Chapter 3

Making Do With A Misfit

Where, when, and how is IP claimed and asserted in the professional lives of artists and scientists? Chapter 1 demonstrates how assertion and interest in IP rights do not manifest in creativity's early impulses. In Chapter 2, the daily work of creativity and innovation is only sporadically or tangentially related to IP incentives, be it exclusive rights or for rent. When law does emerge in the early professional lives of these creators, it manifests in joint ventures and employment relations, not as exclusive entitlements in the IP sense. Moreover, social relations develop and become legal or quasi-legal associations before IP rights are perfected or commercialized.

Recouping investment through IP arises infrequently in the discussions I had in the interviews about the early stages of artistic or scientific development. When they do come up, the IP rights are usually only one small part of a more complex business model. As this chapter will show, IP rights are ill-fitted to the goals and behavior of innovators and creators. IP entitlements do not align with the needs of individuals or the organization of businesses. This is not to say that the people I spoke with do not value IP protection – they do, especially in the context of particular businesses, which I will highlight below (e.g., pharmaceutical and medical device companies, some novelists and photographers). But even professionals in industries in which IP features prominently – textbook publishers, software, musicians – assert IP entitlements in ways that challenge traditional justifications for IP protection.

The interviews demonstrate at least two ways in which IP entitlements are unsuccessful in providing the potential benefits of IP law and policy to businesses investing in creative and innovative production. First, IP's legal protections are frequently unknown, irrelevant, or misunderstood. Individuals and corporations alike overlook or misapprehend IP's potential role in protecting work and generating rent from exclusivity. Those who do not understand how IP can function in their professional careers do not use it as a tool to harness the property, or they misuse it in their business transactions. Those who do see IP as an available tool may misunderstand its contours, leading to a failure of IP to function as property in their daily work or business. Missed opportunities, misunderstandings and misclaiming of IP rights can both undermine the law's effect and weaken its authority.

Second, IP does not meet the desires of those who seek to protect or benefit from their creative or innovative work. Some individuals actually wish they could demand *more* fulsome protection for their work than IP law provides, seeking attribution and control of downstream reuse of inventions or creative works. Corporate actors describe situations where, on behalf of the company, they would over-enforce or stretch IP rights to protect interests when IP doctrine and policy did not neatly align with their claims. Arguably, asserting an IP entitlement when it is not squarely covered by the particular legal or business problem harms the balance that IP law and policy is supposed to achieve. In recent years, over-enforcement of IP rights has been a much-studied phenomena, maligned by scholars who popularly label the behavior, "trolling," "bullying," "copyfraud" or "copywrongs."[1] The interview data also contain examples of the

opposite tendency: a deliberate under-enforcement of a recognized right. Interviewees, speaking as individuals or agents for companies, recognize IP as an available tool but reject it as a sub-optimal mechanism. This kind of misfit occurs when IP creates too many hurdles for ongoing transactions, thereby frustrating the goals of making, disseminating, and earning a living from work.

Instead of focusing on the diverse reasons that IP may fail to achieve its presumed goals of a monopoly return on investment, some interviewees conceive of IP pragmatically. In this articulation, IP is less a legal fiction to be applied or ignored than a flexible and adaptive construct for achieving one of three ends. First, along this dimension, IP can be strategically formed and deployed depending on changing business circumstances. Business models that seek agility in a changing market can benefit from the functional malleability of IP and its ability to enhance wealth. Second, IP is conceived as a right: it facilitates freedom, enhancing autonomy and self-definition. As a legal construct, it refers to an unalienable, enforceable claim tethered to personhood and social justice. Third, essential social relations — like those with collaborators, the consumer base, or an audience — are made and sustained through the legal framework of IP. These three pragmatic considerations are frequently cited as diverse justifications for IP protection under the law.

In the context of these pragmatic considerations of IP's function, many interviewees indicate that they prefer IP entitlements to be leaky or pliable, more accessible and freer than the law otherwise provides, so that the benefits of the work spill into the public at minimal risk to them while still preserving sufficient choices for making and distributing work.[2] This raises provocative questions. Is there a difference in the degree or nature of leakiness between the different IP regimes and industries? Do individuals, as opposed to those speaking on behalf of companies, experience one kind of misalignment— misunderstood or unnoticed IP— more frequently than the —over- or under-enforced IP? Surprisingly, my data suggest that the answer to both questions is no. Ill-fitting IP entitlements exist across industries and IP regimes, among both individuals and corporate actors. But a pattern does arise in the correlations between misaligned IP and pragmatic function of IP. As the chart below demonstrates, there are nine variations, two of which are largely absent from the data. Notably, the under-enforcement of IP entitlements achieves all three pragmatic ends, and freedom and autonomy can be achieved no matter what type of misalignment occurs.

Pragmatic IP	The IP Misfit		
	Misunderstood/Misformed	Over-Enforced	Under-Enforced
Money Making	–	+	+
Establishing Essential Relations	+	–	+
Freedom Enhancing	+	+	+

The first part of this chapter animates this table with interview data. It will describe the various ways IP law is misaligned with or tangential to the professional and personal expectations of those interviewed. Many respondents express frustration with the misfit between IP rules and the professional values that they cultivate in their daily work, like personal control over their time, fair earnings, and relationships. This is true for both individuals and companies working in IP-rich industries and across the statutory intellectual properties (copyright, trademark, and patent). While some do not understand how IP functions at all, leaving it largely irrelevant to their conscious endeavors, others describe misapplying IP (over-reaching or leaving it under-enforced) to maintain the level of autonomy they desire over their work, even at the expense of maximal wealth.

The second part of the chapter addresses the following question: if IP persists in its mistaken or misshapen form, unused or overused, what motivates the making, distributing, and commercializing of creative and innovative work? I offer various accounts of how the individuals interviewed for this study make a living, or the companies with which they are affiliated earn profits in industries populated with IP assets. Cataloging the varieties of ways in which revenue is generated – some *because* of IP, some *without* any thought to IP, and some *despite* IP – begins to diversify the conventional and one-dimensional explanation for IP protection in the United States. This explanation claims that IP is essential to the progress of science and the useful arts. But as the data from these interviewees show, IP takes on multiple roles in creative and innovative businesses, and sometimes plays no part in generating revenue. By documenting the diverse motives and mechanisms that sustain IP-rich fields, I aim to present truly emergent knowledge regarding the roles of IP in these industries, with the goal of revising and improving upon the utilitarian focus of IP theory.[3]

The chapter concludes with a discussion of the consequences of the misshapen and mistaken assertions of IP, especially because IP does play an important role in many of the professional lives and workplaces of those with whom I spoke. Should IP's misalignment and frequent irrelevance lead us to conclude that the IP regime needs tightening in order to more easily apply and enforce the laws, and thus achieve their stated goals? Or, does the persistence of IP's leakiness suggest that the legal regime should stay leaky because an accidental or purposeful malleability that is subject to individual variation optimizes the progress of science and the useful arts? Whatever the answer, the data makes clear that IP entitlements on which interviewees rely are less robust than the current legislative debates arguing for more and stronger rights would have us believe.[4] Whether we seek a better alignment of the actual ways in which IP is harnessed depends on our best guess for the social welfare outcomes of that alignment. For instance, if the hypothesized relationship between under-enforced IP entitlements and the accomplishment of all three pragmatic dimensions of IP ownership (illustrated in the table) is persuasive, we might consider a system that provides for more opportunity for strategic under-enforcement and where discretion is less risky. (The prevalence of over-enforcement and under-enforcement in intellectual property law, as demonstrated by the data, makes it similar to many other areas of law (e.g., tort law, criminal law) in which imperfect enforcement is the norm.[5]) Indeed, we might want to maintain the imprecision to maximize certain underlying liberal values (freedom and autonomy) rather than recalibrate the legal rules for a more perfect fit that may end up frustrating core values. The prevalence of over-enforcement and under-enforcement in IP law, as demonstrated by the data, makes it

similar to many other areas of law (e.g., tort law, criminal law) in which imperfect enforcement is the norm.[6] The conclusion to the chapter also considers how the imprecision may be maintained – either in the informal suspension of law's application or with more formal legal declarations of breathing space.

I. Misfit and Misformed: Time and Money

The value of time, oft-repeated in employment and business, echoes throughout the interviews. Whether earning a salary and benefits from an employer, or making a living from individual contracts for goods and services (commissions, licenses, etc.), most interviewees describe the value they create in terms of their spent time. People want to be paid for the time they put into the work as a measure of the value they produce. They want the duration of their labor to be reflected in and recuperated through the exchange value of the objects they make. And, they try to minimize the risk of losing time, money, and reputation by optimizing payment structures and distributional networks to align with the perceived value of time and energy spent. Often, this entails minimizing IP as an investment vehicle, because its pay-off is highly uncertain and other opportunities for achieving goals exist.

Time and Value. Below are two examples describing how creators and innovators hope to align time with value. Karen, the visual artists from New York City, says:

> If you make a drawing, they don't [price] it by the amount of hours that you spend working on the drawing -- it's like, the size of the drawing. That's how they calculate the cost. … They don't care -- like you might have spent 100 years working on a drawing; it doesn't matter. … I mean … once it reaches a point where things are getting resold, then there will be different valuations for here … [My agent] was the one who … explained it to me. And I guess the gallery -- because I didn't understand. I was like, "Oh, well, these drawings are … on … small sheets of paper," because I usually work pretty small, just in notebooks … And [my business partner] was like, "Oh, well, you need to do bigger ones." And the gallery said, "You need to do bigger ones." (laughter) It was like, "Yeah, but you know, I could spend a long time working on the little ones, so you could charge for them." They were like, "No, it's that size, it has to be that price." … I don't understand it.

Karen correlates the quality and value of art with time and skill. Though she has been making art for over a decade and, despite her business partner describing the market dynamics, the size-based valuation of the art market is foreign to her. She just "do[es]n't understand it."

The second quote from a pharmaceutical consultant, Michael, illustrates this frustration as it arises in scientific fields. Michael began his career as a pharmacologist, putting himself through school so he could earn a living wage. He became more entrepreneurial in his early thirties and started his own business consulting with drug companies to help scale their products and bring them to market. When Michael described his clients from the past fifteen years, he was listing the A-list roster of pharmaceutical companies from around the world. Michael brought a perspective to the business that married the science with the business aspects. He confirmed that it is common for pharmaceutical executives to explain that patent monopolies are essential to facilitate high drug prices in order to recoup the significant investment in time and money required to develop and bring a drug to market. But he also described a related tension: that companies engaged in drug research are insufficiently sensitive to the human labor

(physical, intellectual, and emotional) that is invested in the early stages of development. The mismatch is especially acute when the managers close lines of research due to insufficient profitability. Michael put it this way:

> The lead investigator will be called into the VP of Research's office [and] say, "We're shutting down the program. We decided, you know what? We spent too much, it's not economically viable for us; your program is dead." It's like being told your child is dead. Work on something full-time for six years? … [T]his is what drove me to consulting -- I worked on [one project] for -- my god! This is why I have no hair on my head.

Michael went on to describe what he perceived to be the tension between emotional attachment to the time value of work and the unyielding profit expectations of large firms:

> I worked on this drug for three years, [engaging in what were at the time dangerous development protocols], and I was on a plane flying home from one of these trips, and while I was on the plane, they canceled the program. And what made it worse is that I found out about a year later that a competitor company picked it up and finished it, and took it to market. So you put people in a situation like that, they think, (claps hands) "All right -- you want to cancel this program? Fine. I'm going out on my own. I'll find venture funding, and I'll finish developing it." Because, you know, [big pharma] might not be interested …-- well, see, there are a lot of drugs at 20, 30, 40, $50 million. If you are in a position to take that drug and develop it, and make the 50 million yourself you think you could manage to be happy with $50 million? I think *I* could.

Whether Michael was describing a unique case or a common phenomena, the sentiment regarding the time value of human capital as persistently undervalued by IP-rich businesses saturated the interviews. Artists, scientists and business people want to balance the time invested with revenue that reflects their work, but they are not maximalist. As evident in Michael's quote, one solution is to settle for less ($50 million) in order to bring the drug to a needy population and to support and reward the human capital invested in its initial development. Karen, the artist, similarly resents having her pieces judged based simply on size as opposed to effort or time.

The tension between time and value exists in part because the marketplace for IP-protected goods to the interviewees appears quixotic, counterproductive, and sometimes irrelevant. As Karen said above about the sizes of her work and the prices for which they may be sold, she just doesn't understand how or on what basis the market makes valuations of art. Why size instead of detail and imagination? She determines artistic quality and value in terms of skill, emotional resonance, and high levels of originality. In her view, it appears that IP does not help to capture or transfer compensable value to her. Kevin, an IP-savvy high-tech entrepreneur said the same thing with regard to patented technology in a field he knows well, the telecom industry.

> The big problem in business with patents is that the implications are totally unquantifiable. What is it going to cost us -- well, what are the odds we get sued? Impossible to figure out. What's the likely outcome? I mean, most other business activities, you can make a reasonable judgment. … "That might be a problem." "This might get us sued." … "it will cost us that." Patents? Completely unquantifiable.

Whether describing copyright- or patent-rich industries, the interviewees share a certain awe at how unpredictable or unintelligible the marketplace for IP-protected goods is. This unpredictability leads individuals and businesses to develop *alternative* strategies for achieving profitability while sustaining their artistic or scientific endeavors.

Minimizing Risk. Interviewees seek optimal payment structures that match their professional and personal goals, minimize risk of loss and work stoppage, and reflect hard work, high skill, and time spent. Most interviewees indicated that they would prefer consistently earning a moderate wage over sporadically or unreliably receiving a maximal sum. In many professions, profit can be inconsistent, especially in the early years of an endeavor. The interviewees, of course, assumed substantial risk in the very fact of their artistic, scientific or entrepreneurial profession, so that, when possible, they seek financial stability in other ways, many of which are tangential to or in spite of IP entitlements. These more stable financial mechanisms (including contracts for goods or services and building a consumer base) will be described more fully in the second part of this chapter, but one tactic is pertinent to the discussion of misalignment. The interviewees often opt for salary-based or hourly-based remuneration instead of revenue from licensing IP. For many interviewees, including highly successful artists and scientists, salary and hourly pay more often reflects the optimized relationship between time spent and work produced than holding out for IP royalties. As it turns out, quantitative studies are beginning to show with more frequent consistency that copyright and patent law only make a significant amount of money for blockbuster works or inventions, and in fact makes the rest of the relevant industry professionals less wealthy. The failure of IP to result in a substantial profit for the communities it is supposed to serve, on balance, frustrates rather than promotes IP as an investment vehicle for creative and innovative endeavors.[7]

Here, Lisa, a well-established writer describes an equitable balance between work and pay. This writer lives off her royalties now, but early in her career, she taught part-time and wrote for a local newspaper to fund her novel writing.

> I never sell a book until it's finished. I don't take an advance. So I mean, I just … I don't take an advance because it's too nerve-wracking to have a deadline. I mean, I have worked for -- on deadline for years as a journalist, but that's a different matter. Because I'm always terrified with a book that I won't be able to finish it, or that some legal problem will arise that will stop me from doing it.

Lisa refused advances throughout her writing career, finding publishing deadlines restrictive, even though she is a seasoned writer and currently lives comfortably off publishing royalties. Lisa preferred having control over her time and for that reason refused advances that boxed her in. She relied instead on piece-work and hourly wages while she worked on her books, which, now in her sixties, number nearly a dozen. Another writer, Jennifer, also a former journalist and recently back from a national book tour, expresses a contrary perspective vis à vis her book advance. But she reiterates the observation that book royalties and advances are not dependable, and that all her decision-making and financial-planning begins from that understanding.

> I don't think that, in general, books can be a day job usually. You can't earn enough money with them to make it worth your time, usually. I mean, I don't know. It's possible. But … I mean, you wouldn't *do* a book unless you had a contract. But the contracts tend to be very modest, you know? … And … part of what I am thinking is I *would* happily do another book. I have this great agent now. But you need to, like, be absolutely, passionately in love with your topic to commit a couple of years to it ….

Both of these writers earn substantial money from selling their book to publishers, but neither could tell me the royalty percentages in their book contracts—they simply did not know. This suggests that their royalties were not a factor in beginning their projects. Both sought dependable income early in their careers. And Jennifer continues to draw a regular paycheck from a journalism-related job alongside writing books, supplementing whatever income she receives from the book advance and copyright royalties. In this example, however, Jennifer thinks of her book advance as a "salary" even though its sum was not correlated with the time she spent and it is not part of an employer-employee relationship. Rather, it is a salary, in her eyes, because she distributes it evenly and predictably over several years, and because she worked to earn it. The subsequent copyright royalties were unplanned and, for her planning purposes, remain unpredictable.

In conversations about what they want out of a relationship between time spent and value produced, the word 'salary' appears often to describe a desirable model for compensation. It occurs frequently among artists and other independent contractors as well as among investors and entrepreneurs in start-up businesses. Joan, a well-established sculptor, deposits commission fees for her public art into the corporation she formed, and then distributes it as income to her and her studio assistants, explicitly calling it a 'salary.' Karen, the New York City artist, interchanges 'salary' and 'fee' when talking about how she would like to be compensated: instead of self-funding the costs of the commissioned project and her living expenses, she would earn a wage that covered both. For a recent job, she says:

> I got the [money] that was to cover the flight and the studio, so the actual practical costs of what I was doing. But on top of that, then there should be a fee, which just is a fee; that technically, with every project, you should get a fee that's paying you for doing a job.

David, a photographer expresses similar frustration. When asked what his ideal pay structure would be, he explained that the value he creates and for which he should be compensated derives from two sources: his time and his creativity. Most fees he received were for only one or the other. Clients, he said, often balk at the idea that time and creativity are independent values for a photographer, especially when they are faced with paying separately for the photographer's time *and* the copyrighted work (e.g., the digital file transferred without any restrictions on its reproduction or distribution). Investors in start-ups also describe the draw from their investment as a 'salary,' (or 'fee'). In fact, the standard practice in structuring investment agreements for investors and entrepreneurs requires predictable and regular financial draws ("salaries") in order to minimize the risk of fluctuating revenue, despite the possibility that the young company might not earn a profit.

These financial arrangements work to offset the potential negative effects of IP's inherently risky pay-off. Seeking salaried employment to balance the unpredictability of IP revenue, and structuring commission income, patent, or copyright royalties to function as a "salary" despite inconsistent royalty streams are two ways in which the individuals I interviewed reconstituted the relationship between time spent and value created around unsatisfactory IP entitlements. Salary-seeking, for some people, is a buffer that allows them to take risks—risks that may eventually lead to large pay-offs. Indeed, as compared to individuals and sole proprietors in IP–rich fields, several employees and corporate officers of firms I interviewed find that the benefit of corporate structure is precisely that it spreads the risk of investing in creative

and innovative projects; more research and development can occur in corporations because they distribute risk across their business model. In the same way, it appears that individual interviewees and corporate actors who participate in IP-rich industries similarly seek ways to spread risk and balance revenue-generating mechanisms to compensate for the inconsistency of IP revenue and its poor approximation of time invested and value created.

What Money Can't Buy. There is another side to the time/money balance that appears misaligned with IP's traditional incentive structure. People want to be paid for their time as a function of the value they add to the work. *But they also value their time independent of a financial bottom-line*. At some point in their lives, many interviewees sought more control over how and when they work, and so they moved from working in a firm to a solo practice where the financial upside may be riskier but control over their days was greater. Either because of growing professional status or a life change, the risk of an inconsistent revenue stream shrinks or no longer outweighs the benefits of having freedom over one's time to complete work as desired.

The people who had left a creative or scientific job in a company to work for themselves describe how assuming the risk of inconsistent pay-off was necessary because autonomy over time became paramount. To many, the work they do, by its nature, is ongoing and they need freedom to manage its flow. In particular, often they describe the change in terms of avoiding the constraints imposed by employers' demands for profit margins; instead they want to work at their own pace and at a targeted quality, rather than price and profit, level. Dan, the composer who left engineering to do music full time, describes his decision below. He sits at his dining room table in a modest house in an urban neighborhood. As a middle-age man with substantial freedom to spend his days working as he chooses, he appears both proud and humbled by his accomplishments. It is a Sunday, but it seems like a day as any other day of the week: both his wife and son are home and the house is busy, with friends and colleagues dropping by throughout the interview:

> You know, let's face it: this is a lot less lucrative than being a senior chemical engineer. And if I were in it for the money, I would have made a very poor choice of career. …[But] you know, I get to see what I write realized the way I want it realized in my own company.

The downside of going it alone is the uncertainty of IP's payoff and the lack of commensurate pay for artistic production. For Dan, as for many others, freedom and control over time and workflow trumps the fear of making a risky investment in creative or innovative work and is worth the risk of financial uncertainty. Although he worked a long time as a chemical engineer, making a good living, Dan's shift to music was not without its risks. However, it appears for Dan that knowing the stability of a salaried job for many decades made the choice of leaving it behind in order to spend more time with his family, build a community around his music, and "realize the music the way he wants it realized in his own company" a straightforward choice.

This was as true for lawyers servicing IP clients as it was for the clients themselves. Irene, a solo IP lawyer, told me that she left a large firm so that she could spend more time on client tasks without having to charge for every bit of work (as the firm would have required). Working solo means she can specialize in particular kinds of IP and work for clients whose IP

needs seem more vital to their businesses. Like many of her creative or innovative clients, Irene wants both the freedom to spend time in ways that make sense to her and compensation for that time in a way that reflects the quality of the work accomplished. Dennis, an in-house patent attorney, articulates she same sentiment when describing an exchange with a solo IP lawyer with whom he often works. Dennis reports that when he told the solo practitioner, "This is contrary to my interests, but … you really need to raise your prices," she responded:

> No, … The reason I don't want to is … first of all, I have so much work that if a client makes me mad, I can fire the client. […] And secondly, I just don't … want to cut my time. I want to know that I'm charging what I think is a reasonable amount. So if I want to spend 40 hours on something, I can do it.

Achieving balance in time and value: Organizing work and business. While in some cases, interviewees eventually achieved what they felt was an optimal balance between the time worked, quality achieved, and the amount of money earned, other interviewees struggle to find an optimal work-earning balance, even working independently. Other interviewees such as those still in a start-up phase of their business explain how they had not yet achieved an optimal work-earning balance. Running a young business is time-consuming and the income is not automatically commensurate, especially when money is not their measure of success. Instead, whether the interviewees are seeking fame or some other professional goal, it was common to hear "there isn't enough money in this business to compensate me or anybody who is involved in it for the effort expended." These folks add credence to the cliché that people work from passion rather than for wealth. (Chapters 1 and 2 presented data illustrating this orientation to work.) For these people, money is not the primary measure of their success and they are satisfied with "having enough," rather than more than enough, especially when they have artistic control and a growing reputation. As a filmmaker said, "I just wasn't ever driven by monetary… I am a working filmmaker, and that's the difference." Indeed, working in a creative field is sometimes defined as having a commitment to art over money. Another filmmaker, who is also in advertising, said about the creative arts generally:

> You'd be crazy if you pick up a guitar, and go, "I'm playing guitar to be a millionaire." Anybody who knows the reality of the business would be out of their … mind. That's like saying 'The best way for me to be really wealthy is to play the lottery.' … [Most often] the mentality [is] … if I work my butt off, and I am halfway right, [and] I have a decent idea, this can support a life.

These people find satisfaction in working regularly and making a living at it — indeed, they are quite proud that they earn enough to continue doing what they enjoy and doing it well.

In all cases, self-appreciation and pleasure derives from developing and practicing a skill. The pleasure is inherent to the everyday. And personal rewards, such as reputational benefits, worthwhile relationships, professional autonomy, wealth, more work and daily challenges, are a function of this everyday work. Moreover, valuing the time spent in conceiving and shaping intellectual pursuits grounds the self-identity for the majority of the people I spoke to, and hence how they assess their working life. Because IP law does not value the owner's time, and because its pay-off is risky (it often leads to no payment at all), individuals and organizations create diverse structures for their professional operations and compensation schemes, including, but not limited to, the use of IP.

Identifying the diverse payment and work structures within businesses infused with IP may seem like describing an obvious and common phenomenon in business. There are two points to be made here, however. First, legislative debate and case law identify businesses saturated with (or described as being organized around) IP as uniquely in need of stronger protection for their property assets. Yet, if IP-rich businesses are in fact not different from other businesses in their diversified revenue streams, these debates and case law are misleading; they overemphasize a legal entitlement that many IP-rich individuals and businesses under-enforce in pursuit of other ends (e.g., autonomy and reputational or relational benefits). Claims that stronger IP rights would encourage these businesses and individuals to rely more heavily on their IP entitlements, eliminating the need to diversify business and compensation processes, are not convincing given the evidence from the interviews. Second, stronger IP rights will not address under-utilization because as will be explained below, many individuals and organizations either purposefully under-enforce their IP rights to maximize other healthy or predictable revenue streams or values. Still others do not understand how IP rights work, relying blindly on legal and business agents long after the production and distribution goals of their art or science are established. In both cases, IP plays a later, erratic (although not always unimportant) role in the professional goals of the artists and scientists and their businesses.

II. Misfit and Misinformed: Uninformed and Misunderstood

As described in Chapter 2, many interviewees use the language of real or personal property to articulate what the value of their work is and how they claim it. IP entitlements, as creators and innovators understand them, align well with neither how they make a living nor how they create value in their professions. Likewise, metaphors for natural processes ("harvesting" and "fishing") are used to explain how intangible assets develop, thereby making sense of their intangible properties outside of the IP market context. Instead of invoking doctrinal meanings of IP, their interpretations more closely resonate with norms concerning the time value of labor and the consistency and stability of income than high-risk or high pay-off situations.[8]

Whether conscious attempts to reorient professional values around time and labor or misunderstandings of how IP entitlements create value, the metaphors are persistent. If IP is meant to incentivize the production of science and art, the wide circulation of these metaphors as expressions of value is significant.[9] The interviewees use language that contrasts with how IP actually works to describe how their output is valuable or can produce value, exposing otherwise tacit commitments to and preferences for the role of IP as a tool to facilitate professional well-being. Metaphors for IP bring to light a popular consensus, and exploring these metaphors further (and the misinformation and mistakes regarding IP) provides access to the lived experiences of artists and scientists and how their interpretation of IP claims is oftentimes distinct from how IP doctrine might actually apply.

In the interviews, people often misstated how the IP they are creating might benefit them or their company. This is true of both individuals and corporate actors, although not of the IP lawyers I interviewed. This misinformation comes in various forms. There are folks who simply pay little or no attention to how IP works in their IP-rich field. This is typical when the creators or innovators are employees. "Most of the scientists are … in the drug industry," said one in-house IP counsel, "because … they can make a comfortable living. But I think … most of the

ones I've met in my 15 years of direct exposure … are very interested in finding drugs to help people. … They don't understand the pharmaco economics." Similarly, Kevin, a high-tech investor and former software engineer, who believes that IP slows instead of increases his rate of return, is nonetheless frustrated with newer business partners who have never thought concretely about the connection between revenue streams and product sales (whether protected by IP or not). He says of the innovators in one of his start-ups (who until now were employees and not owners):

> That's been the challenge in all of the work with these guys, which is that they never had to answer any of these [profitability] questions, because the paycheck comes magically from the checkbook in the sky … every pay period, so they don't have to worry about the financial relationships. Everyone who uses the software works for the same employer so there is no negotiation about 'Well, I'll give you the software if you give me $12.' That never happens. And, … this guy has a team; he doesn't really know what it fully costs to have a team … [H]e doesn't pay for his office space, right? … So to swing out and think about what this looks like as a business has been a lot of work.

This is a recurring phenomenon: many innovators do not think about how their business makes money, or, as a result, about how or whether IP is part of that process.

Most of the artists, writers, musicians, scientists or engineers I spoke to understand ownership rights in the context of work-for-hire in an undefined, general way: that the company or client owns the work. When pushed to describe what ownership entails beyond the right to broadly commercialize, their answers were myriad and inconsistent. Some understood that work-for-hire under copyright conferred authorship status, others knew that individuals were inventors and companies were owners. Many people nonetheless cared about the future use of their work in terms of reputation – whether they would get credit, and under what circumstances the work would be used – but mistakenly believed that, even if they did not own the work, having created it provided them with some control over the work's future use. Melanie, a filmmaker with her own production company, said that although it is her dream for a distributor to buy her first self-funded film, she did not know how distributors make money and whether she would have to convey her copyright to them. A different filmmaker described the frustrating process of licensing archival photographs and film footage – because institutions would charge too much or refuse to license – but did not know that many of the once-copyrighted works she sought to use were now in the public domain; she was purchasing access to the physical copy in the archive rather than a copyright license.

Even when asked to describe contracts or business arrangements directly relating to their livelihood – whether as bonuses or as independent contractors – interviewees often were uninformed about the relationship between their IP and their income. For example, at first I was surprised to learn that most creators and innovators paid little to no attention to the financial terms of their contracts that concern IP royalties. But after many interviews, it became common to hear that individuals who owned IP could not describe how their royalty payments were structured. Although they could provide detailed narration of negotiations they had over the advance sum or over artistic and editorial control, even if it occurred decades earlier, when asked about royalties and profit-sharing, they almost uniformly said, "I don't remember. I can check for you." As if proud of the initial lump sums they received for work done in their early careers, artists and scientists alike could quote the bonus they got for an invention or the commission for

their early art. Scientists and engineers could tell me their salary and explain their employment benefits, but few could describe with confidence if and how they got paid because of IP creation. Many said, "I'd have to look at the contract," or "I let my lawyer handle that." Some deferred questions about royalty stream and derivative rights to their agent or gallery. Mary said, "so much of this stuff I just … tuned out and let the lawyer and my manager deal with." Karen, the visual artist, lamented that even though she needed to be more on top of the contractual and financial arrangements of her work, she is just "not very practical like that." This is true of business folks as well as creators or innovators. A marketing executive for a high-end press knows how much books costs to make, how much they could be sold for wholesale, and how to package them to maximize retail sales, but knows nothing about the authors' compensation or their cost to the firm: "royalty deals I really don't know," he said. There are some, of course, who do study the details of their contracts, but even they acknowledge this is unusual. Barbara, an author, distinguished herself and a discrete group of savvy editors-turned-writers from most other authors she knew in being particularly well informed about royalties and other contract details. Barbara went further to explain that her distinctive expertise, being more knowledgeable about IP rights, is a product of her extensive work in publishing before becoming a best-selling author. She says, "I bring an insider's notion to what [the contract] is, and to what a negotiation is, and to what … matters to the person you are negotiating [with]."

Beyond simply not knowing about IP, some creators describe how they purposively ignore or distance themselves from the legal aspects of their work, especially the distribution of economic rights. (This was never true for the corporate agents or lawyers I interviewed.) Sometimes they expressed disinterest, or assumed that the legal-economic language is too complex to parse. (One writer said, honestly, "It bores me.") Other times, the distancing was strategic. Even though she considers herself unusually knowledgeable about her legal arrangements, Barbara says,

> Remember also that I use an agent. And one of the best reasons to use an agent is that you never have to let business come between you and the editor. It … can always be about creative matters. You can always pretend you don't know what's going on. I have been in the middle of tough negotiations, yet I never had to address them whatsoever.

Steve, a media developer, said the same thing; he does not participate in contract negotiations with film studios and merchandizers because doing so makes it harder to work with the client who will eventually be distributing the content he and his company creates.

> [I don't involve myself with the contract details] … because once you do that, it makes things ugly. Because now you are arguing over percentage points, and you are arguing over payment series, and you are arguing over … things in a document that you should not be arguing about … we learned this lesson: it leaves a bad taste in the mouth of the client if we are going back and forth about petty stuff on a contract.

The "petty stuff" is the fee for service. As long as the agreed-to fee between his company and the client is within a reasonable range, he and his partner leave the contractual details to their lawyer and agent. Of course, Steve, says, "there are deal-breakers. There are people who wanted to whittle us down. And we said, 'You know what? Tell them no. We are done.'" But his intervention in the legal matters in these extreme circumstances is only to end the negotiations,

not to refine their terms. Steve explains that as long as the agreed-to fee between his company and the client was reasonable, he left the contractual details to the lawyer and agent.

In general, the innovators in the high technology and biotechnology sectors I interviewed are more knowledgeable than the artists, writers and musicians about the possible roles for IP in their businesses. This may be because of the overt teaching about profit models and strategy that takes place within these businesses, which are, by and large, more complex organizations with legal departments and business development professionals (see Chapter 5). In-house lawyers told me that it is necessary to instruct the engineers and scientists in their company about the benefits of patents and copyrights not only to capture and protect commercially viable products or maintain competitiveness, but also to disabuse the developers and innovators of their distrust of IP in the first place. As members of an organization, collaborating daily on firm business, in-house lawyers regularly consult with innovators. Jacqueline, a long-time in-house lawyer in the software industry describes her experience with the innovators in her company this way:

> It was just hard for them because there was a struggle philosophically around all of this, and a real skepticism - the concept of law, legal, and compliance was 180 degrees away from this very fluid, creative, libertarian …open environment that was required …. So just getting a law department in a company like that where they would even trust what 'the lawyers' would say … required an awful lot of effort on our part, and a completely different perspective on how we approached our internal clients. You could not come top-down as authoritarians. You basically had to come bottom-up, as having gained their respect through your relationship, your appreciation for what they did, and their true belief that … you really believed in the company and its proposition.

For many of the lawyers and innovators I spoke to, the relationship eventually becomes symbiotic: the innovators come to rely, however reluctantly, on the lawyer to facilitate the business process, its risk management, and its profitability. Part of this relationship involves encouraging and instructing the innovators on how to capture, protect, and commercialize IP, since the innovators may not know very much about it or misconceive the function of IP law in their business. Ted, an in-house lawyer, considers himself "very lucky" because at his company (a biotech alternative energy company), in contrast to others he knows, his

> company's very tuned into IP, and very interested in IP. … [T]he company has been very keyed in on IP from the beginning….They understand the value of IP… from top down, there is this interest in IP, and this appreciation for IP. So it makes my job easier in trying to work with the scientists.

Nonetheless, Ted finds the scientists at his company to be more forthcoming and open to patent development than the engineers. Indeed, he describes a range of familiarity with and willingness to engage legal counsel for the purposes of IP development among the innovators he works with. In his experience, the scientists more freely communicate with the in-house lawyers regarding invention disclosures, whereas the "engineers, I think, are more comfortable dealing with trade secrets … they are more … pragmatic, … they don't see things as 'create innovations,' or anything like that. It's just, 'Yeah, well, you've got to tweak it in this way to make it work.'" In response to the lack of familiarity and comfort with patents, Ted runs regular seminars with the two groups, the scientists and the engineers, focusing on their particular misconceptions.

Michael, a biotech consultant, now in law school, told me a by-now familiar story about the resistance of some companies to developing IP protocols as a consequence of basic

misunderstandings about the value of IP protection. To his advice, "Guys, you know, you've got to get confidentiality agreements with all your employees," he hears, "Well, no – everybody [here], we're all family." Michael groaned when he told this story, and rolled his eyes. But in this wide-spread misunderstanding regarding IP protection in his specialized industry, he sees a niche opportunity for his business:

> It's a great business opportunity; it's one of the reasons I'm [in law school] -- some of them don't, in the sense that they don't understand the trade secrets they are working with, they don't understand the patents that they should have. And so they put themselves in very vulnerable positions, in the sense that they could do a ton of work and then lose it.

It is likely that this misunderstanding or lack of attention to IP regulation has parallel misconceptions in other areas of law. For example, insurance company employees (other than attorneys) may have unsophisticated understandings of tort law. Police officers might not have a nuanced understanding of constitutional law. Contractors and other small businesses might not be well versed in contract, agency, and partnership law. Generally, it is reasonable to assume that lay people charged with adhering to or implementing legal rules do not understand the details of legal regulation in the ways professional legal experts do, and instead resort to normative understandings of legal doctrine and processes. The question is whether the misunderstanding or lack of attention in the IP context is distortive or reinforcing: should the IP regime be tightened to more easily apply and enforce the laws as written in hopes of optimally effectuating its policy goals? Or, is the IP regime's misalignment of professional values with IP entitlements nonetheless effective, indicating that the misfit between the experiences and beliefs of artists and scientists on the one hand and their business agents and lawyers on the other should be preserved? If the IP regimes more closely reflect the norms of creative and innovative practices, this would require loosening and altering the legal rules in substantial ways and attending to differences in particular industries. In other words, what do these data tell us about how and whether mistaken, misinformed, or misaligned understandings about IP progress science and the useful arts?

This is not a new question. Scholars and policy-makers in other legal fields ask similar questions about how strict or loose legal regimes should be in order to achieve optimal compliance.[10] Indeed, these are some of the most basic questions for law and its effective enforcement. For example, with criminal and constitutional law, we often choose between enforcing rules through state action (the police or other state actors with detention power) or through private rights of action (private civil rights suits). Often, state laws allow for exceptions to certain crimes (e.g., medical marijuana) to balance competing interests; they choose the leaky form of law over the more draconian, even though it makes enforcement of illegal possession more difficult. On the other hand, some states pass stricter rules (e.g., zero tolerance for school bullying) with the knowledge that enforcement will not be perfect, but with the hope that the rule will have a strong deterrent and normative force. Therefore, in other sectors, leaky legal regimes are ubiquitous. In light of the digital age and the centrality of innovation for the world economy and public good, is the leaky IP regime different in ways that matter for the consideration of its future contours?

Whether the digital age shapes criminal law or constitutional law to the same extent it has changed IP law, we must reckon with how the profusion of digital media inextricably entwines

IP creation with its dissemination and enforcement. Today, most IP infringement occurs because of the ease of access, reproduction, and dissemination of digital representations—both the anxiety and the advantage of our current era. This is true of patented technologies, copyrighted expressions, and trademarked products.[11] Widespread digital dissemination (whether or not for direct commercialization and whether or not in violation of IP rights) enhances relationships with potential and actual consumers and strengthens product identity. The digital age (like the printing press centuries earlier) has made the right of exclusion that defines IP both more relevant and less necessary for building professional identity, revenue, and reputation. And it is precisely because of this digital dimension that IP law can be more perfectly enforced and more pervasively evaded. IP scholars, such as Julie Cohen, ask if, with the digital era, there should come a qualitatively new way of thinking about protection and enforcement and whether "imperfect control of individual behavior" is optimal. She suggests that we should be "designing [IP regimes] for imperfection."[12] Citing other scholars such as Yochai Benkler, James Boyle, Larry Lessig, and Jessica Litman, all of whom take on the question of whether to choose imperfection in IP or settle for it, Cohen believes that "constitutive freedom" should animate the discussion and inquiry around IP. She defines "constitutive freedom" as the autonomy to choose within a meaningful range of constraints for the diverse communities for whom IP matters.[13] Inquiries, including the present study, should investigate the "practices, spaces, and contexts within and through which individuals experience the information environment, and the ways in which authorization and constraint alter those experiences."[14] As the descriptions of misfits and misalignments presented here demonstrate, and as the remainder of this chapter will show, businesses and individuals engaged in creative or innovative work achieve personal and professional goals—autonomy, productive relationships, and revenue—under misaligned and ill-fitting IP regimes. But they function by substantially under-enforcing IP rights and diversifying business strategies. Given this, it is unlikely that more enforcement and more perfect enforcement (as compared to under-enforcement) will better accomplish creators' and innovators' goals.

How is the misaligned and under-enforced IP regime productive? What are the "practices, spaces, and contexts" that individuals and businesses develop to sustain production and distribution in our copy-centered culture in IP-rich industries? The next section addresses the various ways these individuals and entities "make do" with misaligned IP. These adaptations include contracts for services and goods, first-mover advantage, market share optimization, and complementary products. As the discussion will demonstrate, some people hope and expect to recoup investment in their work through some kind of legal entitlement, but IP is only one mechanism (and not necessary the primary mechanism) around which people and entities structure their business to make a living. Generally, IP entitlements function in more varied, less rigid ways than the law formally indicates. And often, they are used or strategically relinquished to accomplish a variety of goals, only some of which involve recuperating investment. Other goals include developing relationships and preserving autonomy.

III. Ways of Making Do: Choice and Control

Differences exist among the interviewees regarding how IP functions in their work, but mostly these are differences of degree. By design, all the interviewees own or contribute to the

making of work that is or could be protected by IP; IP is either in the background of their work, or is available as an option. As such, each could theoretically assert their IP right to exclude others from using their work (or their employer could do so). But each interviewee, as a member of a particular creative or innovative industry, has a different experience with how valuable IP is as a tool in facilitating their professional goals. For instance, business models that require volume manufacturing and distribution to recuperate the significant costs of development and production tend to emphasize the rent-seeking function of IP and the importance of controlling competition. In interviews with people involved with medical devices, biotechnology, and some (but not all) text publishing, the traditional economic rationale of IP law as a mechanism for maximally exploiting copies is more present than in other industries. But even while the financial incentive remains prevalent, these same people emphasize various other goals that are less directly achieved through IP: control over their reputation and workflow, and building or maintaining a community around sustainable relationships. That is, they seek a balance of economic, ethical, and personal interests. By contrast, other industries such as web-design, software products, music, visual art (excluding photography), e-commerce business systems, and home-good manufacturing do not emphasize IP's right of exclusion as much as other ways of succeeding in their business. And they often describe the benefit of under-enforcing whatever IP rights they have to facilitate their various professional goals.

Everyone I interviewed finds earning a living to be imperative to professional happiness. But many reach for IP for reasons unrelated to money (to control reputation, for example), while others reach for alternatives to IP (like contracts or loyal relationships) as central ways of earning a living. IP does plays a role in the professional development and personal well-being of those I interviewed, but on the whole its role is not critical to the on-going sustainability of their artistic or scientific work. As described, IP's varied roles are not as vital to developing creative and innovative industries as the legislative initiatives and court decisions of the past thirty years that steadily strengthen IP rights would have us believe. IP protection is only one of many tools individuals and businesses harness to sustain and grow their interests to generate more creative and innovative output. The diverse ways of "making do" in this case study (many that are at the *expense* of IP rights themselves) demonstrate how overstated IP protection is in the economic health and continued productivity of most creative and innovative industries. In the end, professionals aim to balance productivity and economic wellbeing with personal and ethical goals through a combination of business strategies. Choices about how and with whom art and science is pursued and control over one's economic, ethical, and personal circumstances (even if that means under-maximizing profitability) are ubiquitous throughout the interviewees' discussions about optimizing creative and innovative production.

One alternative explanation for the limited role IP rights have in individual work is that IP mainly incentivizes firms to invest in the development of creative and innovative products and to support the individuals who do the work. The data provide some support for this hypothesis. Firm actors in specific industries, like pharmaceutical and medical device companies, and some text publishing and photography professionals describe a business model that they claim requires monopoly profits at least for a limited time to be sustainable. However, even these industries rely on various sources of revenue, such as a first mover advantage, contracts for services, and sales of complementary products. Also, firms do not have uniform incentives any more than individuals do. Pharmaceutical companies and publishing houses, for example, are hierarchical

organizations built around duty and loyalty, comprised of multiple, complex social and professional roles built upon economic motivations as well as other incentives. These motivations are represented and enacted by the diverse individuals who are charged with making company decisions. In other words, according to these data, the "self-interested corporation" whose sole goal is to maximize shareholder value is an oversimplification and borders on inaccurate. Indeed, "to define a company's only goal as making money would define it as a kind of shark that lives off the community rather than as a member of a community with important agency in the construction, maintenance and transformation of our shared lives."[15] Corporations are made and directed by people, who themselves have various motives that are diversely balanced and depend on particular circumstances; like people, corporations are "complex organization[s] with many purposes and effects."[16] At least, this is what the professionals in this study say, and it informs how they direct and behave within the organizations in which and for which they work. For both of these reasons, the conclusions in this chapter—that IP is an ill-fitting investment vehicle and its under-enforcement optimizes professional goals in the creative and innovative fields—applies to both individuals and companies.

What follows is a catalog of the ways in which individuals and companies in IP-rich industries make do with and without IP. The purpose of detailing the variations drawn from the interviews is three-fold. First, it follows from the above discussion concerning the ways in which IP is both misunderstood and misshapen, leading to under- and over-assertions of creative and innovative work through an IP regime that does not fit their specific and varied goals. The diversity of ways in which the interviewees generate income in their professional lives provides further clarification of this misfit – its relevance and context. Second, the various ways of making do demonstrate how the many different ways of earning a living lead to similar pragmatic goals: autonomy over work and relationships that are both sustaining and dynamic between individuals and within a community. Rent-seeking through IP, when an available option, is usually only one way to achieve these ends. Finally, the catalog places the traditional and hegemonic explanation for IP protection in the context of dense and dynamic motives and mechanisms for engaging in creative and innovative work. Identifying the classic incentive story of IP alongside all the other reasons and means for progress in the arts and sciences provides a thicker description of precisely those activities and interests we claim IP law is designed to foment and protect.

The below discussion begins with examples supporting the traditional explanation for IP protection: rent-seeking as a return on investment. It then also describes defensive uses of IP as a way to protect a work agenda, the "freedom to operate" that IP can provide by guarding business interests, work flow, control and choice, and reputation. Then, the discussion catalogues six other mechanisms orthogonal to IP through which creative and innovative professionals build and maintain their work practice. The discussion begins with first mover advantage, building market share, and selling complementary products, none of which require IP. Next, I describe how contracts for services and goods provide substantial business opportunities that sustain creative and innovative work, some of which rely on aspects of IP and some which do not. The section ends with a discussion of how valuable loyal relationships and reputation are to professional success and wellbeing in the diverse creative and innovative fields represented. In all, the variety of business practices described, many of which do not rest on IP and some of which do, depicts stratified and diverse strategies to sustain professional work in the creative and innovative fields.

Longer, broader, and stronger IP rights seem largely superfluous to creative and innovative professionals. Most make do in addition to or despite IP. This is especially true when professional autonomy and maintaining relationships are paramount.

A. IP-Centered Revenue Sources

1. Rent-Seeking and Perceived Value

Beginning with the most traditional and orthodox view of IP's productive function, several interviewees describe both copyrights and patents as a "foundation" for a business. Here are three examples. An in-house lawyer at an alternative energy biotechnology company characterizes the company's early patent portfolio as the "foundation on which we started." This includes both "home-grown technology" but also "an almost equal chunk of stuff that we've in-licensed." In other words, without the IP, there would have been no financing, no creation of more innovative products, and therefore, no company. A copyright lawyer who represents mostly small-businesses and individual creators describes copyright as a "baseline," the central benefit of which is an "amount of exclusivity ... and I can keep other people from doing things with it unless they ask me." The next step, as she describes it, is "to figure out what to do with [the copyright]" because after the essential exclusive right, "the rest of [the business] moves into other field[s] - parts of law, and just basic business negotiation." For her clients, copyright is the kernel around which she structures their business arrangements. Copyright does not constitute the whole value of the company, but it is a crucial starting point. A venture capital fund manager working exclusively to raise capital and develop global health technology for a medical device and services corporation makes it clear that if "we had no IP going in, we would never have been able to start the company." This finance professional cannot foresee a successful business in his field without an initial portfolio of pending patents, whether or not the IP in fact drives profitability for the company emerging from the investment fund's work.

Many of the professionals who characterize IP as the foundation of their business strategy are nonetheless skeptical about whether patents and copyrights *in fact* drive profits or whether, in the place of actual profitability, the option of exclusivity creates the *perception* of future value. The sheer existence of IP assets is often enough to attract early investment, which in turn enables further business development and the subsequent growth of market share. One lawyer says:

> [T]he way I try to describe it to [the company's engineers] is that it's the way … we represent value. I mean, to be perfectly callous about it, I've used this approach a number of times: 'Look: we're a startup company. All these venture capitalists who are going to be investing in us, they are going to look for IP. They don't know what it is anymore than you or I know what it is, right? But they are going to look for something that says it's IP, so it's the way to show them what the really amorphous stuff you're doing in the research lab, how that translates into *something* that they can put their hands on.' … And the more of it we have - and it's fuzzy what the "it" is, but the more of "it" we have, then the more successful we're going to be.

As Chapter 5 discusses in more detail, many in-house business agents and lawyers confirm this lawyer's account of the signaling function of patents and copyrights.[17] The existence of patents can be a sign of new or in-demand innovation, competitive strength in a specific innovative market, as well as the drive and talent of the founding innovators. Donald, currently in-house

counsel to an e-commerce company, was previously the general counsel to a media company. He describes his previous job as very different from the current one. At the media company, he deliberately used IP as part of building value:

> The vision I had when I was the general counsel … …[was] - well, we knew that we wanted to sell that company eventually, so I was trying to build value. So literally, we had over … I forget the numbers now, but we have 1,000 or 2,000 registered trademarks, we had at least 2,000 copyrights, we have 15 or 20 patents.

Expanding the list of IP looks like a growing treasure chest: IP are assets against which a company may borrow money for further expansion or appear as raw wealth to attract interested investors. Donald later praised a competing firm, calling its strategy of amassing of IP a "trick"—not fraudulent, but clever:

> "[Company X] had a huge patent portfolio. And that's where they did this trick. They had an in-house patent lawyer, and he really created value. … I mean, he created value. People looked at that company, the potential buyers, and said, 'Wow! This company has 100 issued US patents. This company has sued its two main competitors, and won one' - I think had settled favorably one of the two - and already has an offer to settle the other one."

When I asked Donald whether the lawsuits were a deterrent to potential buyers, he practically laughed at me:

> To the buyers they looked *great*, … [the purchasers] looked at these two offensive claims … made against competitors, and they viewed those as a positive. … Because they said, 'Wow! These patents are so strong that they are actually going after their competitors, and are either threatening to shut them down, or are getting royalties out of them.

Implicit in this comment is an understanding that sometimes patents (or other IP assets) are thin or flimsy – even window dressing. But with a successful lawsuit, the IP proves itself to be durable.

Whether or not the patents and copyrights in fact generate revenue, for these business strategists and lawyers, the presence of IP assets signals a strong competitive position because of its ostensible ability to exclude others from the same or overlapping commercial spaces. Many interviewees describe the assertion of IP rights as "slowing down competition" rather than stopping it. This slowdown occurs by actually filing lawsuits, threatening to file lawsuits, or being perceived as willing to file lawsuits. Most of the time, IP is asserted against competitors, but it can also be used against users or intermediaries to prevent the diminution of sales. In the copyright context (e.g., with university course packs and scholarly journal publishing), interviewees describe IP rights as an essential tool for enforcing contractual terms of service rather than as a way to extract rent for the exclusive right. And in some manufacturing contexts, the interviewees explain that copyright can prevent parallel importation. In both of these sectors, an overreaching assertion of IP (which depends on the nature of the use, the interpretation of the statutory provision and exceptions thereto) can be used to preserve a competitive edge, though it may harm relationships with consumers and partners.

To be sure, IP rights are the basis of a healthy revenue stream for many companies and individuals. For example, copyright and patent royalties sustain several of the novelists and

branded pharmaceutical companies with whom I spoke. But by and large, IP is only a small part of how companies initiate and continue in business.

2. Defensive Assertions of IP

More frequently, the interviewees offer accounts of IP as a mechanism that provides operational freedom within a specific creative or innovative space. Justifications for defensive assertions of IP (as opposed to offensive assertions) are *very* common. Several lawyers describe how a patent could work to shield competitors who sought to extort fees for operating in similar commercial spaces or, as one lawyer describes it, as a "chit to trade": "It's the value of protecting things similar to what we're doing, so that we have chits to trade when, inevitably, we'll have to take a license from somebody else." The freedom to operate is also how Dennis, an in-house attorney at a pharmaceutical company, justifies seeking patent protection, even in questionable cases, to the scientists at his firm; they understand and respect this freedom more than rent-seeking goals:

> So … there's an anti-patent streak in - regrettably, in most people. … My response to [these scientists] was "I agree that this subject matter likely shouldn't be patentable. But … right now, it *is* being patented by other people, and we're having to analyze their patents, spend tens of thousands of dollars analyzing them, rendering opinions, telling business people they have to make business risks based upon infringement issues." And I said, "And we're taking licenses … What I want is something that I can trade with somebody … I'm not interested in necessarily asserting these against anybody. I'm looking for something that either A) gives me a quid to trade with somebody, or B) we patent it first so that some other company can't patent it and then come to us for $100,000 a year royalty."

Dennis' company makes money by selling drugs at monopoly profits, so seeking patent protection is essential for protecting on-going research and development from being stymied by patent holders in related fields. This interview gives an example of a company that uses IP both to earn revenue and to facilitate freedom and autonomy in research.

Another in-house IP attorney, Donald, mentioned above who works at an e-commerce company, describes his conversation with engineers about patents in the same way, but finds the value of patents in his industry to be more ambiguous. But even though, the patents are likely worth more in rent-value in the pharmaceutical context than the patents in the e-commerce space, both attorneys believe that the primary value that patents have for scientists and engineers developing the products for the companies is as a defensive mechanism. Patents provide the so-called "room to run" within the industry. Donald explains, "They [the engineers and business developers] truly believe that [patent filings are] only for defensive purposes… And that's why I am primarily doing it. I am never going to have a patent that will shut down my competitors." Donald also draws on the IP work he performed at other companies to distinguish among the roles of IP within diverse industries, pointing to the various ways that IP can contribute to building a company:

> [P]atent lawsuits among competitors [are] really what I think the Constitution envisioned when it gave these monopolies. You know, it's the right - for 20 years, you get a monopoly to your invention.…Now, when I got here and when I was starting to talk to people to help define our culture of what we were going to do with our IP, … I told them I was [previously] at a company where we sued our competitors. I said, "I don't envision that really happening here. … [W]e don't

> have those types of patents." Even doing that is something I found a little kind of reprehensible, you know? … But to build a company, sometimes you have to be willing to do that. You know, if you are trying to get a leg up on a competitor, sometimes you have to be willing to do that. …[Although] … the best way is you have the best product and the best sales force, and the best support services, and you just go up and you beat them. And that's what we've done here: we've just driven other people away.

He sees patents as central to the on-going health of the successful e-commerce firm, but indicates that it functions more as an insurance policy than as a rent-seeking mechanism. In his experience, the way to excel in the field is "to be the best." This concept of being "the best"-- or using "the best" equipment or people -- arose frequently in the interviews as a key to success and will be discussed below in the context of building market share.

In the copyright industries, IP is also used defensively--but not to provide breathing room to continue work. Instead, the interviewees describe asserting copyright to prevent deformation (a disfavored re-use) and misattribution of the copyrighted work. For them, deformation and misattribution disincentivizes the continued creation and dissemination of their work. However, both preventing deformation and misattribution are *controversial* uses of copyright law. The extension of the derivative work right to critical uses is highly debated, and copyright does *not* protect against non-attribution or misattribution. In other words, not all plagiarism is copyright infringement and critical re-use is usually a fair use.[18] In my data, few artists registered their copyrights--a formality that is required to file suit for infringement. But when they did register, it was to protect their work from being used in ways they found offensive to their artistic integrity, a claim infrequently cognizable under copyright law, if at all. Here, a public artist describes registering a copyright to prevent misattribution and mass-exploitation both nationally and abroad:

> We got a little scared because people were kind of liking them, and wanting plans, and … so we actually got a copyright out on it. But I don't know what that actually does. … Some woman from some other nearby city was sort of, on some art committee or whatever, desperately wanted us to give her, make her a little [sculpture]. … we have to explain to people that we're not in the mass production business … I would usually say to people, "Look, we don't sell these, but we would be happy to do something [similar] for your mall, or your whatever it is that you've got," and none of them amounted to anything. Because most of these people weren't really wanting to spend, you know, fifty thousand or more dollars. **…** [But] it was more that the Chinese government, I mean, somehow China could [copy the sculptures] for money …

Attorneys and business agents in the copyright field confirm that clients typically use registration to protect unlawful or interfering uses of the copyrighted work as an injunctive mechanism rather than for rent-seeking. Admittedly, the purpose of an injunction blurs when it prevents uses until payment is rendered. In some cases, especially in photography and publishing, suits are filed to enforce copyright licenses for reproduction and distribution of the copyrighted work. In these cases in particular, copyright law is used to extract rent as well as prevent undesired uses.

But in most other cases, copyright is asserted either to prevent uses (and not for payment) or to demand attribution. (Attribution is discussed in significant detail in Chapter 4). Attribution, however, is not enforceable through copyright, and re-uses that are critical of the underlying work are often permitted as fair use. Nonetheless, the interviewees assert their copyright to prevent certain undesirable uses, defensively protecting the work rather than offensively reaping

rewards from it. Consider this story about a publisher's "flagship franchise," a famous animal character in children's stories that is both trademarked and copyrighted. When a small town bar owner used the character in an offensive manner on T-shirts, the company, which owns the trademark and copyright, had to decide whether to assert their IP rights against the bar owner: .

> [I]t had a picture of [the animal character] … And it had gotten people very upset, as you might imagine, … and the first thing they're doing is calling us, saying, "You've got to shut this guy down." And of course, the intersection of free speech and commercial rights and IP … provide a rather interesting situation.

The publishing executive explained that the publishing company resisted asserting copyright and trademark rights against the bar owner because of the murky application of the First Amendment in the context of political speech. Instead, the audience and local population put significant pressure on the bar owner, demanding help from the publishing company and the local community to prevent the continued sale of the T-shirts.

> [T]o a certain extent, we were baited to step in. You know, our customers were upset, and their view of IP was, "This cannot be allowed." You know? And … this is political speech, and so there's a certain protection there. It's not a slam dunk … we got a number of phone calls from irate people, and a number of messages. And then the media was working to churn the thing…. So we were really in quite a situation. … [I]t was sort of funny: they almost felt possessive about [the animal character], because they had invested in the property. The thing that really got people most ticked off, the people that were most upset were people whose kids were watching the [television] series, because they felt that something that they were invested in and that had a certain meaning to them was being perverted in a way that was extremely offensive, and that therefore that couldn't be permissible. And it was interesting, because we got the first call literally before the protests had started. Because what had happened is apparently, they decided to do the protests, … they contacted the [local newspaper], …And then they're calling us immediately saying, "You've got to come in and do something about this."

This skirmish ended when the company issued a press release denying authorization of the bar's use of the character. The media and the local community subsequently pressured the bar to stop making and advertising the T-shirts: "We gave our press release and said we were going to consider further action. That, … combined with the community pressure, … that was it. [The] guy was out of business."

In this case, the *audience* was behind the assertion of copyright and trademark of the creative property, not the owner, in part because the merits of the legal claim were ambiguous. As the publishing executive says, "we're sitting there as the custodians of the IP going, 'Well, this is a very complicated case … [and yet] the community activists want the publisher to come in and really beat up on this guy [the bar owner].'" This is the purest of defensive claims, asserting the exclusivity of the IP in order to prevent its intolerable use by others and to protect reputation and authentic identity, not to preserve or recoup profits.[19] And yet, in this instance, a trademark tarnishment claim would have been viable and the First Amendment defense weak. However, the central aim of the invested fans and the IP owners (whose claim was ultimately left under-enforced) was to protect the IP from the T-shirt maker's use because it was offensive, not because it diverted or reduced revenue.

B. Despite IP: Diverse Revenue Sources and Other Pragmatic Ends

Compared to the variety of revenue-generating mechanisms, assertions of IP for rent-seeking is relatively rare among the interviews. Rather, individuals and firms tend to rely on an assortment of business mechanisms to realize sustainable profits and achieve other personal and professional ends. IP rights are often present within these other mechanisms as one feature among many that made the tools fulsome (e.g., as an element of a contract). I collated the various business mechanisms across the interviews, finding that the majority fall into these four categories of revenue-generating tools: being the first mover in a market and building market share; developing and selling complementary products; contracting for services and goods; nurturing key relationships with vendors, agents and clients; and developing and protecting one's professional reputation. The following section details each of these.

1. First Mover Advantage

Many interviewees, from diverse industries, associate being the first to market a product or service with commercial success. Even when copycats compete for a share of the market, being first provides a comfortable margin of profitability. Across the interviews, this first mover advantage is strong in both the copyright industries and in patent-rich fields. This is surprising with regard to the copyright industries, since in the digital age, unlawful copying in the copyright industries is easy, ubiquitous, and difficult to prevent. (This is less surprising in many fields dominated by patents and has been discussed elsewhere in both theoretical and empirical literature.[20]) Respondents who work in the business end of textbook publishing, software companies, and trade publishing (notably not in music or visual art fields) emphasize that being the first mover in their field is uniquely lucrative. A vice-president at a publishing company that specializes in K-12 educational texts prioritizes being one of the first to enter a specific geographic market to "set the standard" and establish market dominance:

> You know if you get on the list in Florida, Texas … or California, and you get 25-35% of the market, you'll make your money back on the product, and then you can start selling to the rest. … The thing is, we get approval … we get on the list [in the specific territory]. So we'll know by November if we're on the list for Reading in [California]. And then if we are, great. Then our sales force goes out into the school districts and say, "We're on the list."

This publishing executive said, "our markets work" several times during the interview. For him, being the first to market a product to establish a market presence and thereafter maintain it is crucial to business health and product development. IP was not.

From the production end of publishing, two authors attribute their continued success as writers to their early work, which garnered substantial praise for being unusual or the first of its kind. One of Lisa's first books was about a university scandal shirked by the popular press. This early acclaim for courageous journalism established a reputation that sustains her readership levels; being one of the first female authors to write about that particular scandal set the groundwork for future projects and launched her independent writing career. Barabara attributes her successive novelization projects and her voluminous children's book series—the focal point of her writing career— to her early success at novelizing films. Despite writing over one hundred books in the series, Barbara told me, her first books continue to sell the best. Both authors

describe how being the first to shape their respective writing fields—cutting-edge investigative non-fiction or "tween" books —was the key to a successful writing career.

However, being first to a market also has its downside: deliberate copycats seek to benefit from a trend without investing their own labor and capital. Generally, the interviewees respond to this kind of free-riding behavior in two ways. On the one hand, they are generally unphased by what has been called in literary studies the "anxiety of influence."[21] It is expected that artists will influence subsequent work and will themselves self-consciously borrow content and ideas from others. Indeed, some find this kind of copying flattering. Barbara, the children's book author just mentioned, describes her feelings about other writers copying her series:

> I remember running into one of the people who copied me, who is a packager and somebody I had known I ran into at a local stationery store. And I said hi, and I said, "I understand you have got a new series coming out." And he blushed. I actually am the first person in the world, I think, to make [him] blush. He said, "Well…yeah." I said, "…, you know, it's the sincerest form of flattery." … it didn't bother me. Not at all. … you know you have succeeded when somebody tries to copy you. … Oh, I'd be annoyed if theirs succeeded more than mine did. But mine went into a television series. Theirs was optioned … and then they never did anything with it, so…

Besides genuinely feeling honored, tolerance in this context may also be explained by the lack of significant diversion of sales. However, this contrasts with strong *in*tolerance for plagiarism (unattributed near-identical copying of expressive content), which is reported with anger by several authors, artists, and first-order creators. Plagiarism is felt as a professional and personal affront. Though plagiarism rarely affects revenue, the interviewees described it as "yucky," "weird," and dishonorable. Most interviewees could not tell me the legal difference between copyright infringement and plagiarism. But the emotional difference was significant. Here, Mary (the musician) captures the sentiment across many of the interviews:

> A total copy rip-off, you know, not so great. But if someone's just taking parts, I mean, and being influenced by it, that's totally great -- or inspired in some way by it. … Being inspired, I mean, we're all -- it's all this big pool, and we're throwing stuff into it. So if someone is being inspired to write something by it, or stealing an image, or…that's -- yeah, that's unavoidable.

In the software business, business managers and developers also see being the first to market and establish a client base as crucial to the development of the product lines and business, as well as to on-going innovation. In these businesses, copycats are anticipated, so companies actually build the time it would take competitors to copy certain features of the program into their business models. They expected to under-enforce their copyright and comfortably rely on first-mover advantage to build their revenue stream. Likewise, the inevitability of copying motivates developers to innovate. Thomas, a software engineer with his own privately-held company, describes this business strategy:

> There are other businesses that are very large that did [property] software [like us but] for other things, like ticketing and events, … it's a whole industry unto itself. And so in that period, all of them came out with modules that do exactly what we do. So it's sort of like, you know, we hit it, we picked up a number of [clients], but it's a race until the other people catch up, and then it locks up again. So [in one sector], we have got about a third [of the business]. There is another software program with about 20% maybe, and there is a bunch of little ones. But … you know, you hit it, you move into something, you get a certain amount of market share quickly, and then it solidifies

> and you're stuck. And now we're in exactly the same place, where there is, you know, people that switch here and there … But it's usually these little -- it's just little one-off sorts of things.

Thomas also admits that it is not a priority to protect whatever copyrightable expressions or patentable subject matter his business owns. Rather, he is very protective of his company's reputation (and its brand name). As I discuss below and in more detail in Chapter 4, building and preserving reputation is a more worthwhile financial and emotional investments for the interviewees than preventing copying.

By contrast, in the branded pharmaceutical field, copycat drugs are *authorized* under the rules for generic drug development. Yet they are maligned for this role because they undercut the earned-benefit value of being a first mover in the market; one person I spoke to compared it to "stealing someone's homework." Dennis, an in-house lawyer for a pharmaceutical company pointed out that this also means generics hurt innovation:

> [This company develops] novel targets, novel drugs - just very novel. Looking for unmet medical needs, and stuff like that. OK? And the money in our industry is the - the real money in our industry, or the - let me say the *easy* money is where you are the second or third comer to the market … The first comer to the market generally doesn't make the most money. … The only way you as a generic are going to exactly produce [our protein therapeutic] is if I give you the cell line I used for it, if I give you the broth that I grow the cell line on, if I give you the manufacturing technique or the harvesting technique… Unless I give you everything that I do, you will not be producing [the equivalent of our drug] …. I believe we need more innovation. I don't believe necessarily that we need more generics.

Dennis has been the longtime IP counsel for several large companies, worked in pharmaceuticals for more than twenty years, and has seen company lay-offs because of precarious profits. He was personally and professionally close with the research scientists at his various companies, often describing their labor and innovation in glowing, honorific terms. To his mind, being first to innovate and occupy a market should (and usually does) entitle a person or company to sustainable revenue. But because of increased competitive and crowded fields, Dennis complained, it may be a liability; "me too" drugs often do better in the market than first-to-market branded drugs.

Dennis accepts that follow-on innovation and competitive generics are inevitable, and he agrees – as do many other interviewees in medical research – that affordability for patients is a critical concern. While we might assume that the first drug on the market is expensive because it absorbs and must recuperate the costs of research and development, when I asked Dennis whether patents are necessary to establish first mover advantage to recuperate those costs, he dissociated patents, market share and affordability. Dennis identified the problem of consumer affordability as an issue of excessive marketing by drug companies to patients, not of patent protection:

> … We do charge - sometimes we charge too much. I don't know what the solution is. … And our industry is not clean …. I think the worst thing that happened to the drug industry … was … when they allowed the direct consumer advertising for drugs. I think it is absolutely embarrassing. You know, if I see one more Cialis ad, or Viagra, or Detrol… I mean ... I believe that our client isn't the patient. I believe our client - and don't quote me upstairs - I believe our client is the doctor. …

> Because the doctor is the one that's interfacing with the patient, and I think it's wrong for us to advertise drugs, and then create illnesses.

This executive's approach is to balance the need for profitability in order to pursue novel medical treatments with the desire for ethical professional behavior in the medical industry (which can lead to moderation of profits). Dennis' experience coincides with data from diverging fields regarding diverse motivations of individuals within corporations.[22] I could not confirm whether the folks "upstairs" in his company thought differently, but it is notable that this chief IP counsel seeks moderation in the revenue-driven IP strategy in order to align ethical beliefs with business practices.

To be sure, there may be cultural differences between pharmaceutical companies and software companies that explain the varying tolerance for copying. Certainly, the patent system historically treats the two kinds of innovation differently, favoring patents that result from medical research (device and composition of matter patents) over those that dominate the e-commerce and financial fields (business method patents). This was true until the controversial 1998 *State Street Bank v. Signature Financial Group* decision, which substantially broadened patentable subject matter to include new methods for doing business, including tax strategies, insurance, and banking products. Cultural and legal distinctions aside, however, both the tech and medical industries represented in these interviews recognize the value of being the first to market for business vitality.

2. Building Market Share

Though being first to market is closely related to building a profitable market share as an essential tool for business development, developing a substantial customer-base requires different strategies. Being first may be relevant to establishing rights in trademarks and patents, but strict enforcement of IP rights can frustrate the development of a growing market share. For many interviewees, under-enforcing IP rights is an effective strategy for establishing relationships with consumers and growing their businesses.

One way of doing this is to offer products and services for free in order to attract customers or clients. Musicians play for free in the subway ("busk") to build mailing lists and sell CDs. Publishing industry actors benefit from open-source academic repositories, such as the Social Science Research Network (SSRN), which drive on-line traffic to fee-subscription repositories, such as Project Muse and Lexis/Nexis, thereby increasing their brand recognition. The main goal of several venture capitalists I spoke to is "scalability" — they focus their revenue stream on how large the demand for their product (and its production) can grow. Here is one such entrepreneur describing a current investment model in high-technology:

> So one of the weird things going on right now is that investors have said, 'If you can bring me a business that has tons of eyeballs, tons of users, with some kind of network effect where people who are on Twitter like to be on Twitter because other people are on Twitter, so you get a network effect … and it doesn't cost, in the grand scheme of things, all that much money to run the service; we are talking about a few tens of millions of dollars to run Twitter -- you know what? Go for it. Let the thing get up bigger and bigger and bigger and bigger, and somewhere along the way, we'll figure out how to make money.' … Because when you get a huge number of people all doing some activity, you ought to be able to find some way of -- like, you know, Craigslist, right? …

> everything on Craigslist is free, free, free, free, free, free -- oh, except for job postings and real estate in five cities.

The under-enforcement of exclusive IP rights– copyrighted music, copyrighted academic content, patented or copyrighted software, access to products and services – is a common mechanism for building demand in the beginning.

Here are two examples, one from the music business and one from software industry, of the "economics of free," first from Mary and then from Thomas.[23]

> [Ripping CDs] It's just free marketing. I mean, because … the people that actually buy CDs is still there, you know? But I feel like if you're not going to buy it, but you're going to give it to your friend, great. If you're going to give it to five friends, that's fine. Because I'd rather you have it if you're not going to buy it. I mean, I'm not saying I want everyone to do that, obviously, because like I said, I'm still depending on the sales. But I mean, I discover a lot of good stuff by someone just bringing me a CD, you know?
> […]
>
> I think in a few years, it'll be more important to me that people aren't burning [CDs]. Right now, they are just getting the word out. And the whole point for me is like, people showing up at shows. So if they are burning it for a friend and the friend comes to the show, that all feels great. I think, yeah, in a few years, my answer will be different about that, because I'll feel like, 'OK, people know it now.' … there'll be a strong enough fan base that then I'll be like, 'OK, you don't need to share it with your buddy. … Whereas often, people think, 'Oh, she's more successful -- now I can really burn it.' My ideal scenario, I think, would be that the bulk of my income comes from sales or placements -- in things I believe in, not just random commercial stuff. And that I have -- maybe I play 70 dates a year with a good guarantee …? So the work/life balance is a little [better than it is now.]

For Mary, copyright infringement can build an appreciative audience and generate new music. She assumes that, eventually, fans will buy her music and she will recuperate the cost of her work through ticket sales to her concerts and music sales or downloads. The copyright will be important *eventually*, but for *now* she embraces the notion of sharing freely. She acquiesces to the infringement of IP rights now in order to encourage lawful transactions later, and build her reputation. Thomas, the software entrepreneur, feels similarly:

> You have to spend so much time -- we spent a year -- I mean, it's actually a running -- it's a running joke between [my partner] and I: there have been three times in our history where I spent a year working with [our largest client] for free, just working with them for -- not full-time, but I was -- I gave them the software, worked with them on it, kept running back and forth to different buildings of theirs, and, you know, for basically a year, I had to listen to my business partner saying, 'This is a waste of time. This is a waste of time. This is a waste of time. This is a waste of time.' At the end of that year, we got a contract for 150 buildings and it changed our lives.

The "running joke" between Thomas and his partner is the subtle difference between wasting time and money and building a profitable client base. The endurance and generosity of working for free – what some interviewees describe as a "business spirit" – turned Thomas' small software company into one of the most competitive in his particular niche field. His persistence paid off when he was able to expand the business because he worked free of charge for several large potential clients. After about a year, each signed lucrative multi-year contracts

for service and software with the firm. (As will be discussed below under "personal relationships," Thomas' companies' software is easily copied and is not all that distinct in the marketplace. The value these clients sought in the company is the customer service.)

Giving service or goods away for free to in order build a market is a ubiquitous business strategy: free samples, a free trial month membership, and initial discounted terms of service. IP-protected products, however, are so easily reproduced and distributed in our digital age that free giveaways may have exacerbated financial risks and consequences. Nonetheless, the risks are worth taking for many of the people with whom I spoke, not only to build market share but also keep clients happy. This is true not only for corporate entities that might be able to absorb more financial risk but also with individuals who might not, and as much with copyrighted works (music, art, and software) as with patented inventions (drugs, and medical and electronic devices).

An in-house IP attorney for a profitable business press with whom I spoke recognized that using a digital rights management system to provide the content for which customers had already paid, made bad business sense, even if it protects against potential infringing uses. Under-enforcing the copyrighted content – to the point of leaving it open – was the better business model for maintaining and satisfying existing customers:

> Of course the whole emphasis … is in the opposite direction: we want people to copy and post it. We took all of our DRM off all of our content because it was driving customers crazy. And I don't blame them! I mean, we had two customer service people doing nothing fulltime but … holding the hands of customers who had paid for stuff and then couldn't use it. … I said, 'This is nuts!' You know, so we lose – so people shoplift. You know, it happens. It happens.

To be sure, this business press survives off the purchase of products. Free doesn't apply to everything, but under-enforcing IP is essential for maintaining and growing the customer base.

Steve, the co-founder of a successful media development company, advises clients on just this strategy to build brands and expand merchandizing efforts. His company broadens the reach of specific media products – films or books – by developing diverse platforms through which the particular story and its characters can live and grow. An obviously important platform is the Internet. While moving media products to the Web is not as immediately lucrative as selling products and access directly to paying customers, Steve is confident that it eventually builds stronger networked communities of customers.

> Is online going to make you a gazillion dollars? No. Is online going to enhance your story so that more people buy more books, and … go the movies more often? Yes. You know, will it create more -- yes. And you can monetize that experience. *Battlestar Galactica*, if you remember that show … had a whole series online, and no one really knew about it unless you were an überfan. … But if you [were], you got *all* this other information about *Battlestar Galactica*, and … what happened was, then all the torchbearers who loved *Battlestar Galactica* went to their own little blogging stations and then told everybody else. Which drove more people to the SciFi Network.

"Free" has its downsides, of course. What if the risk doesn't pay off? Nonetheless, most people still feel the risk is worth taking. All things being equal, it reflects a choice about how to spend one's time: freedom and autonomy constitute a pragmatic dimension of IP,

complementing building relationships and making money. Back to Thomas, the software entrepreneur, who spent a year working for free for a non-paying potential client:

> I had a lot of doubts, but I didn't … have anywhere else to really be. … I was still doing a lot of project work. … I felt that I was well-paid for what I did, you know? I had a tremendous amount of flexibility. … and I could pursue any projects that I wanted. So that, at that time, meant more to me than additional money. … I mean, it was more like, 'Hey, this is kind of interesting,' you know? Or, you know, 'This is sort of an interesting thing.'

Building market share by giving things away free or at subsidized cost serves all three pragmatic aspects of IP: it builds relationships, the reason for the giveaway; it eventually leads to financial transactions for products or service; and it reflects a choice about how to spend time and energy.

Not all interviewees feel that under-enforcing IP entitlements to build market share is optimal. Some find the practice to be potentially anti-competitive because established companies, by giving away products and services to maintain market share, can squeeze out smaller companies and newcomers.[24] This practice is particularly lamentable, they feel, in the context of high-tech giants like Google, Apple, and Amazon.

> Our biggest problem is what I think is endemic to the world of technology; is you have got these very large, vertically-integrated companies who don't need to make money from all the different layers of the stack. Like Apple, right? They don't make money, for example, on the telephone service, right? They make money on the hardware. They make a little bit of money when they sell applications to you. Whereas Google gives away its phone operating system, doesn't make any money on the hardware, doesn't make any money on the software, but they make a lot of money when people access Google from their mobile phones and get to Google ads…. It's very challenging in the software business because they keep throwing more things into their phone operating system, Android, and it's free. Free! Oh, yes. 'We are giving it away!' Not only is it free -- they give away the source code. So talk about something that makes it very, very hard to be … nearby [market-wise] trying to extract value. So I call it the 'tall value chain problem.' And you have got a competitor like Google, who has a really tall value chain … and they are just like, 'Well, we are going to take all the money out of right here, and everything else we are going to give away.' And it's an old, old strategy in Silicon Valley, which is you try to commoditize the thing that the person just below you or just above you in the value chain makes.

The "tall value chain" strategy is also a problem in the book industry, as described by Joseph, a publishing executive. Joseph has worked in the book industry his entire professional life, in bookstores as a book buyer, and now for thriving niche press. We sat in his living room which, as might be expected, was piled with books.

> I think independent bookstores are trying where they bring in sidelines with higher margins. I mean, … that seems … a necessary thing they need to do with their business model, given, you know, the aggressive kind of approach of Amazon, …they sell books at a 2% margin and don't care, because they are selling a TV along with it, … and they would love for the independent bookstore to be out of business. They would love nothing more. And they … have kind of gone on record as such. I mean, they don't really hide the fact that they … don't really come from the approach of 'a rising tide lifts all boats.' I mean, they come more from a … 'We want to be the only person selling books.'

Joseph explains how when certain industries are decreasingly diversified, the risk of consolidation and negative effects of monopoly grow. And yet Joseph admits that providing

goods and services for free is "standard practice" and necessary to make sales. And he doesn't much worry about copyright infringement in his small press, much like the IP lawyer at the larger business press. Interestingly, however, Joseph distinguishes giveaways and infringement (which are not worrisome) from price-gouging (which is).

> It doesn't bother me …. It's not about downloads or whatever. I mean … the music industry is … a completely different story. … [B]ooks aren't going the way of the music industry. [The book industry problem is] the consolidation of … who *can* do it and who can't. In publishing … it's becoming increasingly hard for small bookstores to be around. They are shutting down. And it's -- even small publishers. … [P]eople want to pay only $2.99 to download [a book]. They don't want to pay $26 for the hardcover. *That's* the monetary leak….

To Joseph, the problem is scale and consumer expectations. The protectibility of the good through IP law is much less relevant.

Whether building market share with giveaways is a sustainable practice for every industry or every company, it is nonetheless common. Under-enforcing IP in order to build market share is essential for most business strategies, though it does make it difficult for small or new businesses to compete. It grows the audience for the product or service and augments the reputation of the good or service, facilitating the assertion of rights later on.

3. Complementary Products

Many of the business agents discuss "commoditizing complements" and "monetizing the experience" as a means of extracting profit from creative or innovative work. Like building market share, commoditizing complements is often connected to under-enforcing IP-protected goods. In the example above, Google leaves its software open, sells only a small part of its email service (corporate and vanity emails), and largely profits from its advertising. And in the quote above about *Battlestar Galactica*, Steve's company helps to drive audiences from the Web to cable networks, movie theaters, and stores that sell related merchandise as a way to "monetize" the entertainment experience.

Accounts of the ways that businesses commoditize complements abound in both scholarly and popular literature: companies earning profits on razor blades rather than razors, or on printer cartridges rather than printers.[25] This kind of bundling strategy was described by the interviewees particularly in industries in which profits appear under siege due to rapidly changing market structures and customer behavior, such as in the software, music and book publishing industries. For example, musicians say that while selling tickets to performances brings in money, selling merchandise at performances —including notebooks, t-shirts, decals, and CDs. —is equally important as a complementary sales practice. Bundling contracts for support services with software and text-based products is also common. In some cases, software is underpriced (and its IP entitlement under-enforced) but the investment is more than recuperated through service contracts. Software can also be customized for specific clients, so the comparatively high price for the product includes both the customized software and its on-going maintenance. The purchase price relates as much to the customization (which is harder for competitors to copy) as to the aspects of the software protectable through IP laws. As explained by an in-house lawyer for an e-commerce company, "AT&T spent about $4 million just to buy [our] software. They

probably spent another $2 million in just professionals - which we also offer. We offer professional services to help install it."

In textbook, scholarly, and trade publishing, business agents adapt ways to make money. A lawyer for a medical and social sciences journals describes business innovations in his company that are linked to on-line advertising revenue rather than pay-for-access:

> One of the newer projects that we have started, which is actually neither a journal nor a book, is an online website. … it includes a fair amount of third-party content which we have managed to get permissions for, and is an advertising supported site designed for oncologists, and which has a kind of variety of information sources. There is a kind of a news feed. There is more detailed reference material. There [are] abstracts of … current developments in the literature. … we're looking at a lot of kind of service options now in this space, and we're looking at services that are delivering that kind of product online.…I think it's the first kind that's exclusively advertising-supported. We do have other services which are subscription-based services in the nursing space and a few other disciplines. But this is the first that is a deliberate attempt to be non-subscription-based.

As the publisher struggles to maintain profit margins, this lawyer actively worries about the future of copyright protection for their scholarly output in light of the recent "anti-IP" open access movement for academic research and scholarship. He is clearly aware that the company must add value to the content they publish beyond the (now automated) aggregation and distribution service. The news-feed program offers a new service to readers alongside advertisements, thereby monetizing the content created by authors for free but distributed by the publishers at a profit.

Bob, the vice-president of a major publishing house describes the complementary products in their "fulsome" program:

> And we also deliver … things called 'one stop planners.' ... We do pre-canned PowerPoints. We do test banks. …They really want us to deliver a full suite of … probably twenty additional products … so when they buy the book, they get the additional products. There will be workbooks for the life of it, so that the kids can write in the workbooks and throw them away. There will be all sorts of ancillary materials. So this is the sort of centerpiece of a fulsome program.

This system discourages other school districts from copying ancillary materials instead of paying for their own customized program. And, since the materials change from year to year, the rapid evolution of the materials negates what illicit copying does occur. When I asked directly about how illicit copying hurts sales, and whether these complementary products make up for that loss, Bob said:

> There's no effective way to work around [resale of used books or illicit copying] except to create new editions, get the teachers to adopt the new edition. But then as price resistance will creep in, *they* wouldn't do it. So it's hard not to sell it once and have to sit around for four years. The Internet became a great tool for linking in supplemental content, but then you would have to buy the book to get the password to get to the Internet for a one-year college term subscription. So now, to the extent that you could supplement the resource, you're providing a much more fulsome resource, but you are also driving it as more of a transactional sale, you know?

Bob also told me that his company is involved in education lobbying and reform because "states tend to drive our business … [as] they aggressively refresh the product in the schools." This large publishing house's business strategy is to create and shape its market by complementing products with desirable consumer services or legislative fiat.

Smaller companies compete for business in the same way. Joseph, the publishing executive at the niche press told me that when his firm felt threatened by the change in the book market, they developed a new strategy of placing his high-end books in stores, such as Urban Outfitters and Crate and Barrel. It has been a highly successful "complementary products" strategy, because people pay full price when the books are marketed as lifestyle products.

> A lot of what I have been doing has been moving my business from sort of the traditional book market, because fewer people are buying books in bookstores or museums … And I have been moving my business from those to boutiques -- Urban Outfitters, Anthropologie, West Elm, Crate and Barrel, Williams-Sonoma -- and I have been shifting all of my business over to that. And it's put us in a place to where … all the sales have gone down in … bookstores and museums overall … But I have managed to keep my sales -- I have actually gone up. I have managed to just take that money that is missing from there and transfer it over, and find this new … space for it. … [W]as I a visionary in seeing that coming? I don't think so. … [I]n sales, you … follow the dollar, and I saw that there was business there, and … I had an early foot in. … [I call it] the … 'Anthropologie effect,' … where [we] merchandise this book with a whisk and an apron that … have a similar color … or maybe complementary colors. Or … it might be a book on Indian cooking, and they have … an apron with … an Indian kind of fabric, and stuff like that. And it's merchandised with this whole thing, and people will gladly pay full price for it right there. And they'll buy the whisk and the apron, too. And not even think about, 'Oh, I bought this for full price. It's because they are buying part of a lifestyle.

Such strategies are also present in the science and technology sectors, where patented technology is sold alongside complementary services; communication devices are discounted but the service contract is locked in for twenty-four months; drug prices are subsidized but testing and diagnostic services are costly; patented software is thinly protected but customers pay for service and select applications. Both copyrighted and patented products are bundled with profitable arms of the business (service and non-IP protected goods). In some of these cases, the business leverage derives from a loyal customer relationship rather than from a uniquely creative or innovative through reproducible good, which would need protection from copying in order to profit. In other cases, the business is structured around a contractual relationship, a cornerstone of business and the subject of the next section.

4. Contracts

It seems commonplace to note that contracts for goods and services dominate business practices.[26] But while IP rights play a limited role in originating or developing the creative and innovative work, in contrast, contracts are an important supplemental part in developing business relations. Indeed, the two benefits interviewees seek from contracts are absent from IP entitlement: (1) the predictability of the enforceable bargain and (2) the personalization of the business relationship. IP's unpredictability as a revenue-generating business feature is the source of complaint among diverse industry actors (most notably among artists, writers, high-tech and e-commerce players). Similarly, interviewees wrestle with IP's one-size-fit-all application no

matter the industry, actor, or behavior at issue. Contract law provides an antidote to both of these problems with IP.

Many interviewees describe contracts as the most efficient mechanism for conducting essential business and fostering relationships. One person asserts that the benefit of a contract is that its critical terms — licensing fees or fees for work or service —are perceived as immediately understandable and reliable. Sometimes, these parameters implicate IP rights in terms of the scope of editorial control and future use, but the interviewees rarely mention how IP might act as leverage in contract negotiation. The contract terms that they highlight are aspects of business relationships over which they seek more control than they perceive IP law provides. While interviewees admit that they are inattentive to certain contractual details relating to IP (royalty rates, for example), they are able to describe other terms with significant detail, including fees for service and attribution rights. Often times, IP law has little (or no) effect on terms that are actually central to the future of the business relationship and their satisfaction with the deal. The important and supplemental role contracts play in developing business relations contrasts with the background (or invisible role) the statutory grant of IP rights play in originating or developing the creative and innovative work in the first instance.

However, focus on contracts means that interviewees may end up extracting less revenue than IP rents would allow. Some might say that the IP's full value is realized in the contract's reallocation of benefits (e.g., a transfer of some IP rights in exchange for promise of attribution or non-derogatory use). However, for reasons that will be clear in the following pages, maximizing profit is not the primary motive in many contract negotiations. Revenue is important, but generating *predictable* revenue is the purpose of the contract. Moreover, interviewees believe that asserting contractual rights and waiving, minimizing or even ignoring IP rights improves on-going business relationships, cultivates an ethical mutuality of promises, and nurtures additional professional and personal values, like attribution and autonomy.

For example, Dan, the music composer who also directs his own performance company, talks about how "there isn't enough money in this business to compensate me or anybody who is involved in it for the effort they put in it. And that's true everywhere in the field." So when he negotiates the license fees for musical work his company will be performing, he considers other factors in addition to price:

> [Licensors] have these very complicated formulas based on whether you are a for-profit or non-profit theater, how many performances, how many people in your pit orchestra, … the size of your theater … But $3,000 [for a license to perform someone else's music] is generous … given the amount of money that we are spending on the production …. And you know, we want [the composers] to be happy and feel like they are appreciated. … So given the amount of effort that these composers have put into these works, and the likelihood that they will just gather dust after one performance, you know, I think it's worth recognizing the value of what they've done.

This performance license represents a balance between the user's capacity to pay, the financial pay-off to both parties, respect for the musician's effort, and the nature of the business generally. Dan thinks about the terms of the license to perform another person's music as a statement about the need to accommodate and address mutually beneficial aspects of professional production. For him, each actor should personalize the financial transaction to account for specific performance and professional contexts, which will inevitably moderate and mediate the royalty. Copyright is a

baseline for the financial transaction, but the final agreement says something about the value of music production, distribution, and performance.[27]

The owner/CEO of a lucrative media development company characterizes his individualized and generous approach to work-for-hire provisions as a way to work around the copyright system to benefit not only his employees but also his company.

> I remember working at a Fortune 500 company, [my partner also] remembers that, and we don't treat our employees that way. So if I bring you … something to me and we love it, let's go together. You will own certain rights; [the company] will own certain rights. You will get a majority of the publishing … we work out a fair deal because we want everyone here to be successful, and we want us to be successful, too. That's why we are a small company.

His approach contrasts with traditional work-for-hire relationships (in both copyright and patent) in which employees have little control over the end product and have no ownership in it, though both approaches have the same purpose: to manage quality output, provide acceptable compensation, and exercise meaningful editorial control (whether by the employer or employee). These working conditions are far more important than the provision of IP rights; several employees told me they could not remember specific IP terms of their employment agreement, including the work-for-hire provisions, but they could remember balking at (or negotiating) non-compete clauses, salary, and seniority (as a measure of creative control). Their attention to certain contract terms reflects concerns over autonomy and the value of human capital as indicators of professional success and satisfaction in IP-rich fields, though the contracts may have little to do with IP entitlements. This is consistent with evolution in business over the twentieth century that increasingly disassociates IP ownership from individual authors and inventors and shifts it to companies, leaving attribution interests as an inalienable right that employees or independent contractors value and on which they depend for professional success.[28]

The consideration and celebration of the individualized contract as a supplement to business strategies is not so much an evaluative judgment of contracts as it is further evidence of the misfit of IP protection as a vital tool to developing and sustaining creative and innovative businesses. Some interviewees went as far as to say that service contracts, not the right to prevent copies or unauthorized distribution of IP protected goods, keep business thriving. In several software companies, the value of their company's IP appeared negligible. As one in-house IP attorney says, copyrighting software

> doesn't really give you any value. Copyright law is a joke. … I mean, it really is…. Unfortunately, it only costs, like, $25 a copyright application, or I wouldn't even [bother to register the copyrights] - you know, if it was [as much as] $1,000 an application, I wouldn't … do it.

Instead, the company makes money from customer relations—with updates, maintenance, and training services. Could these businesses enforce their IP rights more fulsomely, for example by tightly controlling the amount of computer terminals on which their software is loaded or closely monitoring client adaptations to their software? Yes, and they do, but they focus on the clearly profitable and growth-oriented aspects of their business embodied in specific contractual terms for service.

On the other hand, some interviewees over-enforce IP with the same goal: to promote compliance with critical contractual terms. For example, some patent holders will use even weak patents to intimidate competitors, and thereby obtain or enforce favorable contract terms regarding joint-ventures or non-compete agreements. As Kevin, the telecommunications venture capitalist describes,

> All the companies that I work for, we all file patents. And we are pretty cynical about it, and we say, 'We don't think these patents are really necessarily going to ever be worth anything to us, except [that] in this whole morass [it] is people wagging sticks at each other and saying, "I am going to sue you over your patents."

Similarly, media consultants hired to create or produce copyrighted content sometimes threaten to file for an injunction on the basis that they co-own the content – even when they don't – to enforce the contractual fees for service.

Contract and IP law are sometimes in sync, and other times at odds. Whether it entails under-enforcing or over-enforcing IP rights (normally or legally), the goal of asserting the contract is to fulfill its central terms, which more precisely than IP articulate the priorities of creative and innovative industry players. Despite the commonly stated function of property to facilitate investment and productivity, interviewees generally perceive contractual bargaining to be more customizable and efficient than IP rights to facilitate production and trade. Often, interviewees describe contracting around IP default rules and relying instead on promises, and other normative business practices to sustain their work and livelihood And although implied or express contract terms are by no means the whole business relationship,[29] enforcing formal legal rules (of IP in particular) to effect compliance for its own sake is rarely worth the cost.

5. Loyalty and Personal Relationships

It may sound mundane to highlight loyalty and relationships as central to making do in business, yet every interviewee expresses the importance of professional and personal relationships with partners, clients, and fans for the vitality of their businesses. The mutual trust in these relationships is frequently the focus of their conversations around the maintenance of creative or innovative professions, the reasons they work in the particular business, and the stimulus for signing and complying with contracts. Relationships with collaborators or consumers are also credited with enhancing products and services.

For example, authors and artists consider their agents to be more important than their publishers or lawyers in procuring and facilitating remunerative work. Agents are valued because of the *personal* ways they develop their client's career. Barbara, a self-supporting writer, describes her agent's qualities this way:

> She was a good boss because she had been a teacher before …. She had a very, very, very strong moral center. If you told [her] something and asked her to keep it confidential, believe me, she took it to her grave. She cared deeply about her authors, and it was a personal care. … I remember … one of her authors was … hard-working, and feeling depressed and down, and had a real problem, because her kitchen was a disaster. And … that seemed to be the focus on it, and she needed $10,000 to do her kitchen …. Well, she – [the agent] was selling a book for her. And I don't know where the negotiations started out, but it wasn't anywhere near $10,000. But when they got done, it was $10,000, because that was the amount. So [the agent] called her and said,

> "You've got your kitchen." That was the way she worked. She also worked -- some agents have viewed it as their job to sell, sell, sell. [She] viewed it as her job to -- I mean, she could do that; that's not a hard thing to do. But [she viewed it as her job] to make a career, to plan.

The agent would fail at her job if she did not help her client make a living, but the quote illustrates how entwined their personal relationship is with the book and the book deal.

Meredith, a music agent confirms that sometimes the best business practice is to cultivate the person and hope that the product will follow:

> I tend to do my best work when I am interdisciplinary, [that's] what … motivates me, as opposed to focusing on 'I have 100 dates I want to book for the year,' you know, for an artist. And I just don't get the best deals, to be frank. I'm a bit of one of those nicer managers, which is something I kind of struggle with internally. [T]here's sort of people who are known for being nice managers, who may not get everyone the most money they can possibly get, but you might work with them for years. And there are managers who, you know, everybody hates, but they make big deals. People deal with them because they make big deals. It's just a really messed up kind of community, I think. … people … are not always professional. Like most people working in music never had a job before music, you know? They didn't work in the corporate environment. Some people did, like me. I worked in a corporate environment….

The general consensus in the music and writing communities is that happy, almost intimate, relationships with agents and managers are central to professional development and sustainable business.

But the personal connection extends beyond individual artists and their agents to more traditional corporate business structures. Several investors (ranging in industry from telecom to web services to medical devices) also characterize relationship building as essential to financing business development; people invest money because they trust you and what you believe about the project. Many of the interviewees chose business managers or signed clients based on loose networks of friends and acquaintances. Whether the company was "highly recommended" because it was large and impressive is less important than whether the individual sales person seemed "trustworthy" or "saw things similarly" as the customer.

This isn't surprising. Indeed, it's obvious, and the body of literature on the role of trust in the development of a competitive business is vast and growing.[30] Especially now, in the age of online commercial transactions, the in-person exchange is becoming rare and loyalty and reliability more valuable.[31] But the point here is three-fold. First, the interviewees speak as often about developing personal relationships with and maintaining clients, consumers, and partners as friends as they did about originating, creating, and distributing their creative and innovative work. Second, the development and maintenance of relationships is often pursued at the expense of or in spite of the assertion of IP rights. Third, the interviewees explicitly conflate organizational and firm structure with individual behavior and motivation, saying that firms have "personal relationships" with clients and consumers, or calling a business organization "trustworthy."

When these emotive descriptions ("trustworthy") are uncomfortably attached to legal abstractions ("corporations"), the interviewees are in fact talking about "two sets of individuals each of which is trusting the organization of which the others are members."[32] This redirection of

individual-individual relationship to individual-corporation relationship may explain the complex and sometimes diverging obligations inherent in the particular roles within an organization (e.g., an agent with a fiduciary obligation to a client and to the firm in which she is a partner). The affective role of personal relationships in building and maintaining creative or innovative businesses and the imputation of emotional relationships onto organizational and firm behavior are prime examples of how the rational actor model and economic analysis of incentives and maximizing wealth is eclipsed by other interests, behaviors and intentions.

A book publisher explains how getting a book from concept to sale is "all about personal relationships" between the editor and author and marketer and buyers. I understand this to indicate that the motivation to get work done and do it well has a lot to do with enjoying working with certain people and not having to work with others. As discussed earlier, Thomas, the software engineer had conflict with his business partner over how to retain clients, especially because their software is not unique or robustly protected. His eventual advantage in the dispute was that "every major client relationship is my personal relationship." Thomas builds and maintains these relationships with reliability and honesty, as an individual and principle in his firm, whatever contingencies might arise. A web-designer says his most successful projects were those when he and the client worked well as a team with full authority over the project without having to defer to upper management. Productive teamwork, built around a trustworthy relationship in which vulnerabilities are exposed but not exploited, insured a valuable product and on-going client relationship for him. Michael, a pharmaceutical consultant,believes his best business contracts are with companies without too much ego and with which he could work as a partner. He said,

> They were smart. … They didn't get into any of this, "You hurt my feelings. Why wasn't I included in the meeting?" They didn't get into that. It was very, "We got work to do. Let's just get it done. Oh, you can do that? Fine, get it done. That's not in your area, but you want to do it anyway? Great." Everybody worked together. It was a really small, closely-knit team. You know, the leader set the tone, and the tone he set was, "We are all brothers and sisters here, we are all going to have -- we are all just going to work together."

These business people confirm the common (though controversial) understanding that without cultivating honest and reliable relationships with clients, the business – whatever its sellable good (music, book, website, medicine, software) – suffers. In many ways, the importance of personal relationships overlaps with a business's good will and reputation, which is the subject of Chapter 4.

Relationships not only create business but also increase business and enrich the experience of pursuing it. Melanie, a filmmaker finds that establishing personal relationships in the course of developing and shooting a film is particularly rewarding and, at certain times, key to doing her job efficiently. She recounts how on one occasion a television station

> called me and hired me to make a film for them as part of a series they were doing. That was a very hard series. It was about Native American history, and they teamed me up with a Native American filmmaker. And I feel very proud of that project, both for what the project ended up being, but also for the experience, sort of what I think I did, which was to make the relationship with this filmmaker -- I mean, we made it work with … no help from [the television station], and that's what made the project as rich and strong as it was.

On another occasion, she mentions how these relationships translate into favorable licensing terms and productive dealings more generally:

> the first thing I did, when the project was just being conceived was go down to the [national charity], meet with the head of the archive, make sure he knew I was a serious person, that this was an important project, that I was interested -- and it wasn't inauthentic, but I was interested in what they do as an organization…. And so that human relationship with him and with -- you know, with *him*, really, then meant that when it came time to then hammer out a deal, he was willing to make a deal, you know?

As these accounts demonstrate, personal relationships may translate into bottom line benefits. While referrals in exchange for a reduced fee are the most common, many of these relationships are also based on non-monetary interests – personal synergies, autonomy and control, or enhancing the work product and the satisfaction of teamwork. In addition to being another tool the interviewees use to "make do" in IP-rich fields, personal relationships in professional spaces improve their experience doing creative and innovative work. These relationships feature centrally in professional development and successes, much more so than the IP asset they may claim and license.

6. Reputation

Chapter 4 is devoted to reputation in the professional lives of those creators and innovators I interviewed, but here, I will briefly describe its contours to complete the typology of ways of making do with ill-fitting IP in IP-rich fields. The interviewees nourish their reputation as a primary value in their lives for three reasons: reputation is their identity (the self that acts in the world), reputation drives business (as form of good-will and brand-value), and reputation is a form of expression or representation of the self and one's thoughts (speaking, performing, and sharing). As with many of these categories, reputational interests can be both under- and over-inclusive of IP law's coverage. Interviewees reach for trademark, copyright, or patent law to protect reputational interests but none of these statutory regimes adequately or satisfactorily protect the full dimension of reputational interests the interviewees describe. And sometimes they relinquish IP rights to enhance their professional reputation, to make money, to ensure their professional and personal autonomy, and to establish meaningful relationships.

Many interviewees identify with their work on a very personal level -- it authenticates them to themselves and to others. Audience matters. Projecting themselves through their work is an extension of themselves (and of their company, if they feel closely affiliated). Because of this, many folks eschew "the marketing machine" (as one interviewee called it) and many only self-consciously cultivate their reputation when it feels authentic rather than manufactured. Many writers and artists decry the work of "promoting," leaving that work "to my manager" or "agent" or "husband" – despite the fact that they clearly care about how they are viewed by others, especially by their audiences. Mary's explanation of her views on reputation and professional development is typical of the individual creators I interviewed:

> [My agent] and I talk about 'brand' all the time. … When I first heard that word years ago, I just balked. I was like, "Brand?' I'm an artist! I don't want to think about 'brand'!" … But now I've

> grown to love that, because instead of forcing me into a brand that she wants, she is saying "Let's look … closely at the way you are and make that your brand."

Company representatives similarly say that being "true to the company's identity" is central to its overall business strategy. "It's an identity," a book publisher says, referring to the books they commissions and how they edit and sell them:

> A lot of people talk about 'love' and cooking, you know? … And it's like … they have to love what they do, to have that love, and that's why people can feel it. And I think that publishing, especially these type of books … with [so few] books a year, everyone is so closely identified to them, and it becomes personal.

For these respondents, the development and protection of professional identity for a business's bottom line is vital, and when that reputation is tarnished or diminished, the response can include aggressive legal claims resembling (but distorting) IP claims.

As will be discussed in Chapter 4, these concerns map very loosely – if at all – onto U.S. IP law. Trademark law is primarily concerned with consumer search costs, assuring consistency in product and source based on brand identifiers. Copyright law protects the substance of original expression, not attribution or misattribution. And patent law (like copyright law) facilitates the disaggregation of ownership from inventorship (or authorship) — inventors may be credited on the patent but lack control over the invention's use. Where developing one's reputation for the described reasons is both a motive and mechanism for sustaining creative and innovative work, IP law remains a weak and ill-fitting tool to accomplish that end.[33]

IV. Autonomy and Ill-Fitting IP

According to these interviews, IP protection is a weaker incentive to produce and commercialize creative or innovative work than courts and legal doctrine would have us believe. One consistent theme throughout is that people seek control over their time and the manner in which they work. The misfit between IP rights and how interviewees make a living exposes just how important autonomy and relationships are. The lamentation that IP rights do not facilitate such control only emphasizes the interviewees' desire for autonomy as a form of self-rule.[34] As one sculptor said, quoting advice she received from a mentor years before, "When you're an artist, no one can fire you, and it's as challenging as you make it.'" What function, then, does IP play? To start, the utilitarian explanation of IP overstates the importance of money in IP protection and transactions.[35] And the taken-for-grantedness of autonomy and relationships as fundamental to creativity and innovation reveals itself in the breach of IP law's formal application.

It is worth nothing that some interviewees say they would rather work independently (as a solo) while others prefer being an employee in a company. Self-rule, therefore, does not mean being an owner or chief executive—it means that within the work environment the person can exercise creative or innovative control over the object of work.[36] Sometimes, working in a company provides precisely the right situation – the tools, space, and colleagues – to foster creative and innovative behavior. As one chemical engineer says about his position within a large company, "that's one of the nice things about being in a team, is that everybody contributes in some way, and even if you are not the guy who gets the inspiration, you have a role." At some companies, it is not the managers or owners who restrict the freedom of their creative employees,

but the clients. As a web-designer says, "no matter what I happen to think about the[] end results, if the client's happy and *they* consider it successful, and depending on the terms that they define, then they'll come back for more. … [but] for me … I have different standards." Indeed, many of the artists, musicians or engineers complain that a major hurdle in their work is capturing the attention of a paying audience. They describe the on-going challenge of shaping their output according to the desires of consumers. This challenge exists for people whether or not they are their own boss. With freedom, therefore, comes risk. Some interviewees choose to manage that risk by being part of a larger organization, which affords some freedom, while others prefer to go it alone, which maximizes autonomy but usually heightens financial uncertainty.

Would strengthening IP rights provide interviewees more autonomy, stronger relationships, and less financial risk? From an economic perspective, it is not apparent from the interviews that more exclusivity to demand more revenue for longer periods of time would help the individuals with whom I spoke. While hypothetically, stronger IP rights would allow software engineers or musicians to collect more and higher licensing fees on a regular basis and for a longer time —thereby "freeing" them from a salaried or hourly job—,[37] only one of the interviewees (a successful writer) described this situation as her own. And she describes herself as very lucky. The rest of the people I spoke to—dozens of successful writers, scientists, engineers, and companies filled with IP—, say they prioritize consistency in their income stream (rather than maximization) so they can work regularly on their craft. A musician explains, "I feel like I've structured my life for a really long time around just the opportunity to do music, you know? And how few hours can I – once I did get a job, how few days can I work so that I am free to be doing that?" A filmmaker, who believes she has found the optimal balance says:

> Since I became a producer [at a company], I have made enough money …. And then now that I have my [own] company, I actually make a little bit more money, and it's kind of been nice, you know? It's -- but I didn't expect it. It wasn't -- I just wasn't ever driven by monetary... I am a working filmmaker, and that's the difference.

From the corporate side, stronger IP rights do not translate to more freedom or control within a business sector, except to the extent that strong patents can be asserted defensively to protect certain research programs and offensively to generate revenue. These examples come primarily in the pharmaceutical and medical device industries. But the downside of asserting these rights, as explained to me by both the corporate agents and the individual creators, is the administrative work of producing and protecting IP: the internal facilitation of harvesting IP and policing of the IP rights. This is not to say the IP generation and protection is not worthwhile, but neither is it the central form of profit-making and professional development. Some industries rely more on IP than others (e.g., pharmaceuticals and medical devices, photography, and some text publishing). Others downplay or minimize the importance of IP as compared to other ways of achieving optimal business success (music, documentary film, software, visual art, e-commerce business systems and home-good manufacturing).

The freedom or autonomy that most interviewees seek is the ability to work: at painting, writing, lab science, designing, innovating networks, or facilitating someone else in this kind of work. What they want is to continue to create and innovate; as Camille, a sculptor, says, "I didn't set out thinking this is a great livelihood. I just set out: this is what I want to do." In the discussions about access and opportunity to do their work, there are echoes of Immanuel Kant

and the roots of property ownership in possession and will. As Robert Merges has written, "the essence of property for Kant is this: other people have a duty to respect claims over objects that are bound up with the exercise of an individual's will."[38] Indeed, the people I spoke with desire to make their mark with the things they do or make, whether or not a consuming public consistently purchases their work. But Merges extends Kant's definition to say that the "full realization of [one's] autonomy interest in [one's output] includes the right to make a living from … selling it."[39] The interviews bear out this economic conclusion *only in part*. Camille continues, saying,

> I don't think I followed any model. I think I created my own model, which was direct sales. Like, I could actually live on it, you know? There was no gallery. I think I had a kind of belief that people believed in my being an artist, and when I connected with people, they liked helping that happen.

Making money is one of three pragmatic uses of IP, but it is sometimes traded to accomplish other equally important goals. Individuals seek to primarily be recognized for their work—to be "known" or "credited." Even companies do this: they trade maximalist revenues in exchange for brand recognition to develop corporate and community identity. The interviews cover many examples of corporate agents under-enforcing IP rights in order to sustain professional and community relationships and their own freedom to maneuver. Like people, companies seek to be recognized and known for what good they do or make, and the interviews with individual corporate agents reflect that.

The description of intellectual property in tangible terms (despite IP's necessarily intangible nature) reinforces the desire to make one's mark on the world. The "thingness"[40] of a work means it can substantively reflect the will of the maker. If "will is that aspect of a person which decides to, and wants to, act on the world," then the created thing is a stamp or mark of that personal will.[41] Indeed, the desire to wield influence and affect one's community by putting things of emotional vibrancy or aesthetic or practical value into it was overwhelmingly common in the interviews. Recall Joan, the painter turned sculptor, who describes her works as puppies:

> I wanted to make [paintings.] I wanted to publish them. But I didn't want to own them. I'd rather they be in a public collection. … you know, like my painting exists, I got to make it and it's being well cared for. It's like having a litter of puppies and you found a good home for each one of them.

She does not necessarily give her work away for free, but the kind of control she asserts over it does not encompass "owning," either; instead, she makes sure wherever it is, it is "well cared for." Many interviewees describe their ideal professional life precisely this way: "to be free to write the best book I can"; "I wanted to be an academic scientist … because I didn't want someone telling me the project that I had to work on." Seeing oneself in the work, or enabling others to recognize you through the work, motivates work and defines fulfillment for many of the folks I interviewed. As Leo, the painter said, "I paint because I want to share my visual sense of how I see the world, how I see color, with other people." Whether talking to chemical engineers, biologists, e-commerce innovators, or to painters, photographers or writers, interviewees regularly conflate "doing work" with "the work" they make (though IP law largely resists this conflation). The freedom to work is as important (if not more so) than work product and one's exercise of control over it.

IP law does not always speak to this form of autonomy. Some of the interviews recognize IP rights as beneficial because they provide "freedom to operate." For instance, scientists are convinced to facilitate multiple patent filings because, they are told, doing so enables them to continue doing research at reasonable costs. In the creative arts, it is possible that IP rights sometimes enable creative control, providing artists with a veto over where and how their work is displayed. But in many other circumstances, IP rights impede or are irrelevant to the artists' and innovators' interests. Over-broad patents or patents of questionable subject matter are "sticks" to shake at competitors that divert resources and may sometimes quash collaboration. Digital rights management for copyright frustrates users and customers and is therefore strategically withdrawn. As I have said earlier, in rejecting the "sweat of the brow" justification for IP protection,[42] IP is not a reward for "doing work" except insofar as it protects some aspects and some uses of the work. Many interviewees are stunned when they learn that copyright law does not require attribution or prohibit misattribution, or when patents can be granted for minimal work if it meets certain standards. Similarly, many wish that critical uses of their work required licenses. These interests are largely left unserved by U.S. copyright law (and by patent law, to the extent it does not require inventors to be "credited" except on the patent itself). Nonetheless, interviewees (other than lawyers) reach for copyright (or trademark or patent) to try to enforce attribution norms and prevent reputational harms. Here, over-enforcing IP derives from misunderstanding and frustrated misalignment and leads to the subsequent misshaping and exaggerated claims of IP rights. In these instances, IP law is vulnerable because it does not fulfill the interests of autonomy and relation-building sought by those creating and innovating.

IP-rich creative and innovative industries sustain themselves in diverse ways, only a small part of which is through IP. That IP is sometimes relevant but not often central to the economic health of most creative and innovative industries undermines the long-standing doctrinal explanation for IP. This explanation has substantiated a century's worth of IP expansion through statutory and case law. One obvious implication is that it might be more optimal to seek an alignment of IP rights with the motives and mechanisms for engaging in creative and innovative work. I take up this issue in the next chapter with regard to reputation, an interest that all the interviewees describe as vital to their professional and personal well-being, but an interest that IP law barely protects, if at all.

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[1] Leah Chan Grinvald, Shaming Trademark Bullies, 2011 Wisc. L. Rev. 625 (2011); Siva Vaidhyanathan, Copyright and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity (New York: New York University Press, 2003); Shyamkrishna Balganesh, 86 The Uneasy Case against Copyright Trolls, 86 Southern California Law Review (forthcoming 2013).

[2] Wendy Gordon, Fair Use Markets: On Weighing Potential Licensing Fees, 79 George Washington Law Review 1814, 1823 & n 52 (2011). Brett Frischmann & Mark Lemley, Spillovers, 107 Columbia Law Review 257 (2007).

[3] Mario Luis Small, "How Many Cases Do I Need? On Science and the Logic of Case Selection in Field Based Research," Ethnography Vol 10, Issue 5, pp. 5-38 (2009), pp. 21, 25.

[4] Consider President Obama's statement in a speech at the Export-Import Bank's Annual Conference in March 2010, where he remarked: "...we're going to aggressively protect our intellectual property. Our single greatest asset is the innovation and the ingenuity and creativity

of the American people. It is essential to our prosperity and it will only become more so in this century. But it's only a competitive advantage if our companies know that someone else can't just steal that idea and duplicate it with cheaper inputs and labor. There's nothing wrong with other people using our technologies, we welcome it –- we just want to make sure that it's licensed, and that American businesses are getting paid appropriately."

[5] Shyamkrishna Balganesh, The Uneasy Case against Copyright Trolls, 86 Southern California Law Review (forthcoming 2013); David Fagundes, Efficient Infringement 98 Iowa Law Review (forthcoming 2013).

[6] Shyamkrishna Balganesh, The Uneasy Case against Copyright Trolls, 86 Southern California Law Review (forthcoming 2013); David Fagundes, Efficient Infringement 98 Iowa Law Review (forthcoming 2013).

[7] See, e.g., Martin Kretschmer, Does Copyright Law Matter? An Empirical Analysis of Creator's Earnings, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063735, p. 3; David M. Gould, William C. Gruben, The Role of Intellectual PropertyIP Rights in Economic Growth, Journal of Development Economics, Vol. 48 (1996) 323-350.

[8] Claims made over work in terms of time and work resonate with traditional views of real and personal property that incorporate elements of labor, occupancy and notice to the world. Susan S. Silbey, "Locke, op. cit.: Invocations of Law on Snowy Streets," Journal of Comparative Law, Vol 5(2), pp. 66-91.

[9] George Lakoff and Mark Johnson, Metaphors We Live By (Chicago, Illinois: University of Chicago Press,1980). See also William Patry, Moral Panics and the Copyright Wars (New York: Oxford University Press, 2009) pp. 43-60.

[10]Citations to stricter criminal laws for enforcement; environmental laws.

[11] Barton Beebe, Intellectual Property and the Sumptuary Code, 123 Harvard L. R. 809 (2010). This has echoes of the dawn of the anxieties, both theoretical and real, at the dawn of the "mechanical age" as well. Walter Benjamin, The Work of Art in the Age of Mechanical Reproduction in Illuminations: Essays and Reflections (New York: Harcourt, Brace, Jovanovich, 1968) pp. 217-262.

[12] Julie Cohen, Pervasively Distributed Copyright Enforcement, 95 Georgetown Law Journal 1, 47 (2006).

[13] Ibid. See also more generally Julie Cohen, The Networked Self (New York: Oxford University Press, 2011).

[14] Julie Cohen, Pervasively Distributed Copyright Enforcement, p. 46.

[15] James Boyd White, From Expectation to Experience: Essays on Law and Legal Education (Ann Arbor, Michigan: University of Michigan Press, 2000) p.114

[16] Ibid. at 113.

[17]Clarissa Long, Patent Signals, 69 U. Chi. L. Rev. 625 (2002). Whether the signal is a quality one, however, is of course dependent on many factors and matter of empirical debate. See, e.g., David Hsu and Rosemarie Ziedonis, Patents As Quality Signals for Entrepreneurial Ventures, Academic Management Proceeding, August 1, 2008, pp. 1-6; David Hsu and Rosemarie Ziedonis, Strategic Factor Markets and the Financing of Technology Startups: When Do Patents Matter More as Signaling Devices? (2011) Unpublished Working Paper.

[18] Richard Posner, The Little Book of Plagiarism (New York: Pantheon Books, 2007) p. 12.

[19] Barton Beebe, The Sumptuary Code, 123 Harvard L. R. 809 (2010) (describing IP claims as authenticity claims).

[20] See, e.g., Jonathan Barnett, Do Patents Matter? Empirical Evidence on the Incentive Thesis, in Handbook on Law, Innovation and Growth (Robert E. Litan, ed.), Edward Elgar Publishing, 2011, pp 178-211.
[21] Harold Bloom, The Anxiety of Influence: A Theory of Poetry (New York: Oxford University Press, 1973).
[22] See, e.g., Daniel Pink, Drive: The Surprising Truth About What Motivates Us (New York: Penguin, 2009).
[23] Chris Anderson, Free: The Future of a Radical Prices (New York: Hyperion, 2008). See also Chris Anderson, The Economics of Giving it Away, Wall Street Journal, January 31, 2009; Chris Anderson, Free! Why $0.00 Is the Future of Business, Wired, February, 2008.
[24] This was Jonathan Barnett's point in Do Patents Matter?, supra note 20, when he explains how patents might level the playing field between large firms and small by providing the smaller companies a level of exclusivity with their patent that larger companies can get through early-entry market dominance. A problem with this assertion is that both large and small companies can use patents to protect market share, and so the "equal playing field" theory only works if the larger firm forbears from patent protection.
[25] Randal Picker, The Razors-and-Blades Myths(s), 78 *University of Chicago Law Review* 225 (2011); Lexmark International, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004).
[26] The particular role of contracts in business has long been studied, and is beyond the scope of this book. Notable in this context, however, is Stewart Macaulay's seminal article from 1963 that describes tentative findings from an interview-based qualitative empirical study on the role of contracts in varied industries in Wisconsin. Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, American Sociological Review, Vol. 28, No. 1, Feb. 1963, pp. 1-23. In the article, Macaulay explains how businessmen rely on contracts to define the scope of the desired performance by both parties, but less frequently to address contingencies, resolve disputes regarding the relationship or determine legal sanctions for breach. The partial nature of the contract as a reflection of the actual business relationship (its present contours and implied or assumed future obligations) is commonplace among businessmen and a source of potential anxiety among lawyers. The present study reflects both the centrality of contracts as a dominant mechanism for business relations and the inevitability of gap-filling with business methods, including less formal legal ones, such as loyalty (personal relationships) and reputation.
[27] The proliferation of Creative Commons licenses also reflects the tendency of using copyright – and underenforcing it – to achieve goals that are other than economic.
[28] Catherine Fisk, Credit Where It's Due: The Law and Norms of Attribution, 45 Georgetown Law Journal 49 (2006) (describing the history of the disassociation of IP rights from individuals to companies and attribution and credit as the inalienable right that employees value).
[29] Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, American Sociological Review, Vol. 28, No. 1, Feb. 1963, pp. 1-23.
[30] Keith Blois, Trust in Business to Business Relationships: An Evaluation of Status, Journal of Management Studies, Vol. 26, No. 2, (1999), pp. 197-215; Henry Abodor, The Role of Personal Relationships in Inter-Firm Alliances: Benefits, Dysfunctions, and Some Suggestions, Business Horizons, Volume 49, Issue 6, November–December 2006, Pages 473–486. See also Fred Reichheld, The Loyalty Effect: The Hidden Force Behind Growth, Profits and Lasting Value (Allston, Massachusetts: Harvard Business School Press, 1996).

[31] See, e.g., Traci B. Warrington, Nadia j. Abgrab, Helen M. Caldwell, "Building Trust to Develop Competitive Advantage in E-Business Relationships," Competitiveness Review: An International Business Journal incorporating Journal of Global Competitiveness, Vol. 10 Iss: 2, pp.160 – 168 (2000).
[32] Keith Blois, Trust in Business to Business Relationships: An Evaluation of Status, Journal of Management Studies, Vol. 26, No. 2, (1999), p. 210.
[33] The literature on the ill-fitting nature of reputational interests and IP law is growing. See Daniel Solove, The Future of Reputation (New Haven: Yale University Press, 2007); Laura Heymann, The Law of Reputation and the Interest of the Audience, 52 B.C. L. Rev. 1341 (2011).
[34] Robert P. Merges, Justifying Intellectual Property 18 (2011)
[35] Wendy Gordon, Fair Use Markets: On Weighing Potential Licensing Fees, 79 George Washington Law Review 1814, 1839 (2011).
[36] Ibid. at 83.
[37] Ibid. at 197.
[38] Merges, Justifying Intellectual Property, p.72.
[39] Ibid. at 81.
[40] Michael Heller, The Boundaries of Private Property, 108 Yale L.J. 1163, 1193 (1999).
[41] Merges, Justifying Intellectual Property, pp. 75-76 and notes 24-25. Here, Merges is talking about Kant's personal will, which is related to but separate from the rational will, which exists only in one's mind.
[42] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).