

April 12, 2018

Dear NYU students and faculty,

I attach two documents, a book project summary and a (very) rough first chapter. During the colloquia on 4/26, I look forward to talking with you about both. I am especially interested in hearing what you learned over the semester about the concept of equality in the context of IP as I am struggling in this first chapter with the slipperiness of the legal principle. I am thinking about this first chapter (and the idea of equality) serving as a strawman – a set up for its eventual dissolution in the face of substantive rights, such as privacy and distributive justice (chapters 2 and 3). But frankly, I am not sure. I also am dissatisfied with how it reads as a book chapter. Suggestions on both fronts are very welcome.

On the whole, this next book project follows from my recent book *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford University Press 2015), which was a qualitative empirical study of artists, scientists, business partners and lawyers about the roles intellectual property play in their work as producers of art, technology, and science. I grounded that project in a stratified sample of semi-structured interview data the analysis of which challenged several basic legal assumptions about how intellectual property incentivizes the “progress of science and the useful arts.” This new project follows from some of the *The Eureka Myth’s* themes, exploring alternative narratives in disputes about intellectual property and in first-hand or second-hand accounts of creative and innovative production. I employ a mixed-method approach to the research for this second book – close reading of legal cases, an analysis of qualitative interview data, journalistic accounts, and a case-study of photographers. As such, I would also love to hear your thoughts about method. This mixed-method is not novel– it is modeled after well-regarded books in sociology and cultural studies such as Jack Katz’s *Seductions of Crime* and Francesca Polletta’s *It Was Like a Fever: Storytelling in Protest and Politics* – but I wonder about how the combination of qualitative empirical analysis and narrative theory lands in a legal policy and scholarly arena.

I look forward to speaking with you on April 26.

Jessica Silbey

AGAINST PROGRESS:  
INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE

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We seek progress of science and the useful arts. The founders of the United States saw intellectual property as a way to achieve this progress, by granting authors and inventors exclusive rights to their writings and inventions for a limited time. What progress means and whether intellectual property promotes it remains unclear two-hundred years later. This uncertainty is now the source of destabilizing tension. Technological advances are occurring at rapid speed while wealth inequality and political divisiveness related to these technological resources appear to be at unprecedented levels without foreseeable amelioration. This book explores this tension by attending to intellectual property disputes that contest the meaning of “progress of science and the useful arts” in the digital age. Rather than focusing on inventorship and authorship, this book contends that these disputes in courts and in popular culture turn on fundamental values. Equality, privacy, and distributive justice are central to human dignity but have been largely absent from intellectual property policy. This book for the first time describes these debates about intellectual property as a bellwether of changing social justice needs in the digital age. Challenging conventional accounts of intellectual property’s implications for our society and its future, this book travels new ground integrating progress of science and the useful arts with demands for social justice in the Anthropocene.

The old story is that copyright and patents promoted progress of science and art by granting, for a limited time, a property right in the work made. That story requires revision. Maturing conversations about the roles creativity and innovation play in flourishing economies, communities and everyday labor reveal that exclusive property rights may degrade not develop community sustainability. In other words, property rights are old news. Instead, interests in social and political dignity structure relationships around creativity and innovation. The new story is that twenty-first century creativity and innovation are developed from human and digital networks, which are reconfiguring twentieth-century social and political values for our internet age. By describing how these democratic and fundamental values now orient disputes and practices concerning authorship and inventorship when they did not before, this book uncovers new stories about intellectual property and illuminates critical shifts in a legal regime that promises progress of science and the useful arts in a political society struggling under exacerbated wealth inequality and ideological division.

What does “progress” mean in the Constitution? Sparse history exists of the constitutional clause and thus policy preferences drive contemporary debates about “progress.” Is “progress” simply more copyrighted works or patented inventions? Is it measured by welfare economics, job creation, or health outcomes? Is “progress” achieved if we know more today about breast cancer than we did ten years ago, but diagnostic tests are widely inaccessible because of costs related to patent licensing practices? Music-making technology, such as the ability to self-record and self-publish on the internet, may not be “progress” for musicians and audiences if fewer reliable filters exist for promotion and quality. Perhaps “progress” in scientific fields occurs through iterative improvements to understanding of the natural world, but what is “progress” in the aesthetic fields, such a visual arts, music, and writing? The lightning-speed facility to copy, share and transform almost anything with ubiquitous hand-held computers, indeed the ability to alter political stability and personal identity with digital clicks, requires that we rethink the meaning of “progress” as a matter of property incentives that were once the foundation of intellectual property in the United States.

*Against Progress* describes the mainstreaming of intellectual property stories on a

national level. This mainstreaming affects the popular conception of creativity and innovation and thus the demands made on law that regulates both. New stories link fundamental rights to intellectual property in two related spheres. First, the United States Supreme Court has doubled its caseload concerning intellectual property over the past two decades. The highest national court is a tone setter, selecting content and focusing the debate among legal elites that reverberates to national media. One part of this book will be devoted to the stories the Supreme Court tells about copyrights and patents as less about property and more about equality and dignity, for example. These values are deeply rooted in our constitutional democracy but are only now finding a place in the high court's adjudication of disputes regarding digital technologies.

Second, popular legal consciousness concerning creativity and innovation is deeper and broader than in decades past. Intellectual property law was previously a domain of technicians, a legal specialty that was isolated in practice and in law schools. Now, it is a prevalent legal field and a core course of study, offered not only in law schools but also in business schools, graduate science and humanities programs, undergraduate schools and even high school. The mainstreaming of intellectual property from a corner of the legal profession to a common understanding that even high schoolers acquire transforms copyrights, patents and trademarks into subjects of everyday importance. This book provides accounts from ordinary people about how intellectual property is enmeshed in or undermines the progress they seek through their work. Wedding photographers, folk musicians, videographers, coffee roasters, architects and teachers have surprisingly fresh and important things to say about intellectual property's relevance to their working lives and communities. "Business method patent" and "copyright fair use" are legal terms of art, which have been domesticated by a broadly engaged public who both critique and praise the varying aspects of intellectual property in their lives. These intellectual property stories – what intellectual property is, how it works, and who it serves – is today more nuanced and multifaceted. This mainstreaming of intellectual property in American culture is changing the demands people make on the regulation of art and science as they assert roles for intellectual property to enforce dignity in our digital age.

The book's primary argument is that the mainstreaming of intellectual property in law and culture exposes on-going debates about "progress of science and the useful arts," which was historically and doctrinally focused on economics but today is anchored by other values and principles central to our constitutional system. Subject to public debate and popular cultural conversations, intellectual property is not only about an economic incentive in the form of a limited monopoly, it is about rights of attribution and integrity, community relations, equal access, individual dignity, and sustainable art and business practices. It is about reputation, privacy, nationalism, free speech, and labor justice. Dignity, equality, privacy, and community welfare are constitutional values whose scope and achievement have been debated since the nation's founding. Today, stories about intellectual property law are also conversations about these critical socio-political issues.

As contemporary stories build upon two-hundred-year-old debates for the twenty-first century, these fundamental constitutional values necessarily assume new contours and importance. Excavating these debates within intellectual property reveals their embedded tensions and affordances in digital age terms. Doing so also explains how intellectual property laws affect us all. Like criminal law, contracts, property, torts and constitutional law, all the basis of everyday legal practice and structure, the mainstreaming of intellectual property law

bears its relevance for contemporary society. This is not to say that intellectual property law is central to social welfare – most legal regimes operate in the background and are invoked on the margins only at a time of dispute, crisis or assertion of control. Instead, but controversial still, intellectual property law, like other legal fields with which people are more familiar, is infused with primary societal and legal values of justice, fairness, individual freedom and general welfare.

The other side of *Against Progress* is that debating the place of fundamental human values within intellectual property law exposes a dystopian dimension of technological evolution. Understanding intellectual property regulation as fulfilling interests in privacy, equality and social welfare transforms intellectual property into something unfamiliar. Instead of its usual objects (patents and copyrights), subjects (authors and inventors) and goals (wealth and reduction in risk), intellectual property stories are about political speech, fake news, unfair or discriminatory labor standards, racial and gender justice, access to health care, and sustainable agriculture. Intellectual property so transformed rejects “progress” as an anchor in the modernist project of socio-economic development. Whereas the modernist outlook envisions a definite past and a predictable future – a teleological approach to progress that assumes the general welfare expands with industrial capitalism and democratic government – contemporary intellectual property stories reveal chinks in that modernist armor, exposing competing claims to the good and the just and novel ways of achieving both. For those who understand intellectual property as the epitome of technological development and efficiency, as well as legal regulation built on an economic model of private property incentives for innovative and creative products that benefit the public, framing intellectual property debates in terms of fundamental rights to which all are entitled (equality, privacy, and fairness) will be eye-opening. Plotting intellectual property’s mainstreaming in contemporary socio-legal culture reveals ways in which the economic status quo has for many languished since the digital age’s commencement (and for many has worsened), despite describing our culture as post-modern, technologically advanced and approaching singularity.

The prediction for a technologically-advanced society was that digital connectivity would close income gaps and self-determination and democratic capitalism would flourish. The benefits of our technological age include more communication with friends and loved ones; more efficient and targeted medicines; on-line learning, accessible entertainment, and portable, beloved devices. And yet an emergent refrain complains of education costs without proportionate quality or accessibility. Wages for most working people have stagnated over the past three decades despite the rise in the cost of living. Technological development has not fundamentally altered the socio-economic or political structures characterized by hierarchy and need. We hear that our lives are more connected than ever, threatening our privacy protected earlier by physical boundaries and geographic distance, tying our wellbeing to each other in ways both precarious and welcome. We are both freer and more regulated, have more opportunities and yet suffer under dramatic welfare inequalities. Technological progress and digital connectivity has not lifted the poor or reduced common health problems. What role, if any, does the intellectual property progress clause of the Constitution play in these debates and challenges?

Moving intellectual property off its narrow economic foundation is critical for law and policy today. Long described as a balance between private property as economic incentives with access to public goods, the new intellectual property stories burst open the field of

“progress” and focus on diverse and vital human values that promote human flourishing. These new intellectual property stories are moral narratives that describe and situate our community debates and choices in the digital age. They are lenses through which to understand the promise and pitfalls of the twenty-first century’s technological transformation. Economic cost-benefit rationales form part of these debates and choices, but frequently economic explanations are neither primary nor convincing.

As proliferating consumer devices and addictive digital experiences engulf everyday life, contemporary society embraces the possibility of progress. This is because creativity and innovation are optimistic buzzwords of the twenty-first century with its promise of enhanced connectivity and inventive opportunity. The legal regulation of innovation and creativity – intellectual properties of copyright, trademarks, trade secrets and patents – often receive credit for the technological triumphs of this era. But intellectual property laws are grossly inadequate to produce an ample account of progress sufficient to facilitate human flourishing in the Anthropocene. Intellectual property laws do not explain coherence and cooperation among diverse communities that instantiate collective creative and innovative work. Intellectual property law currently cannot accommodate equality, privacy or distributive justice claims. The new intellectual property stories this book tells introduces these themes, along with characters, crises and resolutions that resonate with old values for our new times. It will upend traditional intellectual property explanations and lay new ground for evaluating progress as a matter of social justice and dignity in the digital age. Fundamental values, such as equality, privacy and distributive justice, must be central to developing human sustainable creativity and innovation in the internet age.

## Synopsis

This book studies intellectual property as a bellwether of changing social justice needs in the digital era. It asks questions about the relationship between technological development and socio-economic welfare by tracing through legal cases, media accounts, and over 75 face-to-face interviews varieties of popular legal consciousness and legal arguments that challenge conventional accounts of intellectual property’s implications for our society and its future.

My previous book, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property*, challenged the intellectual property-as-incentive story with empirical evidence from creators and innovators. *Against Progress: Intellectual Property and Fundamental Values in the Internet Age* situates the question of intellectual properties’ roles in creative and innovative practices in terms of evolving social justice questions specific to the digital age. Each chapter features specific values of democratic society, such as equality, privacy, and distributive justice, showing through animated disputes and particularized accounts from real people how current debates over intellectual property’s regulation of creativity and innovation shape and are shaped by these fundamental values deeply rooted in law. The book’s main premise is that as the digital age democratizes technological opportunities it brings intellectual property law into mainstream everyday culture, generating debates about the relationship of “progress” to these enduring values that are increasingly challenged today. Intellectual property law becomes a framework through which to discuss critical socio-political issues, developing ancient debates over fundamental values and reforming their contours and importance for the twenty-first century. Excavating these debates hones the meaning of progress for science and art,

which is intellectual property's aim, as well as their relevance to justice in the digital age.

In addition to an introduction and conclusion, the book contains the following five chapters.

## 1. Equality

Chapter One discovers equality and anti-hierarchy principles underlying milestone intellectual property cases at the United States Supreme Court. This chapter reorients analysis of these cases from a market-driven intellectual property framework to one debating the contours of equality in our constitutional system that is adapting to evolving technological contexts. The chapter discusses key cases, such as: *Eldred v. Ashcroft* (the “Mickey Mouse” case upholding the extra twenty years of copyright term added in 1998 by the Digital Millennium Copyright Act to protect Mickey Mouse for two more decades); *Golan v. Holder* (the “Peter and the Wolf” case upholding the restoration of foreign works such as Prokofiev’s symphony to U.S. copyright protection and stealing them from the public domain); and *Bowman v. Monsanto* (upholding Monsanto’s ability to control a farmer’s use of genetically modified seeds to a single harvest). These are considered disruptive decisions from the perspective of innovation and technological progress but this chapter digs into the case details, the opinions and their backstory, interpreting them and others as forming part of a larger family of equality jurisprudence aimed at protecting human dignity. The chapter describes categorical variations within debates over the meaning of equality considering important distributional questions, such as “equality of what?” and “equality for whom?” Applying that analysis to these milestone intellectual property cases in light of the people they protect and the harm they seek to avoid reveals new and critical stakes among everyday authors and inventors. As such, it begins the refinement of “progress” for twenty-first century creativity and invention for those people whose aim is to continue producing and distributing creative and innovative work.

## 2. Privacy

Chapter Two canvases the large and growing set of disputes linking copyright law to privacy. These disagreements range from authors and heirs attempting to shield work from unwanted exposure (e.g., protecting diaries and unpublished manuscripts) to authors or subjects of copyrighted works suppressing dissemination for reputational and emotional reasons. Authors such as J.D Salinger and his heirs may seek to suppress the critique or recontextualization of a published work (such as the critical sequel to *Catcher in the Rye* called *60 Years Later*) because it offends or devalues previous work, or because the author wants the old story to stop being told. Subjects of work, such as a medical doctor whose patient reviews are on-line, may seek to suppress their dissemination because of unflattering content. Privacy claims are usually barred when brought on behalf of the deceased. The privacy right is personal (it cannot be assigned) and historically only belongs to the living. Moreover, First Amendment defenses tend to defeat most privacy claims when the work has already been published, despite reputational or emotional injury. And yet, these privacy disputes brought on behalf of complaining authors, heirs, copyright assignees (as in the medical doctor) remain tenacious when framed as about intellectual property. These cases draw media attention and sympathy from courts, for example: *Garcia v. Google*, in which a defrauded actress sought to suppress dissemination of a film in which she performed because it caused her to be subject to death threats for its unexpected and offensive content; and *Hill v.*

*Public Advocate*, in which a photographer and her subjects (a gay couple whose engagement was being photographed) sued to prevent an anti-same-sex marriage organization from using the photograph to promote their political agenda. The legal trick of dressing a privacy harm as a copyright claim in order to control or suppress speech raises challenging questions for intellectual property law's purposes. This chapter explores many of these disputes in detail illuminating the transformation of conflicts between artists, inventors and audiences in our new age of rapid reproduction and distribution. Through detailed discussion of the disputes, both legal and popular, the chapter proposes a fresh perspective on these charged conflicts, deriving privacy's purposes from the chapter's rich examples and proposing a compromise for privacy's changing contours in light of the new forms of communication and communities in the twenty-first century.

### 3. Fairer Uses

Chapter Three draws on accounts from creators and innovators themselves, examining the diverse manifestations of distributive justice and fairness principles that arise from descriptions of their work. Whereas the first two chapters draw on legal disputes, court data, and media reports, the analysis and data for chapters three and four draw on accounts from over 75 face-to-face interviews conducted over the past six years. Chapter Three explores the broader tolerance artists and scientists exhibit for borrowing, derivation and adaptation than our intellectual property system currently allows.

Everyday creators and innovators consider a range of borrowing behaviors essential to their professional work and personal wellbeing. This evidences a misalignment between formal law, which would treat that borrowing as unlawful infringement, and grounded practices that do not. This chapter blows open the binary model of intellectual property infringement and generates from personal accounts of creative and innovative work nuanced and refined categories of borrowing and adaptation that are explained by principles of moderation, fair apportionment, expanding opportunities, and avoiding undeserved windfalls. The variations described in this chapter provide a new lexicon for tolerated uses, or "fairer uses." The common features of the accounts put pressure on intellectual property regimes and their rationales, displacing dominant market approaches and economic incentives with a focus on community sustainability, which requires attention to fair allocation of resources and a more inclusive conception of community and its stakeholders.

The chapter's detailed and rich accounts from individual creators and innovators, as well as from companies and other institutions, are remarkable for their common focus on a narrower infringement scope. According to those interviewed, less anti-copying protection is needed to promote good work. Accounts range from pharmaceutical researchers and novelists to freelance photographers and music agents. Their stories of tolerating or engaging in copying can be understood as based on a capabilities framework of human dignity, and yet the language they use to explain their borrowing practices is neither philosophical nor economic but about maintaining decent work and social relationships and promoting fair labor practices. Defining "decent" and "fair" is an explicit factor in progress for them. Emphasizing distributive fairness rather than basic claims of aggregation releases the pressure of "property-talk" (e.g., worth and exclusion) and shifts the debate to community welfare to meet diverse, connected needs. The focus on shared responsibility for sustainable creative and innovation practices is especially



notable in the Anthropocene when we reckon with the trade-offs between more innovation, less waste, more people and uneven distribution of opportunities for security, comfort and the hope for civilization's longevity.

#### 4. Harms

Chapter Four is the inverse of Chapter Three. It builds from the diverse, personal accounts in the 75 interviews and focuses on descriptions of harms and abuses among creative and innovative communities. Exploring the particular claims from everyday creators and innovators of perceived wrongs and injuries advances our understanding of the underlying principles and needs that everyday creators and innovators believe are central to their work. How does the problem of "infringement" become experienced as a harm akin to discrimination and oppression that immobilizes rather than facilitates good work? What is the appropriate redress when harms are described as personal rather than arms-length property claims? Characterizations of grievances range from common thoughtlessness, moral failures, such as selfishness or greed, to outlier malevolence. This variation reorients thinking about intellectual property from a competitive property injury in which winner-takes-all to personal affronts related to bodies, relationships, and livelihoods that require compromise and compassion. These variations in behaviors and attitudes may inform legal reform and, in particular, experimenting with new possibilities for infringement remedies. This chapter considers how current intellectual property rules fail to treat as relevant the "worst" affronts among creative and innovative communities, such as lack of attribution and impeding the making and distribution of work. And, as explained in the interviews, simpler solutions may exist for promoting progress than current infringement liability provides, such as credit and compulsory licensing, which are already rooted in creative and innovative community norms and embraced by many.

#### 5. Everyone's a Photographer Now

The fifth and last chapter is a case-study about photographers, a creative and innovative community that has experienced particular industry-wide tumult in the digital age. Based on twenty-five interviews with photographers specifically (separate from the 75 described above), as well as observational fieldwork, this chapter applies the previous chapters' concepts and analysis to understand how contemporary photographers make pictures, work together, and earn a living. This focused case study implements the model from the previous chapters in a particular context to understand how the century-old medium of photography adapts in an age of rapid digital reproduction, potentially inapt intellectual property laws, when anyone can be an amateur photographer. Accounts from photographers illuminate how equality, privacy, distributive justice and particular forms of injuries feature centrally in their identity-formation and professional practice, often self-consciously to the exclusion of intellectual property rules. Interviews ranging among photojournalists, fine art, event, commercial and portrait photographers, illuminate the ethics of professional picture-making built on both authenticity and fastidious craftsmanship, which intellectual property rules ignore. The accounts reveal coherent and flexible business and aesthetic norms among photographers that are threatened by the internet, pitting their need to embrace the massive internet audience against the fear of a devalued professional practice to which they have devoted their life. How photographers adapt in the digital age -- identifying the nature of their struggles and possible solutions -- provides a contextual application of the values from the first

four chapters. It illuminates the influence of these fundamental values as intellectual property becomes mainstream in contemporary popular legal culture.

## **Conclusion**

Together, the five chapters' attention to diverse but fundamental values that animate creative and innovative work illuminates various dimensions of "progress" intellectual properties should promote. Wealth aggregation features infrequently and instead progress signifies the amplification of those values central to the common law in the United States, such as fairness, equality, self-determination, privacy, and sustainable community welfare. These values call for a broader understanding of intellectual properties' contours to guide the application of existing doctrine and legislative change. I explore these implications in the conclusion. That fundamental values should guide both seems self-evident if we hope to preserve respect for the rule of law in our digital age. If, as the evidence from the interviews and cases demonstrate, "progress" promoted by intellectual property is not more money or things, the critical task is to understand "progress" in the terms our constitutional democracy has already set. Fundamental values of equality, privacy, self-determination and distributive justice form deep structures for our legal system and yet remain subject to on-going evolution and refinement from socio-economic and political shifts. The book aims to elucidate these legal and popular debates over progress within creative and innovative practices that are the subject of intellectual property regulation in terms of the moral and personal narratives that situate our collective choices in the digital age.

## Chapter 1: IP and Equality

Equality for its own sake means little without identifying the normative values that equal treatment promotes. Debates continue about “what equality is for”<sup>1</sup> and “when does equality matter.”<sup>2</sup> The goal of this chapter is modest in light of these long-standing inquiries: to surface the normative values underlying concerns about equal treatment in the Supreme Court opinions about intellectual property law.

Disputes about what equal treatment means and how inequality is a constitutional harm are unexceptional in constitutional law jurisprudence and scholarship. Since the U.S. Constitution was amended in 1868 to include the 14<sup>th</sup> amendment and its equal protection clause, federal and state courts have diversely interpreted “equal protection” to reflect the heterogeneous contexts in which disputes over dissimilar treatment arise and in light of the principle of equal dignity under the law. Whether applied in context of disparate treatment regarding of racial categories, as the 14<sup>th</sup> amendment originally intended, or of other identity markers such as national origin, ethnicity or sex, courts regularly opine on the values and evolving reach of equal treatment and its exceptions.

The generality of the constitutional phrase permits no literal limits, and so equal protection of the laws reads as a general mandate imposed on the states (and later also on the federal government). Thus, from its inception as a political response to the wind-up of the U.S. civil war, an end to chattel slavery, and the beginning of reconstruction with its promise of a new political beginning on the terms stated in the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> amendments, courts grapple with the ambiguity of “equal protection” and the various dimensions and values of equality in contexts far afield from its original target of racial injustice and the history of white supremacy in the United States. Early equal protection cases concern dissimilar treatment between butchers and other laborers in the city of New Orleans (*Slaughterhouse Cases*), producers of “filled milk” but not on other kinds of milk (*Carolene Products*), and opticians and ophthalmologists (*Williamson v. Lee Optical*). In these contexts and many others, courts consider the justification for dissimilar treatment, the relevance of the categories distinguishing groups of people, and how those categories interfere or augment opportunities to realize “real life” achievements<sup>3</sup> and “to do or be what they have reason to value.”<sup>4</sup> We might think first about the constitutional value of “equal protection” in terms of its anchoring category of race, and later its expansion to other central markers of socio-political identity such as ethnicity and sex, but its juridical reach is as broad as the term is indefinite.

Equality’s vitality to U.S. constitutional debate and its breadth of application should anticipate its eventual presence in Supreme Court cases about intellectual property. And yet appreciating the application of equality norms in terms of intellectual property protection, counseling and dispute resolution is atypical. It is nonetheless becoming more of a scholarly focus.<sup>5</sup> This scholarship reflects diverse avenues through which to explore equality prerogatives in intellectual property policy and law, probing values of access and ownership, incentives and the progress of social welfare, as well as relations between identity, community development and property rights. There is much to be studied here, especially as the intellectual property field remains largely and stubbornly focused on utilitarian and economic models of regulatory

critique. In this chapter, I add to this growing body of literature with a discursive analysis of Supreme Court opinions and their implicit and explicit focus on equality norms.

There are several curious aspects to this emphasis on Supreme Court jurisprudence about intellectual property and equality. First, in the past several decades since the Supreme Court has started granting certiorari more frequently in IP cases, many of the decisions are unanimous. This contrasts with cases about social inequality and race, sex, or sexual orientation, which exhibit deep ideological division on the Court. The relative unanimity of the justices concerning the application of patent law or copyright law and its relation to the constitutional prerogative of “progress of science and the useful arts” contrasts with the division in the IP legal community and lower courts on the same issues. To be sure, the Supreme Court is more often unanimous than divided on most issues it decides in the dwindling set of cases on which it grants certiorari, but with the contentious cases concerning the long-standing debates about the values of equality and its application in contemporary United States society, 5-4 or 6-3 splits on the Supreme Court are common.

Perhaps as a sign of IP’s increasing relevance to everyday life, IP disputes and their resolution at the Supreme Court level are growing. With this development comes more dissention, and yet the disagreements resonate (on the surface at least) with utilitarian and economic explanations of IP law and policy. It is only upon closer look and comparison between cases as one might compare texts by the same author tracing phrases, structure and influences, does the ascendant priority and significance of equality emerge. Reading Supreme Court IP cases in chronological order since the 1990s, conversations among justices develop around common concerns, such as the often noted debate about copyright law between Justice Ginsburg (author’s rights) and Justice Breyer (the importance of the public domain). But there are other conversations and jurisprudential themes in both the divided and unanimous cases that supplement the more obvious legal disagreements. At first, they appear to draw on IP-specific concerns such as the meaning of “progress of science” and the interpretation of IP statutes. But dig further and this canon of IP-specific Supreme Court case law is also debating appropriate beneficiaries for legal entitlements, fair opportunities to those benefits, and the effect of community diversity and exclusivity on access to those benefits. In other words, as with all statutes and constitutional interpretation, the Court fills the semantic gaps with its perspective on the history and policy of the subject matter as it relates to deeper socio-cultural themes and contemporary preoccupations. We learn by studying the gap-filling that various dimensions of equality central to U.S. legal culture influence the court’s decisions and structure the Court’s growing disagreements in the IP field.

It is curious that equality concepts ground these decisions when equality’s opposite, *liberty*, is more fundamentally related to intellectual property regulation given its power to exclude and restrict. Freedom to do or say something, rather than equal access to do or say something, is often the crux of the intellectual property issue. Indeed, until recent Supreme Court decisions such as *eBay* and *Quanta* changed IP remedy rules, the dominant remedy for IP infringement was an injunction followed by damages. This reflects IP’s home in the field of property law, where remedies reflect and rely upon control and dominance over the more typical property asset – a car, a home, a bank account. By contrast, liability rules generate money damages to compensate for broken promises and unauthorized use, resembling a regulatory

scheme that balances incentives to produce value or opportunity with access to both avoiding a windfall award.<sup>6</sup> In law, remedial schemes are often mixed, of course, but not without theoretical and practical challenges requiring one remedial form to give way to the other. We resist thinking of liberty and equality as forming a zero-sum relationship. But often to insist on equality is to implicate the freedom to do or say something. And this is true of the Supreme Court cases about intellectual property. To read and understand these decisions about IP rights in terms of the equality concerns they raise is to sideline the more traditional liberty interests we associated with the intellectual *property* right. Describing these cases as raising equality issues suggests, in other words, that they may instantiate a regulatory regime rather than a more rigid and rights-based property one.

As mentioned already, the equal protection clause fundamentally changed the structure of constitutional rights and powers in the United States, displacing freedom as a government guarantee with the new gloss of “equal protection.” Where freedom of association was listed first in the Bill of Rights, it was displaced by equal access which requires integration of (forced access to) public transportation, employment, and schools, for example. Although government may regulate and license access to regulate professions, it must do so consistent with the equal protection clause. We continue to debate what that consistency requires. What is “unequal treatment” as between men and women regarding parental leave, for example? When do job requirements that fall unequally on different groups of people raise suspicion for their potential invidious purpose to exclude? Despite contextual difficulties concerning the application and breadth of equal protection, the principle of equality anchors the promise of the rule of law.

So it should not be a surprise that equality concerns also percolate through cases about intellectual property, which are government benefits created by statute with their source in congressional power authorized by the Constitution. And yet because of the long-standing economic and utilitarian default in discussions about IP, the equality concerns in the Supreme Court cases are easily overlooked or reinterpreted in terms of the dominant story about IP’s narrower purpose and function. What follows is a rereading of Supreme Court cases about IP that deflates their perceived economic analysis of IP law. Instead of describing the privileging of economic efficiency and wealth accumulation as the goal of IP, a deeper analysis reveals debates over the purpose and proper interpretation of IP laws to promote fairness, anti-subordination and pluralism.<sup>7</sup> The approach through an equality lens is more systemic and connected – equality requiring balancing interests, reducing the importance of exclusivity. This is not to say the cases answer the questions presented correctly, in my view. But the equality interests they debate highlight worthwhile issues of progress and the public good that are often hidden or ignored.

The contours of equality vary with schools of philosophical thought. Indeed, some say that the concept of equality is empty or “one thing to all people and yet different things to different people.”<sup>8</sup> Others, such as Amartya Sen, critique both utilitarian and Rawlsian equality as lacking relevant comparators (“equality of what?”) and posit a basic capability equality, focusing on needs rather than deserts.<sup>9</sup> The discussion that follows will resonate with some of these concepts but will not trace their arguments in detail. Instead, the aim is to discern from the Supreme Court cases how their conceptual and rhetorical frameworks that borrow (whether consciously or not) from historic and contemporary debates about equality shape debates about intellectual property law.

Close reading of the Supreme Court cases about IP elaborate upon the social and cultural meaning of equality in the context of intellectual property and perhaps also helps bring a new coherence to this IP jurisprudence in terms of its past and its future. Doing so locates intellectual property doctrine, once a specialized and isolated field of law, within the broader federal system in which the Supreme Court, Congress and the Executive collaborate to coordinate government's provision of just and predictable benefits. It brings IP into the cultural fabric of federal common law by drawing connections to roots and language that originate in fundamental legal fields such as criminal law, torts, contracts, procedure and constitutional rights and structure.

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Looking at and across specific cases from approximately the mid-1990s, four equality values emerge. The first and most widespread is of *procedural fairness*. Political institutions and legal rights should be accessible and applicable to all on the same terms absent a justifiable reason to deviate. Open institutions and enforceable rights with meaningful remedies are critical to the health of a democratic and just society founded on the principle of the rule of law. Equality here takes the rhetorical form of “likes alike” and reasons by way of analogy. This kind of equality assumes an approximate sameness in each person and/or their starting place. And it requires for its logical consistency and practical application that distinctions may be drawn without violating the equality principle. Differences justifying differential treatment are just that; they are not status hierarchies or abuses of power. The first section below delves into some of the cases grounded in this basic and limited equality framework. The much critiqued case of *Eldred v. Ashcroft*, which upholds as reasonable a twenty-year extension of the copyright term even as applied to existing copyrights, follows this reasoning, as do others.

Two other equality values derive from the exceptions to procedural fairness. One is a *censure of status hierarchies* for their own sake in which differences are stigmatized as markers of inferiority. This describes the rightful disdain of caste systems in which hierarchies perpetuate humiliation and shame for those with relatively little power or status.

“The evil involved in such arrangements is a comparative one: what is objectionable is being marked as inferior to others in a demeaning way. ... [I]t is not the tasks themselves that members of lower castes are assigned to perform that are demeaning – they may be necessary tasks that someone has to perform in any society. The problem is that they are seen as beneath those in higher castes. The remedy in such cases is to abolish the social system that defines and upholds such distinctions between superior and inferior.”<sup>10</sup>

A related equality value is the abolition of “unacceptable degrees of control over the lives of others.”<sup>11</sup> This kind of equality celebrates *choice and consent* assuming (and requiring law to assume) a lack of dominance of one person or entity over another. Ideally, legal regimes facilitate free choice and mutual consent between otherwise independent actors, distributing benefits in order to develop independence and opportunity and avoid unjust subordination. The second section below delves into the cases grounded in these more comparative and contextualized frameworks for equality. The case of *Golan v. Holder*, blessing the depletion of the public domain by extending copyright to foreign works that missed the opportunity for

protection in the U.S., is one of the many IP cases animated by anti-status concerns and meaningful access to opportunity through choice and consent.

At least a fourth equality value exists in these cases but is reserved for Chapter 3, which is dedicated to a discussion about distributive justice. Equality and distributive justice frameworks overlap when they seek to facilitate the development of “talents necessary to compete for positions of advantage.”<sup>12</sup> This framework considers how to facilitate an even playing field sufficient to make procedural fairness a reality and avoid the establishment or reproduction of unjust hierarchies or subordination. This dimension of equality may require *redistribution of the rights and benefits* that government initially provides not to achieve equality of result but to prevent discriminatory exclusions from positions of advantage from a lack of essential foundations on which the experience of capability depends.<sup>13</sup> In addition to Supreme Court cases, such as *Metro-Goldwyn-Mayer Studios v. Grokster*, in which the court wrestles with the appropriate liability regime to preserve access to culture and punish intentional wrong-doers, Chapter 3 examines other appellate cases, as well as empirical evidence and legislative and administrative debates, all of which consider the appropriate distribution of private rights for the ultimate benefit of community welfare.

#### 1. Procedural Fairness: Likes alike

We often call treating likes alike “formal equality” or “formal neutrality.” Its roots lie with Aristotle and his explanation of ethics and procedural fairness.<sup>14</sup> Conceptually, this principle grounds constitutional equal protection doctrine, which proceeds as a balancing analysis that demands sufficient justification for differential treatment of people or groups when otherwise they appear similarly situated. “Equal protection” under the Fourteenth Amendment of the U.S. Constitution does not require that all people or entities be treated the same, only that there be legitimate reason for differential treatment of otherwise similarly-situated people and that the different treatment be rationally related to a legitimate purpose.<sup>15</sup> Only when the law intentionally classifies on the basis of a “suspect” classification historically used to exclude or denigrate groups of people such as race, gender, or religion does the court engage in more searching review of the law and involve itself in the details of the legislative rationales and procedures.<sup>16</sup> In cases involving suspect classifications, federal courts worry that democratic decision-making, which is our constitutional default, has failed a historically disadvantaged group for arbitrary reasons or is otherwise perpetuating long-standing and irrational prejudice.<sup>17</sup> As such, judicial second-guessing of the line-drawing in the form of stricter judicial review is justified.<sup>18</sup> But when ordinary economic classifications of difference are afoot, such as regulations that distinguish between food products or business practices for example, courts defer to legislative rationales and even presume the existence of a rational basis for the law even if one is not apparent on its face.<sup>19</sup>

As such, formal equality embodies the value that all people or entities are presumed equal before the law unless persuaded otherwise. This is a kind of moral equality that says “everyone counts.” Procedural fairness rests most of its authority on this basis, assuming that government institutions and benefits are equally accessible. The formal equality framework is open to the critique that uneven playing fields, however created, unfairly restrict access to process and substance. Similarly, it relies on the rhetorical force of democratic self-government to promote

the common interests through representative deliberation and thus to work through legal discriminations in outcome or application by inclusive participation. And so formal equality admits, even tolerates, uneven distribution of outcomes because it privileges (to the point of denying the existence of alternatives) the ideology of classic liberalism that focuses on individuals (and individual rights) to promote self-interest and protect each person's equal stature.

*Eldred v. Ashcroft* rehearses a virtuous formal equality narrative while also falling prey to the idealized romance of deliberative democracy in a system unevenly accessible to IP stakeholders. The case concerns the rationality of congressional legislation that extended the copyright term of twenty years, from life of the author plus fifty years (as enacted in 1976), to life of the author plus seventy years.<sup>20</sup> A central question the Court considered was whether Congress had a rational basis for adding the twenty years and, relatedly, whether the enlarged term could permissibly apply to existing copyrights as it would to future copyrights.<sup>21</sup> Justice Ginsburg, writing for seven members of the Court, held that Congress did have a rational basis for the extension and for its equal application to existing and future copyrights and copyright holders.<sup>22</sup>

The controversy around *Eldred* centers largely on the fact that few people believe that twenty extra years of copyright protection adds any incentive to create or disseminate creative works, these being the primary reasons for which copyrights are granted.<sup>23</sup> Those disbelieving the Court's reasoning would be forgiven for their skepticism given the lobbying push for this legislation was led by the Disney Corporation in order to protect Mickey Mouse (aka Steamboat Willie) from falling into the public domain in 1998. But rather than dig into the legislative history to discern whether the evidence and factual record supported a finding of sufficient incentives for more than the Disney Corporation, the Court traveled its usual path when concerning the rationality of ordinary economic legislation. It deferred to Congress, the relevant democratic body, saying "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."<sup>24</sup> This is a correct statement of law and history. And there was some evidence before Congress—albeit self-serving and exaggerated evidence—suggesting that the extension of copyright by twenty years would benefit authors and publishers and encourage both to invest in more creative work.<sup>25</sup> But even if there was no such evidence, the Court properly exercises deferential judicial review when it *presumes* the existence of such facts absent irrationality (such as prejudice) or the targeting of a suspect class (race or gender) or the burdening of a fundamental right, all of which would require closer scrutiny by the court.<sup>26</sup>

There was another complaint about *Eldred* aside from the absence of an apparent rational or evenhanded basis for the twenty-year extension. The Court's reasoning exposed the possibility of perpetual copyright protection which would violate the Constitution's "limited times" provision.<sup>27</sup> If Congress could extend by twenty years both existing and future copyrights on the self-serving statement of certain copyright owners given a voice in Congress, what prevents Congress from extending copyright indefinitely through a series of incremental extensions over time (which is precisely what has happened to copyright beginning with the first 1790 statute, which granted a fourteen year term).<sup>28</sup> To this, the Court had little to say except that what it (and Congress) were aiming for in its application to future and present copyright authors alike was "parity" and "evenhanded[ness]." Ignoring the perpetual copyright problem altogether (except to



say that perpetual is not limited), the Court justified its retroactive application of the longer copyright term with the force of the likes alike reasoning. This is as if to say: as long as Congress acts to promote equality in the copyright field, we trust their decision-making and, without more, these other issues do not concern us. Notably, Justice Breyer in his dissent accepts for the purposes of argument that “it is not ‘categorically beyond Congress’ authority’ to ‘exten[d] the duration of existing copyrights’ to achieve such parity.”<sup>29</sup>

One could understand Justice Ginsburg’s majority decision in *Eldred* as about recognizing and protecting the class of copyright holders (as opposed to the users of copyrighted works) that must be treated the same lest the formal equality principle be violated. Indeed, long-standing copyright law from 1903 prohibits discrimination among copyright holders, holding that “high” and “low” art are similarly situated with regard to the exclusive rights copyright law provides.<sup>30</sup> *Eldred* may therefore be simply an extension of this century-old anti-discrimination holding. Simply counting the amount of times the opinion uses words synonymous with “equality” reveals the Court’s focus on similar treatment. The first paragraph ends with the sentence, “Congress provided for application of the enlarged terms to existing and future copyrights *alike*.”<sup>31</sup> The third paragraph states again that “Congress placed existing and future copyrights *in parity*.”<sup>32</sup> It then concluded saying “[i]n prescribing that *alignment*, we hold, Congress acted within its authority.”<sup>33</sup> The opinion repeats the words “alike,” “parity,” and “alignment” or “aligned” nearly a dozen times. If we add references to “matches,” “equity,” “harmony,” “evenhandedly,” and “same[ness],” which also pepper the decision, a word cloud would form that proves the prominence of equal protection thinking in this copyright opinion.<sup>34</sup>

Other than linguistic choices, Ginsburg focused on the individual authors themselves and their expectations for equal legal treatment. She insisted throughout the opinion that current copyright holders are reasonable to expect they will be treated like future copyright holders should new legal benefits arise because that is what has always happened.<sup>35</sup> She also explained that Congress’ extension of copyright terms ensures the equal treatment of American authors to foreign authors under the Berne Convention.<sup>36</sup> Personalizing the equal treatment—its present expectation and its future effect globally—paints this case not about monetary incentives to create or disseminate creative work but about the dignity of equal treatment as a social value absent a good reason to deviate. In other words, although the decision reads as the classic deference to congressional decision-making under Congress’ plenary powers, Ginsburg’s opinion evoked her continuing mission of equal treatment for persons under the law. She, for the majority, could see no plausible reason to treat some copyright holders differently from others (be it current versus future copyright owners or American versus foreign copyright owners). This was in part because of the strength of the formal equality principle as a constitutional value. Unfortunately, it ignores the history of copyright legislation, its captured process subject to special interest lobbying, and the democratic principles of fair process and open institutions on which procedural fairness is based.

The tortured history of special interest copyright legislation is well-documented.<sup>37</sup> Jessica Litman’s book *Digital Copyright* explains how U.S. copyright legislative reform has almost always been the work of only the strong-copyright advocates: the big six movie studios (the “MPAA”), the music recording industry (the “RIAA”), and the text publishing industry (the Author’s Guild).<sup>38</sup> Litman argues that captured legislative process concerning copyright benefits

an elite group of copyright holders and harms the everyday audience of copyright users and creators. (In today's parlance we might call the beneficiaries of these legislative reforms "the one percent.") Litman warned that if the past legislative process is predictive of the future, digital copyright (the dominant form of expression today) will suffocate the constitutional mandate for "progress of science and the useful arts" that requires distribution and access to creative expression. Justice Stevens' dissent does not mention critical legislative history but does say that "congressional action under the Copyright/Patent Clause demonstrates that history ... does not provide the 'volume of logic,' necessary to sustain the ... [Act's] constitutionality."<sup>39</sup> Indeed, as both dissents explain, the formal equality logic appears to be a ruse benefitting the 2% of copyright holders whose estate may profit 50 years after the author's death from the extended copyright but for whom it is manifestly unlikely the extra years of copyright did or will incentivize the production or further dissemination of the creative work.<sup>40</sup>

In this light, the justification for reading into the Copyright Term Extension Act (CTEA) that "likes be treated alike" melts away. As it turns out, very few *people* actually supported the CTEA. It was a compromise struck by digital platform intermediaries building their commercial presence on the internet and content companies, such as the MPAA and the RIAA, whose copyright assets traveled farthest and fastest on those digital networks. In exchange for agreeing to the twenty year extension to the copyrights, the digital intermediaries received immunity for certain kinds of unauthorized uses on-line under a law passed later the same year called the Digital Millennium Copyright Act (the DMCA).

The motivation for record companies and music publishers was clear enough; the former wanted to reduce the number of illicit digital copies competing with their official recordings, and the latter wanted another source of licensing revenues. Technology companies supported the bill – not on principle, but because they wanted to design and sell their products without being sued.<sup>41</sup>

The result of a captured legislative process is copyright law that entrenches moneyed interests.<sup>42</sup> Far from treating people the same, the CTEA (and its sibling DMCA) was a backroom deal nonetheless justified by the Court as democratic and reflecting equal treatment. Justice Stevens' dissent is most vocal on this score, and Justice Breyer adopts the reasoning in full.

Justice Stevens' critique of the parity argument shifts focus of equal treatment from the class of "authors" (content owners) seeking to protect their copyright to the public for whom the Copyright Act was intended to ultimately benefit. "*Ex post facto* extensions of copyrights result in a gratuitous transfer for wealth from the public to authors, publishers and their successors in interest. Such retroactive extensions do not even arguably serve either the purposes of the Copyright/Patent Clause," which he explained is "to allow the public access to products of [author's creative activity] after the limited period of exclusive control has expired."<sup>43</sup> And later he says:

the reason for increasing the inducement to create something new simply does not apply to an already-created work. To the contrary, the equity argument actually provides strong support for petitioners. Members of the public were entitled to rely on a promised access to copyrighted or patented works at the expiration of the terms specified when the

exclusive privileges were granted. On the other hand, authors will receive the full benefit of the exclusive terms that were promised as an inducement to their creativity, and have no equitable claim to increased compensation for doing nothing more.<sup>44</sup>

Stevens unravels the majority's parity argument with an expanded focus on *all* the beneficiaries of the Copyright Act, demonstrating how formal equality logic can be easily manipulated by narrowing the relevant class of beneficiaries. Treating "likes alike" – "all" "authors" the same, in Ginsburg's argument – ignores all those others for whom copyright also exists as well as the flaws in democratic process that established the benefit. The "likes alike" argument structure thereby perpetuates the exclusion of a vast public who should be included within the Act's application of parity, or, as Breyer names them: "movie buffs and aging jazz fans, ... historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds ... who want to make the past accessible for their own use or for that of others."<sup>45</sup> The dissents' identification of flaws in the underlying procedural justification for the majority's formal equality rationale articulates additional values for IP's constitutional implementation in terms of a public and the public domain. The dissents reject the particular application of Aristotelian logic to this case by redrawing the lines of class membership and explicitly asking: to whom does or should the benefit of equal treatment apply in this case?

As the dissents explain, the category of "authors" to whom the twenty-year extension applies varies. Most (98%) would not materially benefit from the legislation. And future authors who rely on previous work on which to build are likely to be hindered by the extended monopoly. The dissents presage in 2003 how today, more than a fifteen years later, the category of authors to whom the equality principle should apply continues to grow and is undoubtedly more vast than the voices and interests represented in earlier hearings about which *Eldred* was concerned.<sup>46</sup> Authors are not only those who succeed at earning royalties in exchange for licensed use by established intermediaries (a very small class of authors to be sure!) but are everyday creators and users (or "prosumers" to borrow Alvin Toffler's coinage) who depend on access to expressive works in order to produce and participate in our dynamic and industrious culture.<sup>47</sup> As the dissents explain, the majority in *Eldred* failed to consider these other copyright stakeholders, despite basing its decision on the value of inclusivity. As it turns out, there is much to criticize about equality jurisprudence that mechanically recites the mantra of "treating likes alike" without investigating more deeply the categories and their qualities being compared.<sup>48</sup> (And Justice Ginsburg is no stranger to this critique given her role in gender and racial equality cases concerning accommodation and affirmative action.) The just application of formal equality principles often depends on carefully defining the category of membership and a starting line to which everyone has the same access. As discussed later, Supreme Court decisions about IP debate these other equality dimensions. But the debate between majority and dissent on these formal equality terms in *Eldred* helpfully illuminates the various stakes on which the argument about IP's appropriate structure and purpose proceeds.

*Eldred* was decided in 2003. Two years earlier, the Court decided a case about newspapers, digital aggregators, and journalists, *New York Times v. Tasini*, with the same 7-2 split (Breyer and Stevens also in dissent). And two years after *Eldred*, the Court decides *Grokster*, a case about intermediary liability and peer-to-peer file sharing, in an opinion fractured in reasoning (but unanimous in result) pitting Breyer against Ginsburg yet again. I discuss these

split decisions later in the context of the alternative substantive equality values they make salient. Meanwhile, other unanimous IP decisions issue from the Court that echo the formal equality modality of *Eldred's* majority, celebrating the value of evenhandedness without adequately justifying the classification system that animates it.

Of these IP cases, two stand out as developing themes of Aristotelian equality in other IP fields to justify the outcome, but nonetheless rest on shaky foundations for the distinctions they draw within those fields. *Wal-Mart Stores v. Samara Brothers* concerns trademark law and *J.E.M. Agricultural Supply v. Pioneer Hi-Bred International* is about patents. Let's take *Walmart* first.

*Walmart*, from 2000, concerns the look and feel of children's clothing as a particular branding choice made by Samara Brothers. Walmart hired a designer to copy Samara's designs and compete in the children's clothing market. Samara claimed trademark protection in the clothing designs, arguing that like the particular shapes of consumer goods such as beverage bottles or cell phones, the clothing design serves to designate the source of the good. As such, Walmart's close copy was confusing consumers thinking its clothing was made by Samara. The effect of the competition was to provide choice to consumers for fairly similar products. But Samara's argument was that the harm of the confusion, which amounts to a fraud on the consumers, outweighs any consumer benefit in the competitive pricing.

Writing for a unanimous court, Justice Scalia interprets the federal trademark law to require product designs like Samara's to prove they perform like trademarks in order to be protected. In other words, they must distinguish Samara's goods in the marketplace as Samara's and not someone else's. This is called "distinctiveness" in trademark parlance, and it can be difficult to prove with consumer evidence. Not all trademarks must prove distinctiveness, however, and whether this kind of trademark (trade dress product design) does have to prove it was part of the issue in the case. *Walmart's* unanimous ruling requiring proof of distinctiveness for product design would be unexceptional except nowhere in the statute does it single out trade dress product design as uniquely requiring proof of distinctiveness. Justice Scalia authors an opinion that imports that expensive and time-consuming requirement into federal law without evidence or legislative history, adding trade dress product design to the special category of color trademarks which also, since 1995, required proof of distinctiveness.

It seems to us that design, like color, is not inherently distinctive. ... Although words and packaging can serve subsidiary functions ... their predominant function remains source identification. Consumers are therefore predisposed to regard those symbols as indication of the producer, which is why such symbols 'almost automatically tell a customer that they refer to a brand and immediately ... signal a brand or product source. .... In the case of product design, as in the case of color, we think consumer predisposition to equate the feature with the source does not exist. Consumers are aware of the reality that, almost invariably, even the most unusual of product designs – such as a cocktail shaker shaped like a penguin – is intended not to identify the source but to render the product itself more useful or more appealing.<sup>49</sup>

This kind of line drawing by fiat – product design is like color for the purposes of trademark law

and unlike words marks or product packaging – is artificial and random. It also appears unmoored from lived experiences of consumers who shop and purchase relying on brand identity in all its diverse forms. The Court cites to its earlier cases as support for the relevance of the trademark categories it establishes, but until *Walmart* lawyers were unsure of their reach because the categories they made relevant are nowhere in the federal statute. The court was the only and ultimate line-drawer and yet the basis and scope of its line-drawing remained fuzzy. The Court’s determination of “like” and “unlike” drive the *Walmart* decision and attempt a refinement of the categories from earlier cases. But there is no obvious basis for distinguishing product design from all other kinds of trade dress and trade mark except because the Court says they are different. This is especially strange since the conservative Justice Scalia appears to be making an exception to his usual theory of strict statutory construction by reading language and categorical exceptions into the statute. Designating trade dress product design as “special” – like the unique case of color marks and unlike other forms of trade dress like product packaging (e.g., a wrapper or a box design) – functions as a *deus ex machina* in the decision’s story about how consumers behave.

To be sure, there are substantive equitable considerations at work in *Walmart*’s Aristotelian logic that Scalia mentions but doesn’t explicitly justify. The Court explains its burdensome rule as enabling competition among products and their design. When trade dress is harder to protect because protection comes at a cost, competition for the similar products may arise that benefits consumers who seek choice and lower prices. It is here where the Aristotelian logic reveals a substantive preference: consumers benefit from the burdensome rule for product manufacturers and trademark law should err on the side of openness when consumer interests are at stake. This is a happy thought, but it is by no means a rule on which lawyers or legislatures can rely when considering how disputes or application of laws will be resolved at the highest court. Notably, this reasoning resembles the *dissents* in *Eldred* debating the rationality of copyright’s extension by twenty years: when the argument may be at equipoise and the relevant categories on which to base the decision contested, interpretation and application of IP law should err on the side of public (not private) benefits.

The case of *J.E.M. Agricultural Supply v. Pioneer Hi-Bred International* from 2001 suffers from similarly unjustified line-drawing in the context of agricultural products and sustainable farming. It holds that newly developed plant seeds are patent-eligible, despite separate statutory protections for seeds through the Plant Patent Act (PPA) and the Plant Variety Protection Act (PVPA). The patenting of seeds raises substantial economic and social welfare issues. Prohibiting the reproduction of seeds by farmers given that reproduction is precisely what seeds naturally do interferes with agricultural production, farming economies, and century-old practices in which farmers expect to plant seeds and harvest them as seeds as well as their byproducts. The PPA limited the copying of seeds (by granting “certificates”) to plants reproduced asexually. And the PVPA exempts from its anti-copying protective scheme the saving and replanting of seed by farmers. These laws therefore were narrow in scope and did not interfere with age-old agricultural expectations and cost-savings by farmers. The question presented by *J.E.M.* was whether despite these plant-specific statutes granting a limited form of anti-copying protection for seed producers, a genetically modified seed could nonetheless be patented and protected under the general but stronger Patent Act.

The *J.E.M.* court concludes that seeds are not excepted from the Patent Act's coverage because of their inclusion in the other statutes and also that the Patent Act does not discriminate regarding subject matter. The Court (Justice Thomas writing for the majority) reminds us that section 101 of the Patent Act is capacious and non-discriminatory. He repeats the famous line from a 1980 decision that "anything under the sun made by man" can be patentable as long as they are not products of nature.<sup>50</sup> A patent can thus cover even a living seed as long as its inventive properties are human-made. Seeds may reproduce through natural process, but genetically modified seeds are not "products of nature." In dissent, Breyer complains that the PPA and PVPA are statutes that attest to seed's exceptionality as a commodity and thus to the law's special attention to how they will be protected, distributed, and marketed. Although these statutes don't explicitly displace the application of the Patent Act to seeds, why, Breyer asks, would the important exemptions for farmers exist therein if they could simply be avoided with a utility patent on the same agricultural product?<sup>51</sup> In other words, should the Patent Act treat plants differently from other useful, non-obvious and novel inventions? The majority says there is no difference between a plant and any other patentable invention as long as Act's standards are met, whereas the dissent declares that seeds are a unique category, unlike others the Patent Act covers, because of the role they serve in the national economy and subsidized agricultural production. The argument structure – are plants like or unlike other patentable inventions? – resembles the distinctions made in *Walmart* between trade dress product design and product packaging, and in *Eldred* between current or future authors: when formal equality structures the analysis, a justification for discrimination must exist. Treating similar groups the same is a moral default. Whether the sameness or the distinction is persuasive, however, usually depends on the evocation of additional and often implicitly evoked substantive values such as in the dissents of *Eldred* and in *Walmart* by the majority itself. Here, without evidence that seed patents are meaningfully different from other patents on living organisms (or on any other invention, for that matter), the majority was unwilling to "discriminate."

Fast-forward a decade, and we find the same application of hollow Aristotelian equality logic informing other controversial intellectual property decisions at the Supreme Court. *American Broadcasting Companies, Inc. v. Aereo* (2014) ("Aereo") and *Bowman v. Monsanto Co.* (2013) ("Bowman") exhibit this logic in full force.<sup>52</sup> The question in *Aereo* concerns the newest iteration of DVR technology. Aereo was a start-up tech company that sold a service allowing subscribers to watch television programs over the internet. Aereo's unique business model consisted of leasing antennae to subscribers who could then retransmit television broadcasts to their internet-enabled devices. A group of broadcasters, including CBS, NBC, ABC and Fox, sued the nascent Aereo for copyright infringement. Their argument was that Aereo was no different from a cable company – a redistribution channel for media to the public – and thus Aereo must pay a license to retransmit the content or be in violation of the copyright owner's exclusive right of public performance. Aereo, however, argued that its service is more akin to DVR and VCR technologies that record and play on command in the privacy of one's own home. Aereo claimed it was not "publicly" performing any of the content because each antenna transmitted content separately and uniquely to each subscriber when requested. It was a one-to-one transmission, like a private email between two people, and thus was not "public" at all, exempting it from payment.

The definitions in the Copyright Act of "publicly" and "perform" lack sufficient precision

to decide the case, and so the Court resorts to reasoning by analogy. How “like” a cable company is Aereo so that it should pay a public performance or retransmission license? How “different” from VCR and DVR manufacturers is Aereo such that it cannot find safe-harbor in the decisions and case law that exempts both technologies from infringement liability? Does Aereo merely manufacture and provide equipment that subscribers install and use, insulating Aereo from direct liability? If like a VCR, there is no recording or playback liability. Aereo’s antennae are just like a machine. Or is Aereo the next iteration of a cable provider without the cable infrastructure, enabling near simultaneous play and record for diverse selections of content? And if like cable, then there is a public performance for which royalties must be paid. And yet distinctions abound: Aereo doesn’t curate or create content, cable companies do. Aereo doesn’t constantly transmit as cable companies do. Aereo makes unique copies of content for each subscriber and saves each package separately; cable companies do not.

Nonetheless, the six-justice majority holds that Aereo is enough like a cable company to be publicly performing under the Copyright Act.

Having considered the details of Aereo’s practices, we find them highly similar to those of the [cable] systems in [prior cases]. And those are activities that the 1976 amendments [to the Copyright Act] sought to bring within [its] scope.... Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo’s activities outside the scope of the Act.<sup>53</sup>

To this, the dissent (authored by Scalia and joined by Alito and Thomas) charges the majority with accusing Aereo of being “guilt[y] by resemblance.” It goes on to list various ways Aereo is different from cable companies and why its “ad hoc rule for cable system lookalikes is so broad” rendering much of the majority’s reasoning “superfluous” and threatening the newest of digital content systems many take for granted (e.g., cloud computing, remote DVR storage, YouTube and Amazon).<sup>54</sup>

Vagaries of copyright law aside, the gist of the debate between the *Aereo* majority and dissent is evident. Treating likes alike makes good sense from the perspective of the fairness principle, and it is a baseline from which the rule of law proceeds. But its intelligibility depends entirely on whether the categories of “like” and “unlike” are clear and justifiable. From a predictive and logical standpoint, how is one to decide – indeed how is Aereo or any cutting-edge technology company to decide – whether its newest invention infringes when the relevant test is “am I more or less like a cable company”? Aristotelian equality that demands similar entities be treated the same simply does not compel consistency when relevant categories are subject to constant evolution. So what tips the balance here? The dissent exposes the nub of the issue in its conclusion:

I share the Court’s evident feeling that what Aereo is doing ... ought not to be allowed. But perhaps we need not distort the Copyright Act to forbid it. ... [W]hat we have before us must be considered a ‘loophole’ in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes. ...

We came within one vote of declaring the VCR contraband 30 years ago in [the *Sony v. Betamax* case]. The dissent in that case was driven in part by the plaintiffs' prediction that VCR technology would wreck all manner of havoc in the television and movie industries.

The Networks make similarly dire predictions about Aereo. We are told that nothing less than 'the very existence of broadcast television as we know it' is at stake. ... We are in no position to judge the validity of those self-interested claims or to foresee the path of future technological development. Hence, the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade.<sup>55</sup>

This conclusion is honest and revealing. It admits the underlying shared concern that Aereo is free-riding on broadcaster's content, whether or not prohibited by law. And it discloses the true disagreement between the majority and dissent, which is about who should fix the alleged injustice (courts or congress).

Formal equality analysis does not help resolve the dispute: why, exactly, is Aereo more like a cable company than a DVR? But it does unearth the central contention: who should pay for the benefit of content-on-demand: consumers, disruptive technologies, or incumbent intermediaries? To the tune of procedural fairness and "likes alike," the Supreme Court ruled against disruptive technologies and the diffuse consumer base and in favor of traditional broadcast companies and copyright owners, but the reasoning remains opaque. An interim ruling for Aereo would have kept content flowing and technology progressing, leaving Congress to react if broadcasters and content creators needed rescuing. A ruling on that basis would have temporarily immunized Aereo and allowed consumers to stream content freely. Either way, the court picks winners and losers, but the majority hides its preferences under the guise of equal treatment. Indeed, the majority's formal equality reasoning obscures its hierarchy of values (content providers over consumers, and incumbents over newcomers) whereas the dissent calls out another implicit hierarchy that is disturbed rather than affirmed: by rewriting the statute to plug a so-called "loophole," the majority disrupts the democratic default in our constitutional system replacing Congress' view with its own. We can criticize democracy for its failure to include relevant voices, but assuming inclusivity (which is what the court usually assumes absent proof of the contrary), democracy's "bad choices" are left to be worked out at further deliberative sessions. Federal judges (who are unelected and serve for life) claim to disdain second guessing democratic decision-making unless they are protecting fundamental rights or the law appears irrational on its face. In general, the wisdom of existing legislative line-drawing is left to the democratic process.

This last contention is worth more attention. Should courts worry about democratically enacted intellectual property laws that generate uneven distribution of resources that may lead to substantial wealth inequality? Certainly, an appeal to "equality," even formal Aristotelian equality, suggests that the application of intellectual property law should proceed with a measure of procedural fairness – a level playing field if not substantively even outcomes. In earlier cases



in which Justice Breyer dissented (*Eldred* and *J.E.M.*), he injected into the majority's formal equality analysis a substantive equality rationale that emphasized consumer and public domain interests justifying a deviation from the "likes alike" logic. But in *Aereo*, Justice Breyer writes the opinion on sameness grounds, despite predictable consumer harms that follow from the ruling.

Breyer's capitulation to the likes alike reasoning in *Aereo*, despite its disparate impact on start-ups and consumer welfare, may have been expected given his similar reasoning in the case of *Bowman v. Monsanto* in 2013. This case is a direct descendant of *J.E.M.*, mentioned already. Like *J.E.M.*, *Bowman* concerns patented seeds and their patent protection interfering with farmers' long-standing practice of saving seeds that result from a harvest of a first planting with the purchased patented seeds. Farmer Bowman's argument was that because he bought the seeds, admittedly patented, he has the right to use them as seeds (plant them and use their by-products, be they a soy crop or more seeds) the same way someone who buys a golf club or a cell phone with patented components can use the club or phone or re-sell either without liability to the patent holders. This is called the "exhaustion" doctrine in patent law (it exists as the "first sale" doctrine in copyright law as well), terminating or "exhausting" the patentee's right to control use and sale of the product after a lawful first sale that transfers the product and the right to use and resell to the purchaser.<sup>56</sup> Despite this longstanding limitation on the patent-holder's rights, Breyer joins the unanimous opinion holding that patented seeds once purchased, planted, and cultivated in part as seeds (and not entirely as crops) cannot be replanted even though they were lawfully purchased and owned by farmers. What could explain his change of heart? Has formal equality won over substantive outcomes, or are there new justifications for treating genetically-modified seeds like all other patented inventions?

*Bowman's* reasoning follows from *J.E.M.* and repeats the "seeds are not special" argument to the farmer's disadvantage. The farmer argued that cultivating seeds for the crop they produce or for the seeds they regenerate is a typical use of the seed, and thus the "copying" of the seed is not an unlawful reproduction but a lawful use of the seed as such. But the Court (and Monsanto) argued that whereas the farmer can use the lawfully purchased seed (by planting it) and can sell the lawfully purchased seed (instead of planting it), the farmer cannot plant the lawfully purchased seed to reproduce seed (instead of purchasing more seed). In other words, the right of use and resale may be exhausted by the lawful purchase of the seed, but the right to make copies of the seed to sell as seed remains with the patent holder, Monsanto. Justice Kagan, writing for the Court, reiterates the position from *J.E.M.* that seeds are not special, despite their self-replicating capacity and even if in this instance seed is used in a way unique to seeds. She turns around the formal equality argument suggesting that it is *Farmer Bowman* who is looking for an exception as a farmer, not Monsanto as a seed-patent holder. "It is really Bowman [the farmer] who is asking for an unprecedented exception – to what he concedes is the 'well settled' rule that 'the exhaustion doctrine does not extend to the right to make a new product.'"<sup>57</sup> This turn around demonstrates how slippery the formal equality argument can be when the justification of its outcome depends on the originating categories compared. Were seeds declared to be unlike golf clubs precisely because seeds naturally self-replicate and golf clubs do not, treating seeds unlike other patented objects (e.g., subject to a broader exhaustion principle) would make sense. Instead, the unanimous court says seeds are not special – they are enough like golf clubs – leaving this particular puzzle of what to do with the class of objects that naturally self-replicate

(e.g., plants or computer programs) for another day:

“Our holding today is limited to addressing the situation before us, rather than every one involving a self-replicating product. We recognize that such inventions are becoming ever more prevalent, complex and diverse. In another case, the article’s self-replication might occur outside the purchaser’s control. Or it might be a necessary but incidental step in using the item for another purpose. We need not address here where or how the doctrine of patent exhaustion would apply in such circumstances.”<sup>58</sup>

In other words, the formal equality argument in *Bowman* is limited to the special case of seeds (although they are not special) and is confined to its facts. (This resembles the reasoning in *Aereo* which also was not special and enough like cable (and unlike VCRs) that copyright payment was required.) In *Bowman*, patented seeds sold under these conditions are like other patented articles subject to the traditional rule that exhaustion applies only to distribution not reproduction. They are not a distinct category in need of exceptions to this patent rule. There is no dissent in this case to push against its formalistic logic that begs a critique of the original “like” categories in the first place (seeds and other patented products). And, one wonders what happened to Breyer’s critique from a decade earlier that indeed seeds are special. As we will see, his resistance to the alleged expansion or strengthening of IP ownership rights under certain circumstances will continue. But before turning to those instances in the second part of this chapter, another case in this formal equality category bears mentioning for its bridge to the different equality variables at issue in there.

*B&B Hardware v. Hargis Industries* (2015) considers the optimal dispute-resolution forum for deciding certain trademark issues. The choices presented were between the Patent and Trademark Office (an administrative agency charged with specialized jurisdiction) and a federal district court (a trial court with general federal jurisdiction). The specific issue presented was when the Patent and Trademark Office (the PTO) decides an issue whether re-litigation of the issue in the federal district court should be “precluded.” Justice Alito, for the majority, writes that “there is no categorical reason to doubt the quality, extensiveness, or fairness of the agency’s procedures. In large part they are exactly the same as in federal court.”<sup>59</sup> Thus despite certain specialized rules applying specifically to IP, general rules of federal civil procedure that result in issue preclusion for reasons of efficiency and predictability should apply here. There is more than a hint of the antidiscrimination impulse underlying the opinion’s reasoning: “It is incredible to think that a district court’s adjudication of particular usages would not have preclusive effect in another district court,” the Court says in conclusion. “Why would unchallenged TTAB [PTO] decisions be different?”<sup>60</sup> Justice Thomas’ dissent critiques this reasoning while accepting the argument structure and its underlying values. He simply disagrees that the two fora are substantially equivalent. “However broadly ‘court of competent jurisdiction’ was defined, it would require quite a leap to say that the concept encompasses administrative agencies, which were recognized as categorically different from courts. . . . This distinction stems from the Constitution itself, which vests the ‘judicial Power’ not in administrative agencies, but in federal courts, whose independence is safeguarded by certain constitutional requirements.”<sup>61</sup>

The debate between the majority and dissent in *B&B Hardware* is not about whether preclusion should apply to intellectual property disputes – of course it should – but whether the

forum that litigated the issue first is enough “like” the subsequent forum in which the parties now find themselves. On the surface is a disagreement about competence and fairness: Are the two fora enough the same in terms of access and procedure? Do they adequately provide the parties similar opportunities to debate the issues? But hiding underneath these procedural fairness questions lurks the specter of hierarchy. The majority (with Ginsburg providing a critical concurrence underscoring the limited holding to only those cases in which identity of circumstance is present) renounces forum ranking. It says the PTO can adjudicate this issue just as thoroughly and fairly as a district court. One is not better than the other, and thus the later forum will defer to the first one. The dissent, by contrast, elevates the Article III court to preeminence with regard to deciding the critical issue of “likelihood of confusion,” the primary harm that trademark law aims to prevent. It does so on the basis of constitutional structure, historical evidence, and the special nature of the right, which Justice Thomas describes as a “quasi-property” right that “has been long recognized by the common law and the chancery courts of England.”<sup>62</sup> He says “depriv[ing] a trademark holder of the opportunity to have a core private right adjudicated in an Article III court ... raises serious questions ... [concerning] separation of powers.”<sup>63</sup> The right is so fundamental, according to the dissent, that it requires a federal court to adjudicate its contours, and thus strongly implies the superiority of the court over the agency in this instance.

It is not often the Aristotelian equality formula so obviously exposes a value hierarchy, but the justices in *B&B Hardware* do not hide the basis of their disagreement. Often, differences distinguishing categorical placement (product design versus packaging, seeds versus other patentable articles) are described as just that: differences in kind not of status. In my view, these cases still need rigorous justification for their categorical kinds given the unequal outcomes that result from their application ignoring critical and diffuse stakeholders in the IP system. But these formal equality cases debating proper categorization are unlike the disputes in *Eldred* and *Aereo*, which overtly designate winners (property holders) and losers (those who have to pay for access to property) on the basis of Aristotelian logic that assumes the virtue (and “difference”) of the property classification in the first place. This circumvents substantive equality problems because, apparently, property rights trump everything else. Chapter Three discusses the problem of substantive equality (distributive justice) in more detail, reviving the dissent in *Eldred* and explaining its more radical application along a range of cases and circumstances. Below, I discuss IP cases that apply an intermediate and less formalistic equality critique. These cases expose Aristotelian logic for the injustice of the status hierarchies it may propagate. These cases do not go as far as to call for a redistribution of wealth or access to it as a matter of IP law’s concern with progress as distributive justice. And like the cases above, these cases critiquing IP law for its reproduction of hierarchy or caste may also fail to consider other variables fundamental to equality reasoning, such as market conditions, institutional constraints, baseline resource allocation, and a stable, robust public domain. But their equality analysis nonetheless illuminates certain other values as a matter of federal common law that inevitably reflects cultural debates about forms of injustice and solutions to the same.

## B. Anti-Hierarchy, Anti-Caste: A Rejection of Dominance and the Idealization of Consent

As a governing principle of legal reasoning, treating likes alike seems intrinsically valuable. With slippery line drawing and unstable categories, however, the significance of equality appears deficient. What does “equality” mean if sameness or difference can be fashioned with shifting characteristics, *e.g.* like or unlike cable (*Aereo*), present and future authors (*Eldred*)? Instead of relying on categories to compare, assuming their relevance and abjuring their underlying assumptions or consequences, some Supreme Court IP cases from the past decade revolve around precisely identifying the harm arising from drawing distinctions and not whether meaningful distinctions exist in the first place.

These cases describe one form of harm as that of status hierarchies. When differences in IP rights or limitations are stigmatic markers of inferiority, Supreme Court justices reject a utilitarian analysis of property rights as incentives and justify their critique of the particular property arrangement in terms of the humiliation and shame differences perpetuate. Relatedly, justices describe the harm of hierarchy or caste in terms of its opposite: the abolition of dominance and undue influence over people and entities to achieve transactional and relational freedoms within or beside the marketplace. This kind of equality celebrates (if not also idealizes) choice and consent, assuming an inherent good in a legal application that buttresses both. Intellectual property can augment as well as limit choice; it can be a chit to trade or a threat that forces forbearance or action. When “difference” perpetuates caste-like conditions or unfreedom, and when intellectual property law is the engine of that difference, Supreme Court cases import anti-subordination equality values into its evaluation and interpretation of intellectual property law.

The 2012 decision of *Golan v. Holder*<sup>64</sup> exemplifies this sort of reasoning. *Golan v. Holder* upholds as constitutional section 104A of the U.S. Copyright Act, added in 1994 as part of Congress’ accession to the international treaty called the Berne Convention for the Protection of Literary and Artistic Works (Berne). Section 104A grants copyright protection to certain preexisting works of Berne member countries previously in the public domain in the U.S. These foreign works lacked U.S. copyright protection and were in the public domain because either the U.S. did not protect works from that country at the time of their publication, or because the authors of those works failed to comply with U.S. statutory requirements in place at the time. Section 104A’s effect was to withdraw hundreds of thousands of works from the U.S. public domain—works such as Prokofiev’s “Peter and the Wolf” and Edward Munch’s painting “The Scream”—and bring them under U.S. copyright protection for the remaining portion of their exclusive term.

Many advocates considered section 104A’s effective shrinking of the public domain—on which innumerable people relied for education, entertainment, and commerce—a First Amendment violation and beyond Congress’ power under the intellectual property clause. The petitioners in *Golan* argued that “[r]emoving works from the public domain . . . violates the ‘limited [t]imes’ restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires.”<sup>65</sup> This shrinking of the public domain presented unorthodox challenges to free speech protections previously unaddressed by copyright law. Those opposed to section 104A drew on the Supreme Court’s statement a decade earlier in *Eldred*, that altering the “traditional contours of copyright protection” warrants heightened scrutiny under the First Amendment.<sup>66</sup> Heightened scrutiny means a court demands more than a

rational justification for the law. Democratic deference is not the rule. In other words, the *Golan* petitioners learned their lesson from the *Eldred* court’s submissiveness to congressional line-drawing. If the Court defers only to Congress’s *ordinary* extensions of copyright terms, Petitioners must show how 104A is no ordinary legislation but instead interferes with a fundamental right, such as free speech. If so, Congress would have to justify the amendment’s harm with a more rigorous record of its purported benefits to creative production and dissemination, a challenge the petitioners thought Congress could not meet.

But Petitioners were wrong. In *Golan*, as in *Eldred*, Justice Ginsburg imports equality jurisprudence into her analysis of copyright law upending a usual economic analysis on which IP law usually proceeds. She begins the decision with familiar language about “sameness” and “reciprocity,” stating that Section 104A gave to foreign works “the same full term of protection available to U.S. works”<sup>67</sup> because “[m]embers of the Berne Union agree to treat authors from other member countries as well as they treat their own.”<sup>68</sup> Ginsburg, for the majority, sees the United States’ acquiescence to Berne as a “reciproc[at]ion with respect to . . . authors’ works.”<sup>69</sup> The Court considers the laudable effect of section 104A, despite its diminution of the public domain, as a “restoration plac[ing] foreign works on an equal footing with their U.S. counterparts.”<sup>70</sup>

But the *Golan* decision goes beyond Aristotelian formal equality—treating likes alike—and justifies its reasoning with reliance on an anti-subordination principle. The anti-subordination principle is sometimes understood as competing with anti-classification (or formal) equality.<sup>71</sup> Commitment to anti-subordination reflects a belief that certain distinctions reproduce or enforce inferior social status, especially of historically oppressed people. As Reva Siegel and Jack Balkin write, “[a]ntisubordination theori[es] contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”<sup>72</sup> The anti-subordination rationale, in contrast to the anti-classification or neutrality principle, allows—and even encourages—the government to prefer or benefit some groups over others to remedy past conditions of subordination or deprivation. Rather than relying on concepts of “sameness” and “difference” for which relevant differences justify different treatment, an anti-subordination rationale excoriates the existence and perpetuation of hierarchy that reinforce both privilege and stigma through either sameness or difference.

Consider the case of gender inequality. Under the formal equality model, women and men are the “same” and must always be judged by the same criteria, for example when applying for jobs.<sup>73</sup> Conversely, they may also be “different” and thus need not be treated the same, for example when assessing leave after a child is born.<sup>74</sup> Neither approach considers how gender as a social category structures power in relationships—opportunities providing for and access to social, political and economic benefits on the basis of sex.<sup>75</sup> Job criteria may be the same, but women may nonetheless be disadvantaged because of access to opportunities that prepare them for the job market. And providing more leave for women after child birth may make sense from a physical disability perspective but not if the goal is to encourage equal parenting so women and men have similar opportunities to return to and advance at work. “Same” or “different” treatment without regard to considering existing gendered stratification simply reproduces

inequality at the hands of power wielded by male-dominated institutions (the paid workforce) at the expense of women. An anti-subordination approach to gender inequality identifies the power relations instantiated in the labels “male” and “female,” and asks whether the maintenance of the labels “participates in the systemic social deprivation of one sex because of sex.”<sup>76</sup> As Catherine MacKinnon has written regarding this form of equality theory:

The only question [for equality] . . . is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status . . . . The social problem addressed is not the failure to ignore woman’s essential sameness with man, but the recognition of womanhood to women’s comparative disadvantage.<sup>77</sup>

What does this have to do with the *Golan* decision and copyright law? As literary historians and copyright scholars recount, the U.S. copyright system was rigged against foreign authors from its earliest days on behalf of the American publishing industry.<sup>78</sup> Foreign authors were disadvantaged as compared to domestic authors regarding copyright. U.S. copyright was riddled with technical traps unfamiliar to foreign authors. U.S. copyright law in large part failed to protect foreign authors (who first published overseas and) who sought to publish and sell their works in the United States. This led to profound imbalances in the U.S. in the relative cost of works by foreign and domestic authors; foreign works were cheap to publish because copyright licenses were not required. Thus, purposeful market asymmetries skewed the perceived value of, and access to, foreign and domestic works. Section 104A was enacted by Congress to remedy those imbalances. It was enacted, according to Ginsburg’s majority opinion, as affirmative action to undo or reverse the harm caused by decades of market deprivation for foreign authors and overseas copyright holders.

According to the *Golan* majority, fixing the anti-foreign bias in the U.S. copyright system by giving formerly deprived authors a benefit U.S. authors do not receive is justified by twin benefits: international harmonization assures better treatment to U.S. authors abroad and it remedies the loss of copyright to foreign authors by restoring their exclusive rights in the U.S. Section 104A did in fact harmonize the U.S. copyright regime by placing foreign works in the position they would have occupied if the current U.S. regime had been in effect when those works were created and first published. As the Court states, “[a]uthors once deprived of protection are spared the continuing effects of that initial deprivation; [section 104A] gives them nothing more than the benefit of their labors during whatever time remains before the normal copyright term expires.”<sup>79</sup> Restoring works to the “position they would have occupied” and “spar[ing]” authors any further “deprivation” unmistakably resonates with the language of affirmative action and remedying past unjust discrimination.<sup>80</sup> Indeed, in a footnote, Ginsburg’s opinion goes farther to accuse the unreformed copyright law (and Justice Breyer’s dissent) of American exceptionalism and isolationism, a critique resonating with concerns of cultural dominance (status and stigma) that animate anti-subordination equality theory.<sup>81</sup>

The *Golan* majority further argues that restoration of copyright and a focused shrinking of the public domain is a modest reform. Far from making foreign authors whole (it does not add all the years they lost), it raises those “deprived” foreign authors to the current status of the U.S. authors.<sup>82</sup> Like the affirmative action doctrine in the gender or race context, the bestowed

“benefit” on the select class—here, copyright of foreign works whose protection was stripped or lost under the older regime—is something that should have previously been conferred, but was otherwise unlawfully or wrongfully withheld. The wrong was the denial of copyright to foreign authors not because they failed standards of merit or creativity but to benefit U.S. authors by providing them with market leverage. Foreign authors were unrepresented in the U.S. legislative process and thus their denial of copyright that enriched the purse of U.S. authors without any obvious connection to copyright law’s goals of promoting the creation and dissemination of creative work smacks of abuse of power.

Of course, there were benefits to the deluge of uncopyrighted works by foreign authors into the U.S. public domain. Those works could be disseminated without license, making them cheaper and more available to readers. Some say this fact alone explains the prevalence of the modernist authors from Europe in the U.S. public school curricula for much of the 20<sup>th</sup> century.<sup>83</sup> Breyer’s dissent in *Golan* develops this theme, focusing on the public domain’s indispensability to education and national culture.<sup>84</sup> He also critiques as unfounded and irrational the majority’s argument that the remediation of the lost copyright and harmonization of both foreign and domestic rights “promotes the diffusion of knowledge” (a copyright goal) by incentivizing the republication and restoration of those works “lost” to the public domain.<sup>85</sup>

The *Golan* majority decisively rejects the benefits of the U.S. protectionist regime because equality is worth the costs to users, analogizing to a well-understood equality harm of pay discrimination:

The question here . . . is whether would-be users must pay for their desired use of the author’s expression, or else limit their exploitation to “fair use” of that work. Prokofiev’s *Peter and the Wolf* could once be performed free of charge; after §514 [Section 104A] the right to perform it must be obtained in the marketplace. This is the same marketplace, of course, that exists for the music of Prokofiev’s U.S. contemporaries: works of Copland and Bernstein, for example, that enjoy copyright protection, but nevertheless appear regularly in the programs of U.S. concertgoers.<sup>86</sup>

This retort by Ginsburg and the majority resonates with the rhetoric of “equal pay for equal work,” the slogan used for the Equal Pay Act of 1963 that continues to be marshaled in support of the Paycheck Fairness Act, which was first introduced in 1997 and has been re-introduced every two years since but never passed.<sup>87</sup> On the surface, Ginsburg reasoning makes sense: why value Copland’s work higher than Prokofiev’s? If there is no difference between the works by copyright standards, we may assume irrational or invidious discrimination. Ginsburg sees a xenophobic and U.S.-centric practice that purposely devalues and excludes foreign works to enrich national authors. To her, there is no good justification for the stigmatic and material harm arising from this scheme.

But contrary to equal pay laws, which have no losers except the employers for whom antidiscrimination policies may be expensive, the dissent in *Golan* argues that section 104A causes real harm to a diffuse and vulnerable public. Those who rely on the stability and existence of public domain material, such as educators, researchers, fledgling artists and authors, are now

forced to pay where they had not previously. Moreover, the *Golan* majority and dissent dispute the relevance and importance of the public domain to cultural production, expressive freedoms and community development. The dissent claims the public domain is a resource relied upon as of right with constitutional importance<sup>88</sup> but Ginsburg's majority describes it as unowned and thus less protected or important than personal property.<sup>89</sup> We may believe that the U.S. publishing industry's "piracy" of European works shaped the American public domain and literary culture and this alone justifies the "subordination" of foreign authors to U.S. authors. But there is another way to consider the outcome: without the "burden" of copyright protection, foreign authors such as James Joyce, Ezra Pound, Djuna Barnes and even Gilbert and Sullivan evaded U.S. government censors and enriched their the celebrity through lower prices and saturated markets.<sup>90</sup> Many of these works were intellectually challenging or even obtuse to the American readership. Their prevalence in the marketplace given their affordability and lack of regulation very likely facilitated their widespread acceptance and celebration.

*Golan*'s anti-subordination emphasis does not reduce copyright issues to mere economic incentives, although it includes in its arguments nods to that rationale as well. Ginsburg's equal pay argument is laudable in the context of pay discrimination cases in which similarly situated workers are paid less because of irrelevant differences (such as gender or race). But in the copyright context it speaks past the dissent's concern that the public domain baseline remain constant or growing and that shrinking the public domain thwarts copyright's goals of "progress" as creative production and dissemination. Ginsburg alleges a financial benefit exists for authors whose copyright revives under 104A that may encourage their further publication and dissemination of those works. To the dissent and many commentators, this position is laughable. For the most part, works not under copyright disseminate freely and are accessible.<sup>91</sup> Work once in the public domain and now under copyright due to *Golan* may be stalled from dissemination and republication precisely because permission is required and may be expensive.

*Golan*'s unconvincing reliance on the financial benefit of exclusive dissemination to justify for foreign copyright restoration under 104A belies the majority's true focus, which is the dignity deprived European authors by being excluded from the legal regime of authorial control.<sup>92</sup> Foreign authors who lacked U.S. copyright and sought to be published in the U.S. with some hope of copyright-like revenue had to devise creative business solutions. Some issued alternative versions of their work so "first publication" of this "new" work would be in the U.S. after the technical provisions of the law were learned.<sup>93</sup> Others struck precarious publishing deals on a handshake without the enforceability of law. These additional hurdles required for foreign authors simply to participate in the same market as U.S. authors was insulting and degrading. Working twice as hard for less control or pay is a professional affront in other contexts (such as gender or race discrimination situations). Indeed, authors such James Joyce, Ezra Pound, and T.S. Eliot were vocal and organized on the issue of the unfairness of U.S. copyright law to non-U.S. authors and fought the system to control the form and manner in which their work was published and disseminated in the U.S.<sup>94</sup> These and other authors signed Joyce's "protest"<sup>95</sup> "deploring the inadequacy of American copyright law and blaming the 'pirates' for taking advantage of it."<sup>96</sup> Ginsburg's majority decision in *Golan* echoes these sentiments without dwelling on the literary characters or history and draws on the more general characterization of the dignity harms authors experience within this international field of copyright.



In other contexts, the harm of anti-subordination is obvious. Women who cook do so as wives and mothers without pay, men who cook do so as chefs to fame and fortune. Men are doctors and women are nurses, where the former is high paying and provides more autonomy and prestige.<sup>97</sup> There is nothing inherently “beneath” a person to do laundry and change bed linen – it is likely the vast majority of us do it – but those who over centuries have done it for others are perceived to be part of an underclass as maids, servants or even slaves.

The evil involved in such arrangements is a comparative one: what is objectionable is being marked as inferior to others in a demeaning way. ... [I]t is not the tasks themselves that members of lower casts are assigned to perform that are demeaning – they may be necessary tasks that someone has to perform in any society. The problem is that they are seen as beneath those in higher castes. The remedy in such cases is to abolish the social system that defines and upholds such distinctions between superior and inferior.<sup>98</sup>

The identity and status of “author” is subject to the same structural analysis: when are authors valued as “authors” under copyright and when are they excluded despite doing the same work as legal authors? The *Golan* majority and other Supreme Court opinions from the recent past appear to draw on this equality critique, identifying unjust hierarchies in the distribution of IP benefits and burdens anchored in status and subordination. Their underlying effect is to elevate the status of authorship to include more within that category while reinforcing its privileges.

The 2014 case of *Petrella v. Metro-Goldwin Mayer* appears to be a straightforward dispute about Ms. Petrella missing a statute of limitations and letting lapse her hopeful claim of copyright infringement. Ms. Petrella inherited from her father the copyright in the screenplay for *Raging Bull*, made into a 1980 blockbuster movie starring Robert DeNiro and directed by Martin Scorsese. Although her father transferred the copyright to MGM in 1976, after his death the copyright (and the assignment to MGM) reverted to Ms. Petrella as the sole heir. In 1991, Petrella learned that MGM was exploiting her copyright without permission and in 1998 put them on notice that she expected to be paid. MGM disputed the claim and the parties ceased negotiating. Ms. Petrella eventually sued MGM for copyright infringement in 2009, eleven years later.

The majority and dissent in *Petrella* dispute the justice of Ms. Petrella waiting so long to sue MGM for its continual exploitation of the film *Raging Bull*. Copyright law has a three-year statute of limitations, which commences upon notice of infringement. Petrella admittedly waited to sue MGM until the film was earning substantial revenue, making a lawsuit that can look back to the previous three years of infringement worth the time and money. The dissent (written by Breyer and joined by Chief Justice Roberts and Justice Kennedy) considers this kind of “wait and see” approach to copyright litigation stifling of the production and dissemination of works, which undermines copyright law’s progress goal. As such, defendants should be able to plead “laches” – a waived claim based on unreasonable delay – especially when a defendant suffers prejudice due to time passed. A majority of the Court disagrees, holding the laches unavailable to copyright defendants because of the clear three-year statute of limitations in the Copyright Act. Both sides debate the equitable issues: who is hurt more or less by the ability to “wait and see?” There is no clear answer to this question as the split 6-3 court demonstrates. And so what tips the

balance? For the majority, at least according to its language and emphasis, it is the importance of authorial control and balancing the scales when it is likely that authors unwittingly struck a poor bargain at the outset. The flexibility to choose the time of suit returns some power and financial benefits to vulnerable authors, as if righting an earlier wrong.

Scratch the surface and *Petrella* (also written by Ginsburg) subtly picks up the mantle of *Golan v. Holder*, strengthening the status of authors and their control over their works in view of a past when authors may have been taken advantage of or made decisions under duress. The *Petrella* majority talks back to the 2007 case of *Ledbetter v. Goodyear Tire & Rubber*, a case in which Ginsburg dissented because it denied a pay-disparity claim based on on-going discrimination to a woman who failed to bring the claim “in time.”<sup>99</sup> Ginsburg dissented in *Ledbetter* arguing that the discrimination claim did not accrue until the injured plaintiff could know of the unequal treatment, which likely was years after her first paycheck. And, more importantly, Ginsburg argued that each act of unequal pay was a continuing wrong that extended and refreshed the statute of limitations of the discriminatory act. Comparing the injury to a “hostile work environment,” she wrote in *Ledbetter* “[i]t does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”<sup>100</sup> Similarly in *Petrella*, but this time in majority, Ginsburg defends the plaintiff *Petrella*’s eighteen-year delay in bringing her copyright case because like the discrimination in *Ledbetter*, the copyright infringement is ongoing and occurs within the three-year statute of limitations. Moreover, her status as copyright owner (an author’s heir) provides the privilege of choosing when to sue within the long copyright duration. Narrowing her right to sue to the first three years after the initial infringement unjustifiably strips that privilege, belittling the harm she experiences at the ongoing infringement and reducing her choice and control over the copyrighted work, which is hers for several more decades.

The language of choice and control as both dignitary and remedial strongly inflects the majority opinion. “It is hardly incumbent on copyright owners ... to challenge each and every actionable infringement,” Ginsburg writes.

There is nothing untoward about waiting to see whether an infringer’s exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it. ... If the rule were as MGM urges, ‘sue soon, or forever hold your peace,’ copyright owners would have to mount a federal case fast to stop seemingly innocuous infringements lest those infringements eventually grow in magnitude. Section 507(b)’s three-year limitations period, however, ... allows a copyright owner to defer suit until she can estimate whether litigation is worth the candle.<sup>101</sup>

Ginsburg describes the plaintiff in this case as a typical author who eventually becomes savvy and strategic and the Copyright Act as an expedient statute aimed to advantage the author in business and to make up for the defendant’s exploitation or unfair advantage. The author is simply exercising her prerogative provided by the Copyright Act. This resembles the plaintiff in *Ledbetter*, whose claim “rested not on one particular paycheck, but on ‘the cumulative effect of individual acts.’” Eventually, *Ledbetter*, like *Petrella*, could

charge[] insidious [injury] building up slowly but steadily.... Initially in line with the salaries of men performing substantially the same work, Ledbetter's salary fell 15 to 40 percent behind her male counterparts only after successive evaluations and percentage-based pay adjustments. Over time ... the repetition of pay decisions undervaluing her work gave rise to the current discrimination of which she complained. Though component acts fell outside the charge-filing period, with each new paycheck, Goodyear contributed incrementally to the accumulating harm.<sup>102</sup>

Ginsburg draws explicit comparisons between Petrella and Ledbetter and aims to remedy their respective injuries of exploitation and deprivation with a lenient reading of the statute of limitations that celebrates the plaintiff's choice and control to optimize filing suit.

Underlying the injustice to be remedied in this case is an understanding that first-time transactions for creative works usually undervalue them. Petrella's father made an easy bargain with MGM initially. A new bargain today, when the copyright is still in force, would be much more lucrative for the copyright owner. Ginsburg reminds the reader that part of the Copyright Act was to "provide for reversionary renewal rights exercisable by an author's heirs," describing the claw-back provision in the statute that gives authors and author's heirs "a second chance to obtain fair remuneration."<sup>103</sup> Congress did this despite being "aware that the passage of time and the author's death could cause a loss or dilution of evidence" often necessary for defendants to renegotiate a beneficial deal or protect themselves in a lawsuit.<sup>104</sup> This is a typical story about authors and publishers: first time deals undervalue the work because authors are so anxious to be published and publishers can claim first-time publication is a risky investment. But copyright law's claw-back provision allows authors several decades later to renegotiate all of those first deals in light of the changed circumstances and passage of time, should they wish. Publishers get the benefit of the first several decades at a low price for the copyrighted work and authors (or heirs) many years hence, should the market for their work increase, have the chance to cash in on the increased value of their work. This is the balance struck in the Copyright Act. Ginsburg and the majority says that this rationale and its authorial benefits— a second bite at the apple and ultimate control over the lifetime of their work — should extend to the statute of limitations context. Barring Petrella relief in this context when she was assessing and waiting would give MGM a "cost free license to exploit Raging Bull throughout the long term of the copyright."<sup>105</sup> The Copyright Act should be interpreted to avoid this windfall to MGM.

Petrella notified MGM of her copyright claims before MGM invested millions of dollars in creating a new edition of Raging Bull. And the equitable relief Petrella seeks — e.g. disgorgement of unjust gains and an injunction against future infringement — would not result in 'total destruction' of the film... MGM released Raging Bull more than three decades ago and has marketed it continuously since then. Allowing Petrella's suit to go forward will put at risk only a fraction of the income MGM has earned during that period and will work no unjust hardship on innocent third parties, such as consumers who have purchased copies of Raging Bull.<sup>106</sup>

The majority values the flexibility the Copyright Act provides authors. It thus interprets the statute as maximizing those choices and tactics because, as we will see even more clearly with

the next case, the Court worries that authors are in fact not in equal bargaining positions with regard to business transactions, publishers or other intermediaries who exploit authors' situational weaknesses. The Court suggests the Copyright Act should be interpreted to rectify those imbalances and to reverse, impede or remediate the adverse action of publishers against of authors. This anti-dominance or anti-subordination rationale for particular interpretations and applications of the Copyright Act arises when the statute is ambiguous and the Court imposes upon the statutory language its particular views of relationships between authors and intermediaries. Often lost in these debates, however, is the copyright goal of "progress" through production and dissemination of creative works to the public, which the next dispute highlights.

The first sentence of *New York Times v. Tasini* (2001) declares the case about "the rights of freelance authors and a presumptive privilege of their publishers." Doing so, it foregrounds the notion of "privilege" – a right inherent in authorship to control reproduction and dissemination of their work – which may be transferred to publishers under specific conditions. The term *privilege* dates from before the first "copyrights" in England, when they were instead called "privileges" granted by the Crown to printers and booksellers to copy and vend books.<sup>107</sup> Justice Ginsburg resurrects this language here, not only because it is included in the ambiguous statutory section to be interpreted issue, because it elides author's rights with the unified and powerful status of the monarch.

At issue in *Tasini* is whether freelance writers when granting publishing rights to newspapers and periodicals also granted the right to republish the newspaper and periodical in an electronic database such as Lexis/Nexis. Section 201(c) of the Copyright Act extends the transfer of copyright to the publisher of a collective work to "any revision of that collective work, and any later collective work in the same series." The dispute concerns whether an electronic database counts as "any revision" because it does not always preserve the original form of the newspaper. Within databases such as Lexis/Nexis, news articles are identified, read, and distributed in isolation from their placement in the original collective work.

The Court majority (again authored by Ginsburg) reads Section 201(c) narrowly thereby strengthening author's rights. "We conclude that the 201(c) privilege [granted to publishers] does not override the Authors' copyrights."<sup>108</sup> Section 201(c) thus limits the statutory transfer from authors to publishers of collective works to the reproduction and dissemination of the work *as part of a collective work*, which the database is not. In so holding, the Court relies on the history of the 1976 Copyright Act that aimed to "enhance the author's position vis à vis the patron."<sup>109</sup> Several provisions of the 1976 Copyright Act were intended to upend the "publishers['] ... superior bargaining power over authors" who, because of failure to put copyright notice on collective works, inadvertently forfeited their copyrights to the public domain upon publication. The 1976 revisions to the Copyright Act were meant to "clarify and improve" author's rights with regard to "frequently unfair legal situation[s] with respect to rights in contributions."<sup>110</sup>

The majority's persistent and repetitive description of the publisher's statutory transfer as a "privilege" is an overbearing reminder that the case concerns the preservation of "author's rights" born of monarchical privilege and power. The majority describes the harm to authors were the statute to extend publisher's "privilege" to databases as destroying the author's ability to market her work individually outside the collective work context. The majority justifies a

narrow reading as preserving demand for the author's work as a stand-alone piece. Republication in a database strips authors of the ability to charge more for such inclusion as an additional reproduction and dissemination. The majority quotes the Register of Copyrights who reports that "freelance authors have experienced significant economic loss" due to a "digital revolution that has given publishers [new] opportunities to exploit authors' works."<sup>111</sup> Section 201(c) is therefore read narrowly to maintain the hierarchy of author over publisher in terms of the right ("privilege") of republication. It tilts toward the author the bargaining with publishers over contributions to collective works as an affirmative action measure for authors who were unfairly exploited in the past.

The dissent does not dispute the majority's historical explanation that frames its statutory interpretation. The dissent disagrees mostly in the failure to apply the Copyright Act's "media neutrality" principle that prohibits statutory provisions from being interpreted differently with regard to diverse media (film, photography, text, images) absent specific exceptions. In effect, the dissent claims the majority is violating an anti-discrimination principle at the heart of the Copyright Act by excising electronic databases in particular from 201(c)'s general "collective work" language in order to help authors control their republication rights. The majority violates copyright's anti-discrimination principle and subordinates the primary interests of the reading public who benefit from the robustness and proliferation of databases to that of the publisher's payment to authors to redistribute work. Whether authors should be preferred to publishers in the interpretation of the Copyright Act's progress goals – a point on which the dissent is agnostic to the majority's fundamentalism – the dissent believes authors and readers deserve equal consideration under the Copyright Act and that here readers should prevail.

Quoting T. Macaulay's famous statement that copyright is "a tax on readers for the purpose of giving a bounty to writers," the dissent (Justice Stevens writing, with Breyer joining) explains that the

tax restricts the dissemination of writings, but only insofar as necessary to encourage their production, the bounty's basic objective... 'The primary purpose of copyright is not to reward the author, but is rather to secure the general benefits derived by the public from the labors of authors.' ... the majority's decision today unnecessarily subverts this fundamental goal of copyright law in favor of a narrow focus on 'authorial rights.' Although the desire to protect such rights is certainly a laudable sentiment, copyright law demands that private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts.'<sup>112</sup>

In addition to reordering the majority's hierarchy of author's first under the guise of anti-subordination reasoning, the dissent further critiques the majority's ruling as harming authors in two ways. First, it could further disadvantage freelance writers, either by inducing the "purge [of] freelance pieces from ... databases" making their work more obscure rather than more noted and available. And, "today's decision in favor of authors may have the perverse consequence of encouraging publishers to demand from freelancers a complete transfer of copyright. If that turns out to be the case, we will have come full circle back to the pre-1976 situation."<sup>113</sup>

To the majority, preserving the breadth of authors' privilege rests on anti-dominance

equality theory. We protect the dignity of authors in the copyright system from voracious publishers by buttressing author's status and control. Although the dissent responds that databases may actually help authors in the long run (to be read, known, and compensated), the majority contends that freelancers brought suit alleging harm and "we may not invoke our conception of their interests to diminish [their] rights."<sup>114</sup> In other words, the Court is not to decide what is best for authors when they explain through suit their injuries and desired remedies. The majority says it is the Court's job to respect (and support) author's choices and assertions. The majority concludes its paean to choice as a measure of dignity and autonomy – traits of the idealized Romantic Author to be sure<sup>115</sup> – by asserting that "it bears reminder here and throughout that these Publishers and all others can protect their interests by private contractual arrangement."<sup>116</sup> The majority reverts to private ordering and mutual consent to protect market-based prerogatives, which may embolden authors in the transactional context and imagines their strength and independence. But, as the dissent forewarns, a choice and consent default may more likely and unhappily reinstate the power publishers exercise over authors in the long term. Interpreting the author's "privilege" under Section 201(c) as precluding incorporation into a database without consent means that publishers will seek that consent. And, if history is a guide, publishers will not pay any more for it. Authors do not magically have more bargaining power by interpreting Section 201(c) narrowly.

The majority and dissent fundamentally disagree about the source of equal dignity. The majority sees leveling up of rights as between authors and publishers as essential to the actualization of exercising those rights in the manner of one's choosing. The dissent understands leveling up to be only a small part of a larger and complex context that determines power and control. Simply shifting entitlements and then relying on contract to actualize individual needs and desires may reproduce the same imbalances the majority seeks to eradicate. Moreover,

[i]t simply begs the question for the majority to argue that the right not to have a work included within [an electronic database] is an 'authorial right' that 'Congress [has] established,' or that ... a decision allowing such inclusion would amount to 'diminish[ing] authorial 'rights' on the basis of 'our conception of their interests' ... [given that] copyright law is not an insurance policy for authors, but a carefully struck balance between the need to create incentives for authorship and the interests of society in broad accessibility of ideas. ... The majority's focus on authorial incentive comes at the expense of the equally important (at least from the perspective of copyright policy) public interest.<sup>117</sup>

The dissent embraces the principle of anti-subordination in the copyright context and appreciates that distribution of statutory rights may mitigate domination of one group by another. But the dissent's primary objection to the majority's zero-sum analysis is not that the public interest is short-changed (or ignored) but that in the hierarchy of values the public interest as a measure of progress should be as important (if not more so) than the author's interests. Copyright or "author's rights" could not exist without the public domain. Even more, the right to control copying is "unintelligible in the absence of an entrenched sphere of *unauthorized lawful copying*."<sup>118</sup> The majority's prioritization of the author's privilege misunderstands the inherent bilaterality of copyright that requires profuse unauthorized lawful copying as a correlative to authorized copying, what Abraham Drassinower calls the "correlative equality" of copyright law.<sup>119</sup> Author's equality vis à vis publishers (leveling up) is an unhelpful baseline of equality

without consideration of the correlative equality of the public vis à vis the author. Otherwise, the majority's prescribed leveling up subordinates the public to everyone else.

Patent cases also debate values of choice and consent as a measure of dignity and anti-subordination equality. The 2010 case of *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems* ("Roach") is a case about patent licenses between inventors and their employers, particularly the relative control employee-inventors may exercise when contributing inventions to their employers' asset base. *Roach* quite explicitly continues the conversation in *Tasini*, holding that the so-called "Bayh-Dole Act" of 1980 does not change the underlying default in the Patent Act that vests inventions initially with inventors. The Bayh-Dole Act aimed to incentivize universities to patent faculty's inventions by enabling their commercialization (and collecting profits) even when developed with federal funds. But, said the *Roach* majority, if the university does not receive an assignment from the faculty-inventor, the university owns nothing to claim or commercialize. In *Roach*, the faculty-researcher signed an agreement with a private company that preceded any valid assignment to Stanford University. The Bayh-Dole Act's purpose of maximizing the benefits of federally-funded research does not apply where the university fails to receive title of the inventions from its employees in the first place.

The majority's holding for the inventor relies on the myths of patent origins in the inventor alone and of mutual, knowing consent between inventor and licensee. Specifically, the majority rejects the reading of the Patent Act that "moves inventors from the front of the line to the back by vesting title to federally funded inventions in the inventor's employer – the federal contractor. ... for Congress to supplant one of the fundamental precepts of patent law and deprive inventors of rights in their own inventions ... would be truly surprising."<sup>120</sup> The language of pecking order and priority – like the language of privilege and authority in *Tasini* – laces this opinion, reminding the reader that patent inventors are special and deserve respect. If Stanford failed to get a clear assignment from its faculty-researcher, that is Stanford's problem. Or, if as the dissent says the public has to "pay twice for the same invention"<sup>121</sup> – once through federal funds to the university and twice for the invention from the private party that received the assignment from the faculty-researcher – that is a failure of contract not patent law. With the protection of the inventor's priority and of his title to the invention, the majority in *Roach*, as in *Tasini*, mitigates harsh IP ruses with appeals to the ideal of mutual consent and contract. "[U]niversities typically enter into agreements with their employees requiring the assignment to the university of rights in inventions. With an effective assignment, those inventions – if federally funded – become 'subject inventions' under the Act, and the statute as a practical matter works pretty much the way Stanford says it should. The only significant difference is that it does so without violence to the basic principle of the patent law that inventors own their inventions."<sup>122</sup>

As with *Tasini*'s dissent, the *Roach* concurrence and dissent worry that the "contract solution" is no solution at all. Under the "majority's [reasoning] ... the individual inventor can lawfully assign an invention (produced by public funds) to a third party, thereby taking that invention out from under the Bayh-Dole Act's restrictions, conditions and allocation rules."<sup>123</sup> The dissent recognizes that inventors routinely assign away their rights with significant and long-term consequences of which they are usually unaware and that universities and companies have formidable leverage negotiating those patent assignments. As such, the Bayh-Dole Act intended

to protect the *public* (not patentees) from lopsided deals by preferring universities (Stanford) to private third-parties (Roach) in the bargain. Being an inventor doesn't make one magically able to protect oneself (or the public) in the contractual bargain any more than being an author (in *Tasini*) enables one to strike a better bargain in light of the restructured statutory rights the court announces. Both majorities imagine and hope that inventors and authors have equal fortitude in the face of business negotiations with large organizations – recognizing the hope and promise of equal dignity and fair bargaining – while also relying on the myth of mutual consent and contract to allay any fears of mismanaged rights. The dissents in both cases embrace the ideal of anti-subordination equality but recognize the distance between ideals and equality-in-fact. Moreover, the dissents emphasize how private ordering is unlikely to protect the unrepresented public interest at all. Progress for court majority is exclusively a private affair. And the anti-dominance fix in both cases does no more than symbolically lift the status of authors and inventors.

A last case, *Kirtsaeng v. John Wiley & Sons* (2013) returns the equality analysis to *Golan*, but reverses course with a ruling favoring the public interest over copyright authors.<sup>124</sup> *Kirtsaeng*, like *Golan*, embraces an anti-discrimination analysis here in the context of copyright's "first sale" doctrine. And yet in *Kirtsaeng* the analysis benefits the non-authors (the readers and the secondary distributors) not the authors or publishers. *Kirtsaeng* holds that a lawful first sale worldwide of a copyrighted work that is protected by U.S. copyright law exhausts the author's exclusive right of distribution in the U.S. This would be an uncontroversial ruling had the sale of a lawful copy of a copyrighted work occurred in the U.S. The first sale doctrine facilitates the market in used books and is a cornerstone to copyright's dissemination function. The dispute in *Kirtsaeng* derives from the target books originating overseas and their first sale occurring overseas. If the book is made and sold overseas but protected by copyright in the U.S., the *Kirtsaeng* majority held that the author's (or publisher's) exclusive right of distribution terminates and the book can be imported into and sold on the secondary market in the U.S. free of authorial or publisher control. The practical implication of this ruling is that books first sold overseas and imported into the U.S. for the U.S. market will be substantially less expensive than if a first sale in the U.S. is required to create a used market in the books. *Kirtsaeng* sounds the death knell for international "price discrimination" which, based on copyright control over first sales (but not subsequent ones), enables copyright holders to segment the globe into various markets and vary the price of copyrighted goods within them. As Ginsburg complains in her dissent, international exhaustion eradicates price-discrimination between distinct global markets, which she claims is essential for authors (and their publishers) to earn sufficient revenue.

Interestingly, *Kirtsaeng* is just a year after *Golan*, when Ginsburg's anti-subordination and affirmative action rationale justified the special benefit of restoring copyright to foreign authors to resurrect their U.S. market leverage. But a year later, she fails to convince a majority of the same court to interpret copyright's first sale doctrine to protect authors' (and publishers') initial monopoly in the U.S. market. This may be unsurprising given that Ginsburg's argument in *Kirtsaeng* taken to its logical extreme would encourage U.S. companies to send their manufacturing of copyrighted works overseas in order to preserve market segmentation, likely to the detriment of local state economies. But she nonetheless embraces a segmented international marketplace and the opportunities global trade provides for developing countries, describing benefits worth pursuing as she did in *Golan*. She argues for freedom – freedom of authors and



publishers to choose their markets – and criticizes abdication of control over distribution that a global used-book market would bring. By contrast, Justice Breyer describes the benefits of exhaustion as accruing to consumers who will have a global market in which to shop, benefitting from competitive prices. He also identifies benefits to the authors and publishers as well. They received the price of the first sale somewhere, after all.

Breyer’s majority opinion also identifies rank geographical discrimination in the dissent’s argument. The dissent’s view claims that national boundaries are illusory and burdensome from the perspective of a global and digital marketplace and its consumers. The majority even uses the term “castes” to describe how geographical price discrimination depresses markets and limits legitimate access to copyrighted works the Copyright Act means to foster as a matter of progress.<sup>125</sup> The majority justifies its international exhaustion rule by embracing “unified” markets and “equal[] treatment of copies manufactured in America and those manufactured abroad” saying that “it is particularly difficult to believe that Congress would have sought this unequal treatment while saying nothing about it and while, in a related clause (manufacturing phase-out) seeking the opposite kind of policy goal.”<sup>126</sup> Indeed, the majority goes further suggesting that although publishers might after this ruling find it

more difficult to charge different prices for the same book in different geographic markets ... we can find no basic principle of copyright law that suggests that publishers are especially entitled to such rights. ... [T]he Constitution’s language nowhere suggests that its limited exclusive right should include a right to divide markets or a concomitant right to charge different purchasers different prices for the same book. Neither, to our knowledge, did any Founder make any such suggestion. We have found no precedent suggesting a legal preference for interpretations of copyright statutes that would provide for market divisions. ... To the contrary, Congress enacted a copyright law that (through the “first sale” doctrine) limits copyright holders’ ability to divide domestic markets.<sup>127</sup>

As this language demonstrates, the majority heavily relies on equality and unity tropes to justify international exhaustion, assuming the righteousness of leveling up: raising consumers and secondary distributors to the level of authors and publishers in terms of competition in the marketplace. Ginsburg’s dissent calls again for special treatment for authors and publishers in contrast to readers and secondary distributors on the theory that special treatment for authors and publishers levels a smaller, more critical playing field of just authors and their partners, in order to protect creation and its profits in the first place.

At bottom, the two main arguments speak past each other, neither directly wrestling with the central disagreement, which is the proper distribution of rights and benefits to authors *and* the public under the Copyright Act. Entreaties for equality – formal or anti-dominance equality, sameness or mutual dignity approaches – often run in circles unless baseline distributions, values and beneficiaries are established and agreed upon. Chapter 3 will speak more to these baseline distributions when discussing for how “fairer uses” and other explicit forms of distributive justice mechanisms manifest in the case law and in accounts of everyday creators and inventors who depend on such mechanisms to produce work. For now, however, it is worth nothing that disagreements about how basic equality frameworks should decide issues of intellectual property law variously shape Supreme Court decisions and produce disagreement around these very basic

socio-political concepts. Folding intellectual property into our debates on fundamental values, such as equality, may create confusion at first. But attending to those fundamental values in light of intellectual property law's goals of "progress of science and the useful arts" is not a mistake. It may help evolve intellectual property law in terms of the people it affects most directly: the public and everyday creators and innovators who work and produce work to live.

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## Notes to Chapter 1

<sup>1</sup> P. Westen; A. Sen.

<sup>2</sup> Scanlon.

<sup>3</sup> Id.

<sup>4</sup> B. Frishmann (book proposal on capabilities and infrastructure theory)

<sup>5</sup> Chon, Shaver, Arewa, Greene, Kapczinski, Katyal, Sunder, Silbey, Osei-Tutu, Rosenblatt (fn 17).

<sup>6</sup> Guido Calabresi and Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972); Louis Kaplow and Steven Shavell, Property Rules versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713 (1996).

<sup>7</sup> It is not enough to say utilitarian analysis will maximize whatever good is chosen, e.g. efficiency is a form of justice. "A fair price in law is not necessarily the same as an efficient or wealth maximizing price in economics... justice, fairness, equity, reasonableness, and equality are not the subject of mathematical calculus: they are values formed from the human experience of living in community with others. If such concepts ... are simply translated into economic equivalent of efficiency and wealth maximization, they lose much of their social and cultural meaning." (R. Malloy 8, 12)

<sup>8</sup> P. Westen xvii

<sup>9</sup> Amartya Sen, Equality of What?

<sup>10</sup> Scanlon 8.

<sup>11</sup> Id. at 9.

<sup>12</sup> Id. at 17.

<sup>13</sup> Id.

<sup>14</sup> Aristotle, The Nicomachean Ethics bk. V, at 1129a-1131b (David Ross trans., Lesley Brown ed., 2009) (c. 384 B.C.E.).

<sup>15</sup> United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174-75 (1980).

<sup>16</sup> Id. at 174.

<sup>17</sup> Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 6-11 (1976).

<sup>18</sup> Id.

<sup>19</sup> Fritz, 449 U.S. at 174.

<sup>20</sup> Eldred v. Ashcroft, 537 U.S. 186, 193-94 (2003) (upholding the Copyright Term Extension Act (CTEA) of 1998, which amended the durational provisions of the Copyright Act at 17

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U.S.C. §§ 302, 304 (1998)).

<sup>21</sup> *Id.* at 204, 231.

<sup>22</sup> *Id.* at 194.

<sup>23</sup> *Feist Publ., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (stating that “the primary objective of copyright” is “[t]o promote the Progress of Science and useful Arts”) (alteration in original) (quoting U.S. Const. art. I, § 8, cl. 8); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the [Copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . .”).

<sup>24</sup> *Eldred*, 537 U.S. at 212.

<sup>25</sup> *Id.* at 255-257 (Breyer, J., dissenting).

<sup>26</sup> *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980). Notably, Justice Breyer suggests the level of scrutiny should be more than rational basis because the copyright extension intrudes on speech and raises First Amendment concerns. (p. 244) Were this position to have prevailed, the lack of evidentiary support that both existing and future copyright holders are incentivized by the twenty-year extension might have doomed the Act.

<sup>27</sup> *Eldred*, 537 U.S. at 198-99.

<sup>28</sup> Describe all the term extension.

<sup>29</sup> *Eldred*, 537 U.S. at 266.

<sup>30</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

<sup>31</sup> *Eldred*, 537 U.S. at 193 (emphasis added).

<sup>32</sup> *Id.* at 194 (emphasis added).

<sup>33</sup> *Id.* (emphasis added).

<sup>34</sup> Briefs in the case?

<sup>35</sup> *Id.* at 200, 206-07.

<sup>36</sup> *Id.* at 205-206 (“Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.”).

<sup>37</sup> Aram Sinnreich, Bill Herman and Litman.

<sup>38</sup> Jessica Litman, *Digital Copyright* (2001).

<sup>39</sup> *Eldred*, 537 U.S. at 233.

<sup>40</sup> *Id.* at 248.

<sup>41</sup> Bill D. Herman, *The Fight Over Digital Rights: The Politics of Copyright and Technology* (2013) p. 35.

<sup>42</sup> *Id.* at 48-52.

<sup>43</sup> *Eldred* at 227.

<sup>44</sup> Stevens dissent at 244. Breyer reiterates this point: “Copyright statutes must serve public, not private, ends; . . . they must seek ‘to promote the Progress’ of knowledge and learning, and . . . they must do so both by creating incentives for authors to produce and by removing the related restrictions on dissemination after expiration.” (247-248)

<sup>45</sup> Breyer dissent at 250.

<sup>46</sup> SOPA/PIPA response

<sup>47</sup> Alvin Toffler, *The Third Wave* 27 (1980). See also Don Tapscott, *The Digital ECONOMY* 62

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(1995); George Ritzer & Nathan Jurgenson, Production, Consumption, Prosumption: The Nature of Capitalism in the Age of the Digital ‘Prosumer,’ 10 J. CONSUMER CULTURE 13, 17 (2010).

<sup>48</sup> Catharine A. MacKinnon, Toward a Feminist Theory of the State 219 (1989) (describing how law and society subordinate women to men through defining sex difference in terms of power) [hereinafter MacKinnon, Toward a Feminist Theory]. See also Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 123 (1987) (same) [hereinafter MacKinnon, Feminism Unmodified].

<sup>49</sup> Walmart cite.

<sup>50</sup> Chakrabarty.

<sup>51</sup> JEM at 155.

<sup>52</sup> Intriguingly, Justice Breyer authors the majority opinion in *Aereo* and joins the unanimous opinion in *Bowman*, which is particularly surprising given his dissents in related prior cases concerning the reach, purpose and interpretation of IP statutes.

<sup>53</sup> *Aereo* at 17.

<sup>54</sup> Dissent at 7, 9.

<sup>55</sup> Dissent at 12-13.

<sup>56</sup> This patent law doctrine has historical common law roots. See, e.g., *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964), *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U.S. 425 (1894). See also *Wilber-Ellis Co. v. Kuther*, 377 U.S. 422 (1964) (purchaser may modify article to improve or alter functionality). Compare *Quanta Computer Inc. v. LG Electronics Inc* (patent exhaustion) with *Kirtsaeng v. John Wiley & Sons Inc.* (copyright). For copyright, this is a statutory protection (17 U.S.C. §109) whereas in patent law it is a common law doctrine.

<sup>57</sup> *Bowman* at 8.

<sup>58</sup> *Id.* at 10

<sup>59</sup> Cite to BB Hardware.

<sup>60</sup> B&B Hardware at 20.

<sup>61</sup> *Id.* at 5.

<sup>62</sup> *Id.* at 13.

<sup>63</sup> *Id.* at 14.

<sup>64</sup> *Golan v. Holder*, 132 S. Ct. 873, 894 (2012).

<sup>65</sup> *Golan*, 132 S. Ct. at 887 (internal quotation marks omitted).

<sup>66</sup> *Eldred*, 537 U.S. at 219.

<sup>67</sup> *Golan*, 132 S. Ct. 877.

<sup>68</sup> *Id.* at 878.

<sup>69</sup> *Id.* at 880.

<sup>70</sup> *Id.* at 882.

<sup>71</sup> Reva Siegel, Equality Talk: Anti-subordination and Anticlassification Values in Constitutional Struggles over *Brown*, 117 Harv. L. Rev. 1470, 1472-73 (2004).

<sup>72</sup> Siegel & Jack Balkin, The American Civil Rights Tradition: Anticlassification or Antisubordination?, 58 U. Miami L. Rev. 9 (2003-2004).

<sup>73</sup> MacKinnon, *Feminism Unmodified*, supra note 53, at 33. See also MacKinnon, *Toward a Feminist Theory*, supra note 53, at 219.

<sup>74</sup> MacKinnon, *Feminism Unmodified*, supra note 53, at 33; MacKinnon, *Toward a Feminist Theory*, supra note 53, at 219.

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- <sup>75</sup> MacKinnon, *Toward a Feminist Theory*, supra note 53, at 34-39.
- <sup>76</sup> Catherine MacKinnon, *Sexual Harassment of Working Women* 102, 117-118 (1979).
- <sup>77</sup> *Id.* at 117.
- <sup>78</sup> Robert Spoo, *Without Copyrights: Piracy, Publishing and the Public Domain* (2013). See also Paul St. Amour, *The Copyrights* (CHECK THIS)
- <sup>79</sup> Golan, 132 S. Ct. at 893.
- <sup>80</sup> *Id.*
- <sup>81</sup> *Id.* at 890 n.28.
- <sup>82</sup> *Id.*
- <sup>83</sup> Spoo.
- <sup>84</sup> Golan.
- <sup>85</sup> *Id.* at 889.
- <sup>86</sup> *Id.* But see SPOO, supra note 4, at 143, 303 n.148 (questioning whether American authors were held back by European competition which actually hurt the production and dissemination of U.S. literary works).
- <sup>87</sup> See Senate Bill 819, House Bill 1869, introduced April 4, 2017. See also <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/the-paycheck-fairness-act.pdf> and [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/discrimination/the-paycheck-fairness-act.html](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act.html).
- <sup>88</sup> Golan, 132 S. Ct. at 888 n.26.
- <sup>89</sup> *Id.* at 892.
- <sup>90</sup> Robert Spoo, *Ezra Pound's Copyright Statute*, 56 *UCLA LAW REVIEW* 1775, 1817 (2009).
- <sup>91</sup> Paul Heald, *How Copyright Keeps Works Disappeared*, *Journal of Empirical Legal Studies*, Vol. 11, Issue 4, pp. 829-866, 2014.
- <sup>92</sup> Wendy J. Gordon, *Dissemination Must Serve Authors: How the U.S. Supreme Court Erred*, 10 *Rev. of Econ. Res. Copyright Issues* 1 (2013).
- <sup>93</sup> Spoo.
- <sup>94</sup> Spoo.
- <sup>95</sup> *Id.* at 168,186-88.
- <sup>96</sup> *Id.* at 186.
- <sup>97</sup> Where the opposite is true – doctors are predominantly women, as in Russia, being a physician is not as prestigious or well-paying a job. Cite.
- <sup>98</sup> Scanlon at 8; Also Hasday.
- <sup>99</sup> Petrella, n. 7.
- <sup>100</sup> Ledbetter, Dissent at \_\_\_.
- <sup>101</sup> *Id.* at 18.
- <sup>102</sup> Ledbetter, dissent at \_\_\_.
- <sup>103</sup> *Id.*
- <sup>104</sup> cite
- <sup>105</sup> *Id.* at 11, n.13.
- <sup>106</sup> *Id.* at 21.
- <sup>107</sup> Ronan Deazley.
- <sup>108</sup> *Id.* at 493.
- <sup>109</sup> *Id.* at 495, n.3.

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- <sup>110</sup> Id. at 497.
- <sup>111</sup> Id. at 498, n. 6.
- <sup>112</sup> Id. at 519-20.
- <sup>113</sup> Id. at 520, n. 17.
- <sup>114</sup> Id. at 498, n. 6.
- <sup>115</sup> Mark Rose; Peter Jaszi and Martha Woodmansee.
- <sup>116</sup> Id. at 502, n. 11.
- <sup>117</sup> Id. at 523, n.20.
- <sup>118</sup> Drassinower, 117-118, and Copyright is Not About Copying, HLR (emphasis added).
- <sup>119</sup> Drassinower, 119.
- <sup>120</sup> Board of Trustees of Leland Stanford Junior University v. Roach Molecular Systems, at 8, 14.
- <sup>121</sup> Id. at Dissent, 3.
- <sup>122</sup> Roach at 15.
- <sup>123</sup> Dissent at \_\_\_.
- <sup>124</sup> Kirtsaeng v. John Wiley & Sons (2013)
- <sup>125</sup> Cite
- <sup>126</sup> Id at 15.
- <sup>127</sup> Id. at 32.