understand that the assumptions underlying the IP system largely ignore the range of powerful

non-economic motivations that compel creative efforts. From painters to open source developers, many artists and inventors are moved to create, not by the hope for monetary return, but by innate urges that are often quite resistant to financial considerations.[2] Although some of our case studies reinforce this point, the communities we highlight offer a new set of insights. Specifically, they reveal that the assumptions behind IP law overlook the capacity of creative industries for self-governance and dynamic social and market responses to the appropriation of information.

Some of these communities are forced to operate without IP protection because current law does not reach or explicitly excludes their creative output. Others could assert IP in theory, but in practice they choose to opt out of the formal legal system and rely on informal social norms to govern their creative behavior. And still other creators take copying as a given and route around its harmful effects through nimble marketplace strategy. From tattoo artists to physicians, Nigerian filmmakers to roller derby players, the communities illustrated in this book demonstrate that creativity can thrive without legal incentives, and perhaps more strikingly, that some creative communities prefer self-regulation to law.

Perhaps not surprisingly, IP law demonstrates something of a blind spot for non-legal means of regulation. For lawyers, judges, and legislators, legal prohibitions are the most obvious means of changing human behavior. By creating civil or criminal liability for disfavored actions, the law harnesses the immense power of the state to influence how we act. Law is undoubtedly a powerful tool. But it is not the only means of regulation, nor is it always the most effective.

In addition to law, we can think about three other general approaches to regulating behavior: architecture, norms, and markets.[3] For any real or perceived social ill, we can deploy one or more of these modes of regulation with varying success. Take for example the scourge of cell phone use at movie theaters. No longer limited to the poorly timed ringing phone, distractions from the cinematic experience now include texting, email, and brazen games of Candy Crush. How do we curtail this growing menace? We could of course pass a law that locks up unrepentant phone users. But the legal solution imposes costs on law enforcement and the judicial system. And it may seem to many of us something of

an overreaction. Other tools can be subtler, less expensive, and have the appearance of greater legitimacy.

We might, for example, rely on architecture to reduce cell phone use. Architecture here refers not just to the design of our buildings but to all of the features of the physical environment, both natural and built, that shape our behavior. For example, speed bumps help regulate our driving habits by altering road conditions. A more contentious deployment of regulation through architecture can be found in the use by famed urban planner Robert Moses of overpasses too low to accommodate buses in order to promote racial segregation.[4] If our comparatively innocuous goal is eliminating cell phone use, we could install wireless jamming technology in movie theaters or build them from materials that impede wireless reception. After all, if your neighbor's phone receives no signal, she is less likely to disturb your viewing experience.

We might also rely on social norms to reduce cell phone use. Social norms are obligations to engage in or refrain from certain behaviors enforced through private interactions rather than by the state. They regulate through the pressure of social disapproval. Sometimes that disapproval is expressed by others when we violate a norm; other times it is expressed internally through our own sense of guilt when we fail to meet the expectations of our community. If a community objects to a behavior and holds in contempt those who disregard prevailing expectations, it can leverage our sensitivity to social judgment and isolation to alter behavior. Disapproving looks, impatient sighs, and frustrated shushing all communicate the violation of movie theater norms and, for at least some cell phone users, discourage such behavior in the future. These social norms often emerge organically, but they can also be reinforced through deliberate efforts. Consider the pre-feature public service announcements at the Alamo Drafthouse, a popular movie theater in Austin, Texas.[5] One short clip featured a voicemail message left by an irate customer who was thrown out by theater management after repeatedly texting during a film and tauntingly concluded by thanking the customer for never returning. The announcement served the dual purpose of informing patrons of the relevant norms and shaming a violator.

Finally, we could discourage cell phone use through market mechanisms. Regulation via the market relies on the simple insight that by making undesirable behavior more expensive, fewer people will engage

in it. Consider fuel economy. In the United States, we rely on legally mandated fuel economy standards to increase the average miles per gallon of our vehicles. But the market can be used to achieve a similar outcome. In countries with higher fuel costs, consumer demand drives greater fuel efficiency. So to return to our cell phone example, if mobile carriers imposed additional fees for calls and texts within one hundred yards of a movie theater, we would expect cell phone use during movies to decrease, at least among less affluent users. Or perhaps movie theaters sell more expensive tickets that entitle patrons to sit in a designated Smart Phone Zone. In either case, the theory is that forcing cell phone users to bear additional costs for their actions will reduce phone use in theaters.

As even these simple examples suggest, these four modes of regulation are not entirely independent. They interact, complementing and opposing one another to create the overall regulatory environment that shapes our behavior. Often, these separate regulatory approaches bolster each other. The architectural regulation of the speed bump reinforces the legal regulation of the speed limit. And the norm system of the Alamo Drafthouse leverages the legal regime of trespass law when it removes norm violators. But in some cases, they work in opposition, and their effectiveness is reduced as a result. The posted speed limit on the freeway might be 70 miles per hour, but the norm, enforced through tailgating and horn honking, might strongly suggest a faster rate of travel. To take an example we will return to in another chapter, copyright law prohibits the unauthorized reproduction and distribution of protected works. But that legal rule is less powerful in an architectural environment, like the Internet, that enables widespread, low-cost, anonymous sharing of information.

The dominant narrative of IP largely overlooks the role that social norms, marketplace strategy, and architectural changes can play in shaping an environment hospitable to creativity. Instead, it overemphasizes legal regulation, approaching the problem of maintaining creative incentives as simply a challenge to design the right set of laws. But optimizing legal regulation requires some understanding of the other factors that influence creators. In part, the reluctance of IP policymakers to engage with these other regulatory tools reflects the considerable variability among creative industries and communities. With few exceptions,

IP law in the United States emphasizes uniformity.[6] Although the law draws rough divisions between the copyright, patent, trademark, and trade secret regimes, IP law does not generally draw distinctions between industries. The same copyright rules apply to book publishers, recording artists, movie studios, fine artists, and software developers. And the patent rules that govern the biotech sector are the same as those that apply to the aerospace, consumer electronics, and financial services industries. But as the research collected here reveals, the social norms and market conditions that prevail across creative communities are anything but uniform. The picture that emerges from these studies is a complex set of factors that contribute to creative incentives. This understanding simultaneously undermines the accepted wisdom of IP law and explains the tendency of lawmakers to retreat to uniform legal regulation in the face of the untidy industry-specific facts of creativity in the real world.

This collection of studies offers important insights for IP policy—not despite their messiness, but because of it. For these creators, the degree of available IP protection is rarely determinative in their creative decision-making. As these studies demonstrate, markets for information goods can function despite the absence of meaningful intellectual property protection. Some creative communities rely on social sanctions to prevent copying. Others accept copying as inevitable and focus their efforts on marketplace strategies to recoup their investments nonetheless. And while our focus will be on norms and marketplace strategy, we will see that nearly every community is deeply influenced by the physical and technological architecture in which it is situated.

Within these communities, we see both common features shared across a range of industries and highly individualized, industry-specific responses. In communities that rely on social norms, for example, an expectation of attribution—crediting the contributions of others—is nearly universal. So are rules that preserve the building blocks and stock elements necessary for future creativity. And for communities that rely on marketplace strategies, a focus on selling services and experiences rather than easily copied products is widespread. But these case studies also reveal considerable variation along a number of dimensions: what kinds of creativity are valued and promoted; the relationship between creators and consumers; how ownership is determined and apportioned among creators; what exceptions to the general rule against copying are

deemed appropriate or necessary. Through both their shared features and their points of departure, these case studies reveal how particular communities of creators, situated within a social and market context, develop sustainable creative practices without relying on formal IP law.

We cannot prove, nor do we claim, that communities that rely on social norms or market-based responses to address information appropriation produce an optimal balance of incentives and costs. But the same is true of the case for strong IP protection. In part, this question remains unanswered because it involves inescapable value judgments about the socially desirable quantity and quality of creative and innovative output. How many films should we produce in a year and of what sort? How many inventions are ideal and what unmet needs should they address? But in part, the answer eludes us because IP policy has paid insufficient attention to isolating and measuring the incentives at the core of the justification for the IP system. Not until we distinguish the backdrop of non-legal incentives from those that depend on law can we engage in the kind of clear-eyed assessment necessary to transform incentives from a rhetorical tool or article of faith to an empirically grounded basis for public policy.[7]

This book is divided into three parts. The first explores the surprisingly intertwined arts of food, drink, and medicine. For good reason, we naturally associate the culinary and mixological arts. But it turns out that pharmaceuticals and cocktails are distant cousins whose point of genealogical separation is closely tied to IP protection. Both food and drink are unlikely candidates for such protection. They are unable to satisfy patent law's requirements of novelty and non-obviousness, and likewise run headlong into limits on copyright protection. Drugs and medical procedures, on the other hand, are more appropriate subjects for patent protection, but for many decades the medical community strongly discouraged their patenting. In the absence of IP, innovative communities of chefs, bartenders, and medical practitioners have developed either social norms or market responses to regulate the creation and use of those works.

While the creations of many chefs are undoubtedly innovative, not all valuable creativity finds a home in the IP system. Copyright law has been reluctant to embrace culinary creations, considering them unprotectable methods or processes, or perhaps useful articles—items with

intrinsic utilitarian functions. As presented in chapter 1, Emmanuelle Fauchart and Eric von Hippel's research documents the system of social norms among a sample of accomplished French chefs. Recognizing the value of the recipes they create and their limited legal recourse against copying, these chefs have developed and enforced a set of strong implicit social norms that enhance their private economic returns from their recipe-related creations and maintain strong incentives for innovation in the kitchen despite the unavailability of legal exclusivity.

Next in chapter 2, Matt Schruers demonstrates that from their earliest days as delivery mechanisms for medicines, to the era of patent elixirs, to today's resurgence of craft cocktails, alcoholic beverages have been fruitful ground for innovation. Although cocktail recipes are unprotected by copyright or patent law, new libations are far from scarce, despite the fact that these inventions can be freely copied and used by competitors. While culinary creations are regulated through informal norms, innovation in the mixological arts is driven by market strategies, in particular by cross-financing the investments made in easily copied information. Cocktails are often devised and sold as services, rather than products, as well as promotion for the spirits they contain. As this chapter colorfully illustrates, classic intellectual property theory often fails to account for market-based innovation incentives.

In chapter 3, Kathy Strandburg looks at the field of medicine, which has a long history of opposition to patents. She tracks the historical evolution of user innovation among physicians, with particular focus on ether anesthesia, a medical breakthrough that started out as a nineteenth-century party drug. User innovator communities often eschew patenting, relying instead on reputation-based reward systems and sharing norms. But while virtually all medical innovation was once the province of user innovator physicians, this is no longer the case. The ethical norms against patenting drugs and devices are no longer observed today, yet the norm against patenting medical procedures has remained surprisingly robust. This chapter argues that physician patenting norms have evolved to track changes in the role physicians play in medical innovation. This story helps illustrate the interplay between social norms and law, showing how they can influence each other and shift over time.

In Part II, we consider three communities for whom IP protection is available that nevertheless reject formal law in favor of social norms.

Though they share an outsider's skepticism of the legal system, creators in the worlds of tattoos, graffiti, and roller derby are motivated by overlapping yet distinct concerns. For some, the IP system leads to unwanted outcomes that are inconsistent with their creative priorities. In other instances, the act of self-regulation reflects and reinforces deep cultural commitments that go beyond creativity. And for others, the economics of self-regulation are more appealing than those of legal enforcement. Taken together, these case studies show that for some creators, social norms are not merely a second-best alternative to the legal system; they are the preferred means of regulating and promoting creativity.

Aaron Perzanowski's research on the tattoo industry, discussed in chapter 4, provides one illustration of this phenomenon. Despite generating billions of dollars in annual revenue, the tattoo industry rarely relies on formal assertions of legal rights in disputes over copying or ownership of creative works. Instead, tattooing is governed by a set of nuanced, overlapping, and occasionally contradictory social norms enforced through informal sanctions. But tattoo artists opt for self-governance despite the fact that their creations fit comfortably within the scope of copyright protection. This chapter offers a descriptive account, drawn from qualitative interview data, of the social norms that have overshadowed formal law within the tattoo community. It also provides a set of complementary cultural and economic explanations for the development of those norms.

Graffiti artists face a different set of concerns. Although graffiti images are copyright eligible in the abstract, the inherently illicit act of spray painting private property without permission complicates efforts to rely on formal law. As presented in chapter 5, Marta Iljadica's empirical research on the graffiti subculture in London demonstrates that despite its illegality, graffiti writing has rules. Those rules address questions of subject matter, originality, and copying common to any expressive work. But they also extend to concerns unique to the graffiti context. Because graffiti is inextricably tied to the physical environment, it raises questions of placement: which structures are appropriate canvases for graffiti writings and which are off-limits? And because available real estate is limited, graffiti writers must confront scarcity: under what conditions is it permissible to cover another artist's work with your own? So although the rules of graffiti writing parallel those of formal

copyright law in some ways, they also go beyond it to confront a set of problems graffiti writers are themselves best suited to address.

The flexibility of social norms in building and maintaining a community is demonstrated by the shifting efforts at self-regulation undertaken by roller derby athletes. Dave Fagundes explains in chapter 6 how roller derby skaters once guaranteed exclusive use of the pseudonyms under which they compete. Roller derby names were initially a central part of this countercultural, all-girl sport. Despite the availability of trademark protection, skaters developed an elaborate rule structure, registration system, and governance regime to protect the uniqueness of their pseudonyms. When the norms around name exclusivity changed over time, so did the governance regime. This suggests that regardless of law, communities can develop and evolve norms systems if they are close-knit and the norms are welfare-maximizing. Communities are especially likely to rely on self-regulatory approaches, even formal ones that require substantial investment, when membership is closely linked to individual identity.

A skeptical reader might be tempted to discount the case studies presented in the first two parts as outliers that bear little resemblance to traditional IP-intensive industries in terms of their output and structure. In Part III, we turn to creative practices that—while still unfamiliar to most readers—exhibit many of the hallmarks of typical IP-reliant industries and nonetheless subvert expectations about the role of legal regulation. From vibrant and productive fan fiction communities, to online pornography, to the Nigerian film industry, all of the examples in this part offer strong parallels to the industries that drive copyright policy. They illustrate that some content industries will create despite the absence of copyright incentives and will innovate around the need for IP enforcement. Some of their success relies on special market characteristics like fast-paced product cycles, optimally low production costs, and sometimes the nature of the creative process itself. But whether driven by inherent motivation or clever business models, these markets are able to sustain content production even in the absence of law or norms.

Fan fiction, a practice that sometimes attracts the ire of copyright holders, but can often lay a strong claim to fair use, is neither clearly lawful nor unlawful. Untroubled by the legal status of their creations, fans write stories, draw pictures, make movies, remix existing content,

and share their works with the broader community. This practice is as communal as it is creative, and requires spaces where fan fiction authors can come together to disseminate works, connect, and collaborate. In chapter 7, Rebecca Tushnet demonstrates the importance of architecture in fostering online communities. Despite being touched by copyright law, media fandom is low-IP and generally governed by the norms of its community. Their concepts of right and wrong, often subject to debate, are increasingly built into the architecture of online platforms. And those platforms, in turn, exert a significant impact on creativity without relying on law.

A notoriously innovative industry, adult entertainment has survived and thrived through every technological disruption. Kate Darling discusses in chapter 8 how the copying and sharing of digital files over the Internet has posed new challenges for content producers, effectively eliminating their copyright protection. But rather than destroy all incentive for production, this change has driven companies to reinvent their business models. Amidst some struggles, the U.S. industry has quickly shifted toward selling services and interactive experience goods, while continuing to create traditional content as a loss leader.

Across the globe, we find another industry that deals in low-cost entertainment products. Nollywood, the Nigerian film industry, is the top producer of digital video films in the world. Funmi Arewa argues in chapter 9 that Nigeria is an unlikely locale for the development of a major film industry given its lack of robust intellectual property enforcement. She demonstrates how Nollywood constitutes a natural experiment for creativity in the relative absence of IP protection, in which the intertwined actions of creators, entrepreneurs, and infringers all contribute to the market's growth. Because the viral spread of Nollywood films has been a key element of success, content producers can adopt business strategies that actually harness copyright infringement by monetizing wide-reaching distribution networks.

Finally, Chris Sprigman concludes with a discussion of IP's "negative space." Each of the studies in this book explores creative communities and industries that could theoretically be governed by IP law, but instead exist in a space outside of it. Together, this body of scholarship challenges the canonical justification that IP incentives are central to innovation and creativity. Drawing on his previous work on the fashion

industry and stand-up comedy, Sprigman argues that the type of creation incentivized by IP is inherently limited. A lesson he distills from our growing but still incomplete understanding of creativity without law is a need to shift our focus from a preoccupation with intellectual property to a more inclusive inquiry into innovation and its many drivers, broadening our horizon and the tools at our disposal to create effective policy.

Criticism of the IP system is nothing new. IP scholarship has frequently questioned the theory behind our laws, arguing that creators have diverse motivations and that the chosen regulatory tools are an economic burden to society. But it is only recently that IP scholars have begun to conduct empirical research in an attempt to explore and test these arguments. The growing body of industry-specific studies presented here should serve as a catalyst to quantify the assumptions in what has been largely a theoretical discussion. The ideological debate between those who would maximize IP protection and those who would abolish it has proven predictable and unproductive. Evidence-based IP policymaking is the best way to cut through the rehashing of familiar arguments. The case studies collected here do not prove that IP is unnecessary or unwise. Indeed, in some industries IP law is the most effective strategy for managing creative incentives. But these case studies do suggest that the received wisdom about incentives is too simple a story. Creativity on the ground is messy and complicated. And IP policy should take into account the full range of factors that influence creation, copying, and use. These studies also show that the conditions for incentives and investment are often industry-specific in ways that would be nearly impossible to predict without a deep understanding of the community in which they operate. If we hope to optimize innovation law and policy, we must take seriously the possibility of shifting away from the monoculture of uniform regulation that defines the current IP system.

NOTES

1 When Congress asked economist Fritz Machlup to evaluate the patent system in the 1950s, he found the evidence supporting the incentive theory inconclusive. In his estimation, if we had no patent system, the evidence could not justify its creation, nor could it justify the elimination of the existing system. Subcomm. On Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 85th Congress, An Economic Review of the Patent System, Study No. 15, at 80

(1958). In recent years, scholars have devoted significant attention to empirical assessments of the operation and underlying justifications of the IP system. But we are no closer to vindicating the hunches that motivate copyright and patent law. And, perhaps more troublingly, the work of IP scholars has gone largely unnoticed among policymakers who should be keenly interested in evidence-based decision-making.

2 Jessica Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford: Stanford Law Books, 2015).

3 Lawrence Lessig, "The New Chicago School," 27 *Journal of Legal Studies* 661, 662–63 (1998).

4 Sarah Schindler, "Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment," 124 *Yale Law Journal* 1836 (2015).

5 Alamo Drafthouse, #DontTalk Collection, https://goo.gl/c43nh4.

6 Michael W. Carroll, "One for All: The Problem of Uniformity Cost in Intellectual Property Law," 55 *American University Law Review* 845 (2006): 856.

7 Mark Lemley, "Faith-Based Intellectual Property," 62 *UCLA Law Review* 1328 (2015).