February 2014

Dear Friends at NYU,

I am looking forward to sharing this book project with you. I have been collecting data for this book since 2008. The book will be published by Stanford University Press – hopefully by fall of 2014.

I am sharing with you the book summary, that is an overview of the book's argument and structure. It also describes briefly the empirical methodology I employ. I am also distributing Chapter 3, "Making Do With A Misfit," which remains a chapter still in flux but at the heart of the book's argument. I have benefited from sharing this work with many law students, faculties and conference audiences for the past several years and each time I return to make significant revisions.

My first hope is that the data itself – the interviews with artists, scientists, engineers, their lawyers and business managers – will engage you. I have tried as much as possible to let the language from the interviews lead the analysis. My second hope is that the theoretical framework for the interview data makes persuasive sense. Despite the book draft being finished, the project itself remains ongoing, and I plan to augment the data and continue to work with it in the future. I look forward to your thoughts and comments. With each workshop I hear additional, nuanced ways to consider the data in light of IP law's place and function in the US.

I look forward to sharing the work with you,

Jessica Silbey

WHAT REAL PEOPLE THINK ABOUT IP:

CREATIVE COMMUNITIES, INNOVATIVE INDUSTRIES AND THE IR(RELEVANCE) OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY

JESSICA SILBEY

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BOOK SUMMARY

Since the United States' constitutional beginnings in 1789, the reigning justification for intellectual property protection has been to incentivize the progress of science and art. Two centuries later, the need for monopoly profits remains the dominant story surrounding intellectual property law reform debates. This book challenges the dominant story by asking those who produce science and art why and how they engage their work. The book is one the first qualitative empirical books on intellectual property to investigate the mechanisms and motives of creators and innovators. It charts new terrain for our understanding of and future in scientific and artistic innovation and the intellectual property that purports to sustain them.

Based on in-depth analyses of fifty face-to-face interviews, this book describes how, if at all, intellectual property intervenes in the professional lives of artists and scientists. Using their own words, the book traces the professional development of artists or scientists (and of their business partners and managers) from their origins, through career highs and lows, delineating the presence and absence, and shape and role of intellectual property throughout. Contrary to the dominant stories of incentives and profit maximization, the artists and scientists interviewed, along with their business partners and managers, elaborate intellectual property's *diverse* functions and *sporadic* manifestations in their lives and work. The interviewees demonstrate that IP law is ill-fitting with the needs and desires of individuals working in creative and innovative enterprises. This leads to overclaiming when IP law fails (e.g., in the case of moral rights and reputational interests) and underclaiming when IP law is perceived as unnecessary or irrelevant (lawful personal uses and insignificant or complementary commercial uses). I call this a "leaky" IP system, one with benefits if it can remain leaky but with critical problems for its foundational goals should the leaks be plugged. IP law's function appears to align most directly with its purpose of incentivizing and commercializing creative and innovative work in the case of corporate behavior. This, too, has troubling consequences because the goal of aggregating corporate wealth does not necessarily redound to the benefit of the individuals who are the creators and innovators.

Filled with stories from sculptors, chemists, novelists and software engineers, business attorneys, venture capitalists and music agents, this book reveals assorted (instead of singular) ways of achieving a flourishing livelihood in science and art, both for individuals and for firms. These stories captivate in their personal details as well as in their generalizable content. The book's theoretical framework based on empirical methods, intellectual property theory and practice, traces beginnings, struggles and pinnacles in scientific and artistic work. It also draws connections and distinctions between the professions and intellectual property laws in order to improve our understanding of what *actually* progresses science and the useful arts in hopes of contributing concrete facts and detail to the on-going debates about facilitating innovation and cultural productivity in the United States.

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STATEMENT OF CONCEPT

Innovation and creativity are buzzwords of the twenty-first century. The United States proclaims its dominance in the technological and cultural cutting edge, be it in computer design, film or music production. What facilitates innovation and creativity in our digital age? And what role, if any, do our intellectual property laws play in the growth of innovation and creativity in the United States?

Incentivizing the "progress of science and the useful arts" has been the putative goal of intellectual property law since our constitutional beginnings. But two hundred years later, we remain unsure – indeed deeply conflicted – about whether the laws that protect intellectual property work as we hope. This is because there are no studies of artists and scientists that ask them to describe how and why they do what they do and that investigate whether or how intellectual property law has a role in their activity. Making sense of the intersections between intellectual property law and creative and innovative activity is the object of this book.

This book centers on the stories told in fifty face-to-face interviews by artists and scientists, their employers, lawyers and managers. In these interviews, artists and scientists from diverse fields describe how and why they create and innovate. Their employers, business partners, managers, and lawyers also describe their role in facilitating the creative and innovative work. The focus on the interviewees' stories animates this book about technical and often puzzling legal regimes governing patents, copyright, trademarks and trade secrets. The stories structure this book, but the connections and distinctions made between the stories and statutes based on empirical and theoretical analyses inform present and future innovative and creative communities.

Psychologists and social scientists have studied creative and innovative work to discern its contours and its context. Those scholarly projects tend to study creative personalities and the evaluative standards for creativity or innovation.[1] The present book focuses less on the kinds of people that produce creative or innovative work or the values society places on it. Instead, it focuses on the motives and behaviors of the creators and innovators, the reasons they give for doing what they do and the descriptions they provide of mechanisms that help or hinder their continual engagement in creative or innovative endeavors. As a book-length project, *IP Interventions* will be one of the first with such a focus and thus has the potential for breaking new ground in a field central to the United States economy and cultural identity. More will be said in below about the book's unique contributions to the literature on law, innovation and creativity.

Interviewees demonstrate diverse ways in which IP law helps and hinders artistic and scientific productivity. For example, some writers lament the copyright royalty system, wishing instead for a consistent salary to write on a regular basis. They need to earn money to live, but they do not care if the money they earn is from royalties or as a salary from a standing organization. These writers are not incentivized by copyright laws that give them control over

[1] See, e.g., Mihaly Csikszentmihalyi, Creativity: Flow and the Psychology of Discovery and Invention (1996). Howard Gardner, Creating Minds (1994).

their work, which control may translate into licensing fees. These writers write – it is what they do and will do with or without U.S. copyright. They wish most for some regularity in their revenue stream so they can write without worry. Some of these same writers, however, wish for control that would prevent other people from misusing their work. Deemphasizing financial benefits, these authors seek, in copyright parlance, derivative and moral rights – control over the reuse of their work to protect it from exploitative uses of which they disapprove. Listening to the stories these writers tell about how and why they became writers, how and why they work with agents and publishers, about the challenges and joys of being a writer and what, if anything, they would change about their lives professionally, is a window into the intersection of creative work and the successes and failures of copyright law. Parsing the stories of these writers, and comparing them with the stories from their agents and employers, or from visual artists, biologists and engineers, provides a layered account of the multi-dimensionality of U.S. intellectual property law, its popular evocations, its criticisms and commendations.

Instead of conducting and analyzing interviews, I could study outcomes. Do pharmaceutical companies with more patents make more socially beneficial medicines? Do filmmakers and production companies who exploit the full range of their copyrights remain viable for longer? Measuring outcomes would be easier – there is a tangible dependent variable to count. But such quantifiable outcomes are notoriously ambiguous metrics. How do we determine which medicines fulfill the constitutional "progress" rationale? By how many lives saved? By how much profit generated? And, importantly, how do we know whether intellectual property law that protects the output is the mechanism that is causally responsible for it? Instead of focusing on outcomes, this book focuses on processes and unpacks the assumption that the property entitlement is the catalyst and on-going incentive. It asks those creating and innovating (or people in the business of partnering with those who create and innovate) how intellectual property law has enabled or constrained their output.

In contrast to scholarship that focuses on productivity (the quality or number of things made), this book unpacks the assumption and mystery of incentives by *analyzing the accounts people provide* about how and why they do what they do and who (or what) helped them along the way. Certainly, isolating and analyzing one's "motive" is challenging. Nonetheless, this is the way law talks about IP. Without exception, courts, legislators and lawyers describe the purpose of intellectual property law as providing the necessary incentive for creativity and innovation. However, this utilitarian justification speaks of incentive without evidence of connection to lived experience. Despite a growing body of quantitative research on IP law and policy, qualitative research that could document or challenge the incentive assumption is rare.

Moreover, close attention to language and stories tells us things that surveys or other quantitative research do not. The language used to describe lives and work offers access to the cultural milieu of creativity and innovation, including the law that regulates work and livelihood. Language – words and stories – make sense of the world. Whether called narrative, rhetoric, or interpretation, stories explain or justify the situation in which we find ourselves. This includes the legal situation that frames (enables and constrains) creativity and innovation. At the same time, stories are inherently political. They can justify the status quo or affect change. Their repeated use (along with words and phrases) reify or transform categories and expectations,

which in turn structure relationships (legal and otherwise) in our communities. Studying the stories told and the language used is of great importance for understanding how we live together.

The fifty transcripts at the foundation of this book together create a database of language – cultural tropes and meanings – that describe what people think about as they engage with creative and inventive processes and intellectual property regimes. Qualitative analysis based on discursive patterns, language repetition and narrative structure provides a rich and complex picture of innovative and creative practices. The data in this book confirm some quantitative studies of IP law and policy, and this consistency will be highlighted. But the interview as analyzed also dispute basic legal and economic assumptions about individual and institutional decisions regarding IP's relation to creativity and innovation. The book will highlight both concurrences with and divergences from IP law's rationales. Its signal contribution will be to supply for the first time *a thick description of the varieties of intellectual properties' interventions* in the lives of artists, writers, scientists and engineers. With substantial narrative detail from the interviewees' own words, the book will be both enjoyable and informative. It will also add much needed diversity to the stubbornly one-dimensional explanation for intellectual property protection in the US.

The book proceeds in two sections, each with three parts.

Part I. Unpacking Incentives. The first section is called "Unpacking Incentives" and it describes the various ways those interviewed talk about how and why they (and their business) got off the ground and kept going.

1. Inspired Beginnings. The first chapter, "Inspired Beginnings," traces the features and development of a specific story form that nearly every person told at some point in their interview. These are "origin stories," the kind of tale that begins with an inspired moment that may be serendipitous or hard-won but which sets the person or organization on its path to where each is today. Origin stories are a story genre that serves particular purposes. Most origin stories, such as the story of Genesis or the Founding Fathers, explain how a culture or society came into being. Telling these stories can infuse an aspect of everyday life with special significance by explaining why things are as they are ("you were born that way") or by providing guidance for how things should evolve in the future ("the agreement memorializes our future intentions"). Each of the interviewees explain a milestone in their professional life in terms of an origin story, harkening back to a beginning to which they attach unique significance for making sense of their present. This first chapter canvasses the origin stories in these interviews and explains how creators and innovators, as well as their lawyers and business partners, describe the embarkation on a life's work in art or science mostly as function of intrinsic or serendipitous forces and entirely unrelated to a legal regime that would protect their output (intellectual property).

2. The Work of Craft: Work Makes Work. The second chapter, "The Work of Craft or 'Work Makes Work'" explores the varied ways the interviewees describe their daily work, how they come to their studio, lab or office everyday and what drives them to produce as regularly as they do. Despite vast disparity in fields and successes, similarities exist across the interviewees that coalesce around the dimensions of time and space. Most articulate a common respect for constant and committed daily work. Be they laboratory scientists, sculptors or novelists, sitting down in a defined space and focusing on the details of a project is what defines the pleasure and

purpose of each day's task. Interviewees often focus on the importance of physical spaces of work (the studio, the lab, writing desk) and they speak about the dignity of concentrating on the challenge or puzzle of a specific task for a significant period of time.

Distinct metaphors and word patterns emerge illuminating work habits and motivation that support the expressive focus on time and space. These metaphors highlight a misfit between intellectual property protection and the interviewees' aspirations or expectations for reward. Interviewees describe work in terms of natural metaphors (e.g., harvesting or fishing), implying that the physical labor of the job dignifies the output because it is made with the body and time of a person. This justification for the work's value contrasts with intellectual property law, which does not reward labor as such. Many interviewees lament the irrelevance of time spent on work in the market place for their art or science. As such, they translate their intellectual work (and their claims to intangible property) into tangible output, comparing their work to real or personal property with inherent value and deferring the categorization of their work (or its value) as intangible property for another context. Ironically, describing the value of their work in material, physical terms strengthens the possessive impulse and, in certain circumstances, manifests as expressions of property that are more robust than current intellectual property law provides. The misfit between intellectual property protection and the ways in which creative and innovative professionals conceive of their art and science as daily work have implications for law reform, business practices and the progress of art and science more broadly, further developed in Chapter 3 below.

3. Making Do With A Misfit. The third chapter, "Making Do With A Misfit," describes the transitions interviewees experience from the studio, office or laboratory to the commercial sector. Despite many interviewees describing the beginnings of creative and innovative work as unrelated to a pecuniary motive, and despite the pleasure and ethic of everyday work being misaligned with intellectual property law's protections, people care about making a living and most of them figure out a way to support themselves through their daily work in art or science. The varied ways of making a living for these artists and scientists is worth close analysis because most of them describe their livelihood as "making do," without an abundant or predictable stream of income but enough for them to continue doing what they enjoy. Most are grateful for the legal or business help that facilitates their art and science as a livelihood, and these productive partnerships are highlighted in this Chapter. But many business models only indirectly relate to intellectual property law. Limited industries rely on traditional intellectual properties as a mainstay of income while many more sideline intellectual property in their business. The varieties of ways of "making do" with and without intellectual property are described in this Chapter. And the overarching commonalities are as well: in most cases, IP protection is welcomed as "leaky" in that it provides some revenue stream but rarely the monopoly prices on which IP theory is based. Most interviewees proudly describe ways of "making do" as artists or scientists by tailoring professional business relationships to fit their personal choices. IP's pragmatic goals of facilitating autonomy, revenue and relationships mean that IP entitlements are simultaneously under-enforced and over-enforced at different times, sometimes strategically and sometimes without clear understanding of how IP works. Indeed, underenforcement of IP rights (or replacing or supplementing IP with other more dominant revenue drivers) is a consistent theme throughout the interviews. This chapter parses these

commercializing strategies of "making do," which form an intricate and shifting patchwork of social and legal relationships in which IP plays a limited role.

Part II. IP Interventions. This second section describes the various ways intellectual property explicitly features in the work of the interviewees. Identifying "the law" in these interviews was not always easy. In many of the interviews, the interviewees never mentioned law or intellectual property until the end when I explicitly asked about it. In thinking about the law's presence, even when facially absent, I looked in the interviews for claims of right or harm and for the desire to control or exploit the output of their labor. I also looked closely at discussions of aspirations and means to achieve them or of success and failures and reasons for either. In short, I was looking for accounts of structures that were beyond the intrinsic realm of the interviewee that each sought to engage, influence, or refute to their personal and professional gain.

4. Reputation. Chapter Four "Reputation" describes how the interviewees value an aspect of their work that the law does not formally protect. Whether through misconception or wishful thinking, the interviewees (even the lawyers and business managers) espouse the importance of attribution to the creative and innovative endeavor. When asked to imagine or detail some of the most contentious infractions during their career, interviewees describe reputational free riding, not economic free riding. And where the two intersect (which can be often, especially in the trademark context), the language of dignity and desert rather than being made financially whole dominates. Interviewees assert a desire for reputational control from the intellectual property law where it does not exist. This Chapter suggests that because emotions run high in this context – because people care so much about attribution and reputation – the language seeking to justify the entitlement to reputational control often sounds in property talk even when not covered by the IP regime. Over-claiming in these cases can lead to abuse of the intellectual property laws, resulting in bad cases making bad law and the increasing frustration from artists and scientists that IP law is of no use to them. This Chapter describes how for many interviewees personal relationships and a robust reliance on private contracts fill the perceived gaps in the IP law to achieve a paramount interest, which is reputational. The analysis in this chapter speaks to the growing debate in the intellectual policy circles about controversial role of contracts and agency to supplement or supplant intellectual property rights in our digital age.

5. Instruction. Chapter Five "Instruction" describes how the interviewees in their professional life celebrate (and in some cases accept as a necessary evil) the importance of legal instruction. This Chapter details how the intellectual property law intervenes as an external force to shape and direct the activities of the artist or scientist. The legal regimes that might affect the on-going vitality of the creative and innovative work largely does not appear, according to this account, until a lawyer or agent or business partner intervenes to manage or build the work as properties. Here, intellectual property law is a layer of the experience that arrives later in the trajectory of creative and innovating ways and comes with a coach or a teacher. The lawyer is often described as disruptive to the art or science, intruding upon the work in an unwelcome way. Where the lawyer describes herself as bringing tools to their client to facilitate their on-going work or business, the client perceives the lawyer's intervention as distracting. Other times, the lawyer is welcomed, but mostly when the lawyer has translated the intellectual property law into claims that resonate with the artist's or scientist's interests. The lawyer's varied characterizations of IP for the particular client correlates to various jurisprudential categories of legality. This

invites the conclusion that IP's form and purpose, as encouraged and shaped by legal advice and particular client concerns, is not predetermined by legal rules or economic principles, but is constitutive of creative and innovative work as influenced by subsequent legal and business structures. In this light, intellectual property law is a late comer to the process of art or science in which the individual engages and may be imposed as a structural framework onto the client's work habits or routine.

6. Distribution. Chapter Six "Distribution" describes how the interviewees establish or connect with formal legal or institutional frameworks in order to share or sell their creative or innovative work. Intellectual property intervenes in this scenario to facilitate relationships with audiences for (and users of) the art, science or technology. The stories told in this context are about negotiating and managing agreements that detail the nature and scope of distribution. They vary widely, from free and promiscuous sharing to circumscribed and discriminating price schemes. Rarely in this context, however, do interviewees talk about individual or personal rights. Instead, they talk about relationships. The propertization of the work (protecting it as property through exclusivity) is often a precondition to fulfilling widespread distribution, especially given standard terms in publishing and distribution contracts. But in the discussions of distribution as a paramount goal, the language of property and IP's ability to maximize profitability through exclusivity fades. Instead, contractual obligations feature more prominently than exclusive rights in conversations about the importance of achieving the goal of widespread dissemination to the public. Given the proliferation of licensing regimes in and the policy push toward liability rules instead of property rules in our digital culture, the interviewees' emphases on dissemination over profit-maximizing is notable.

Conclusion. There is a lot of talk about the corruption of medical research and discoveries by patent law and other market or legal forces. Similarly, growing concern exists about the demise of copyright in our digital culture. Because so much of legal scholarship simply rehearses the underlying assumptions of intellectual property law, however, it is hard to know how to evaluate the doomsday talk about the need to protect of intellectual property in order to fulfill the constitutional mandate of progress. Where intellectual property is unavailable or underutilized, how does "progress of science and the useful arts" proceed? When intellectual property is harnessed, what are the preferences and conditions of access set by the artists and scientists, their lawyers and business partners? This book engages this empirical question from a qualitative perspective in one of the first studies of its kind, and it will analyze the rich details of the context and conditions of the production of cultural forms and scientific knowledge in the professional lives of the fifty individuals interviewed.

These interviews reflect slices of lived experience in artistic and scientific professions. The six chapters develop a framework through which to understand these experiences and reflect the complicated and varied ways in which people who create and innovate (or who facilitate such activity) harness intellectual property (or other mechanisms) to reach their goals. As readers will learn, I embrace this complexity and consider the formal law's failure to address the variations in the contexts from which creative and innovative work emerges and flourishes to be one of its singular failures. This book will fascinate because of descriptions and analyses of the process of producing and protecting creative or innovative work in light of the variable ways law makes itself felt by those interviewed. At its conclusion, *IP Interventions* provides both general and

specific proposals for rethinking intellectual protection in our future. These suggestions are not law reform proposals but structures of thought to guide lawyers as they counsel clients, inform legislators as they evaluate new (and old) laws, and encourage audiences to enjoy and build upon the creative and innovative work that sustain us

Appendix. Methods and Data Analysis The primary data from this project comes from semi-structured interviews with artists, scientists and intellectual property professionals, each interview ranging from one to two hours in length. A semi-structured protocol covers central issues but leaves room for individual variation; it is a series of open-ended questions that are designed to elicit descriptions, explanations and stories from the interviewees on the relationship between the art and innovations in which they are involved and intellectual property law.

Together, the interview transcripts become a substantial database of language that describe creative and innovative processes and the role (or absence) of intellectual property in those processes and businesses. Interviewees describe their daily work in detail, where, how and with whom they work. They describe the challenges they face in their work and the reasons they continue pursuing it. During the interview, I ask about both normative aspirations and routine practices, asking about what respondents think they ought to be doing and what they actually do. The comparisons are elicited through direct questioning but also by posing alternatives, asking for comments and comparisons on different motivations and approaches. Interviewees are asked about how and why (or why not) they work with intellectual property as part of their career. They are asked to compare the reasons for initially engaging in intellectual property law with reasons for on-going engagement or disengagement with it. Interviewees are asked to draw connections, if any, between their career successes or failures and intellectual property, making comparisons when possible to others in the field who have been more or less successful than they are.

Analysis of the transcripts proceeds at the level of language (word choice, narrative structure and content) and conceptual themes (drawn from reading across the transcripts and from the literature on innovation and intellectual property). Drawing on my experience and training as a literary scholar, analysis of the interviews isolates and analyzes the various linguistic and narrative components that form a particular moral ordering (or "point") and that often may reflect or maintain a particular institutional or social structure. The analysis of conceptual themes in the interviews develops from the socio-legal literature on innovation and legal policy. As interviews are read, reread and coded with help of the analytic software, I revise searches of the data based on reformulated questions and categories that emerge from this on-going study of the interviews and the scholarly literature.

I developed codes to analyze the transcripts. These codes were developed deductively from preliminary findings and inductively from the emergent language, repetitions, narrative structure and conceptual themes contained in the interviews. Each transcript is read and summarized in a four to five page synopsis. These condensations include any notes made during the interview, a description of particularly interesting stories related by or quotations from the interviewee, and a list of overarching themes from the interview.

Interviewees are located through a snowball sampling method as well as letter campaigns. I follow a method of non-representative stratified sampling. Utilizing three significant variables – respondent occupation (intellectual property professional or creator/innovator), field of law (copyright/trademark or patent) and whether they work as an independent contractor or an

employee – 8 possible variations were generated. Interviewees are evenly divided among these categories. For exemplary books in other fields based on similar methodology, see Michèle Lamont, How Professors Think: Inside the Curious World of Academic Judgment (2009) and Mihaly Czikszentmihalyi, Creativity: Flow and the Psychology of Discovery and Invention (1996).

As a database of language about intellectual property formation, creativity and invention, the interviews are evidence of the culturally circulating schema, memes, interpretations and understandings of intellectual property law. Transcripts reveal preferences acted upon by the interviewees through their descriptions of their work and its concrete output, as well as connections and disconnects between popular consciousness and self-reported behavior. This project thus maps more systematically the relationship between the incentive story of intellectual property law (what IP is for and how it functions) and the innovation process (how art and science proceed). This book will contribute directly to the accumulated literature on the law in practice as opposed to the law on the books. More specifically, it will contribute data to the emerging literature seeking empirical evidence concerning the role of socio-economic and organizational constraints in facilitating production of art and science. Finally, it will produce a fuller understanding of intellectual property law practice based on empirical evidence from practitioners and creators to inform the current debates and policy proposals concerning the efficacy of intellectual property law as motivation for innovation.