The Mythical Beginnings of Intellectual Property

Jessica Silbey
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INTRODUCTION

People commonly justify intellectual property protection with homage to utilitarianism (protecting the incentive to create, invent, or produce quality goods to maximize net social welfare) or natural rights (people should own the product of their creative, inventive, or commercial labor). Despite the ongoing dominance of these theories, a dissatisfying lack of a comprehensive explanation for the value of intellectual property protection remains. One reason for this failure is that economic analysis of intellectual property law tends to undervalue its humanistic element. Whereas utilitarianism and natural rights theories are familiar, at least one other basis for intellectual property protection exists. This Article explains how intellectual

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3 See Madhavi Sunder, IP3, 59 STAN. L. REV. 257, 260 (2006) (“To put it bluntly, there are no ‘giant-sized’ intellectual property theories capable of accommodating the full range of human values implicit in intellectual production.”) (footnotes omitted).

4 Id. at 259 (“Intellectual property utilitarianism does not ask who makes the goods or whether the goods are fairly distributed to all who need them.”); see also James Boyd White, Economics and Law: Two Cultures in Tension, 54 TENN. L. REV. 161, 172-85 (1987) (criticizing the moral and political implications of economics).
property protection is rooted in narrative theory.\(^5\) It contends that all of the United States copyright, patent, and trademark regimes are structured around and legitimated by central origin myths—stories that glorify and valorize enchanted moments of creation, discovery, or identity. As a cultural analysis of law,\(^6\) rather than the more familiar economic theory of law,\(^7\) this Article seeks to explain how these intellectual property regimes work the way they do.\(^8\) And as a narrative explanation for the structure of intellectual property protection, this Article enhances the more customary economic or philosophical accounts because narrative, especially one devoted to myth-making in our society, provides "models for human behavior and, by that very fact, gives meaning and value to life."\(^9\)

An "origin myth" or an "origin story" is a narrative that explains how a culture came into being.\(^10\) Genesis is an origin story, as is the story of the Founding Fathers of the United States Constitution. I will have more to say about the structure and function of origin myths in Part I, infra, but at its core an origin story serves both ontological and epistemological functions.\(^11\) It infuses everyday life and relations with significance by explaining why things are as they are and by providing guidance for how things should evolve based on what we already understand about our world. As David Engel has written, the "retelling of [origin] myths is . . . many things at

\(^{5}\) Understanding law through narrative theory is not a new endeavor, only largely overshadowed by other theories of human understanding and behavior. *See*, e.g., CAROL M. ROSS, PROPERTY AND PERSUASION 5-6 (1994) (using "norms and narration" to "bridge the gap between economic-based and communitarian approaches to property" and explaining that "if . . . property regimes cannot get over the self-interest problem without imparting some sense of a common good, then narratives, stories, and rhetorical devices may be essential in persuading people of that common good").

\(^{6}\) "[C]ultural analyses of law attempt to describe the processes by which law contributes to the articulation of meanings and values in everyday life." Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 LAW & SOC'Y INQUIRY 39, 42 (1992).


\(^{8}\) Although I draw a distinction between explanation and justification, I understand that explanations are not free of normative implications. As the discussion of origin myths below will make clear, origin myths are structured around certain social values and not others. To describe intellectual property protection in terms of origin myths, therefore, is to show how intellectual property law elevates certain principles over others. If we value the principles that origin myths omit or denigrate, then we can argue that the structure of intellectual property protection as a function of origin myths is flawed.

\(^{9}\) MIRCEA ELIADE, MYTH AND REALITY 2 (Willard R. Trask trans., 1963) (1963); see also David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 LAW & SOC'Y REV. 785, 789 (1993) ("The role of narrative in constructing concepts of self and society has become clear in a multitude of studies, including those addressing a broad range of law-related issues such as race, gender, community, and the practice of law." (footnote and citations omitted)).

\(^{10}\) See JOANNE H. WRIGHT, ORIGIN STORIES IN POLITICAL THOUGHT: DISCOURSES ON GENDER, POWER AND CITIZENSHIP 3 (2004); see also ELIADE, supra note 9, at 5-6.

\(^{11}\) Generally speaking, an ontological inquiry is the study of reality or the nature of being and an epistemological inquiry is the study of the methods and limitations of knowledge or ways of knowing.
once: an act of insight, a reinterpretation of the past, a reaffirmation of core values and beliefs, and a ‘reactualization’ of the cosmic order. 12

Parts II, III, and IV of this Article investigate the statutory regimes and common law that govern intellectual property protection in the United States in light of the narrative theory of Part I. Patent, copyright, and trademark law each instantiate the importance of origins, albeit in different ways. Patent law protects that which the inventor conceived, the inventor being the first to reduce her conceived invention to practice. 13 Copyright law protects original works of authorship, the expression originating with the author. 14 Trademark law protects signifiers as distinctive source identifiers. 15 These parts of the Article, when read together, contrast the three statutory intellectual property regimes for their structured valuation and reification of their own origin myth. They also show how the political origin myths structuring intellectual property protection articulate a well-worn story about the origins and continuing vitality of the American republic (rugged individualism and the American dream). 16 Each part also draws on popular cultural stories about intellectual property and a recent intellectual property dispute to illuminate how origin myths structure the respective discourses of these intellectual property systems and explain adjudicative results.

In contrast to the structural importance of the origin story in defining and substantiating intellectual property schemes, the conclusion briefly examines recent developments in patent, copyright, and trademark law that drift away from the protection of origins to alternative sources of value. Trademark law has experienced the federalization of anti-dilution law, which protects less the source identifying function of the mark than it does a right in gross. 17 Congress is currently debating a reformation of the Patent Act that would substantially change the definition of an inventor from one

12 Engel, supra note 9, at 792.
15 See 15 U.S.C. § 1127 (2000) (defining “trademark” to include “any word, name, symbol, or device . . . [used] to . . . indicate the source of the goods”).
16 See generally President Herbert Hoover, Speech at Madison Square Garden (Oct. 22, 1928), in THE NEW DAY: CAMPAIGN SPEECHES OF HERBERT HOOVER 149, 154 (2d ed. 1929) (“We were challenged with a . . . choice between the American system of rugged individualism and a European philosophy of diametrically opposed doctrines—doctrines of paternalism and state socialism. The acceptance of these ideas would have meant the destruction of self-government through centralization . . . . [and] the undermining of the individual initiative and enterprise through which our people have grown to unparalleled greatness.”). The content of the “American Dream” is as diverse as our nation, but the dominant narrative tracing the American Dream has been repeated by numerous political theorists and American presidents. E.g., President Bill Clinton, Remarks to the Democratic Leadership Council (Dec. 3, 1993), in 2 PUB. PAPERS 2094, 2094 (“The American dream that we were all raised on is a simple but powerful one—if you work hard and play by the rules you should be given a chance to go as far as your God-given ability will take you.”).
who first conceives an invention to one who first files for patent protection.\textsuperscript{18} In copyright law, recent debates about the United States’ obligations under the Berne Convention (e.g., obligations regarding moral rights, the right of attribution, and the current practice among certain authors who grant royalty-free non-exclusive licenses of digital works on the condition that attribution be granted upon publication and distribution) underscore competing notions of whether and how the originator of a work will be protected by the law.\textsuperscript{19} The final part of this Article discusses these changes in the various intellectual property regimes and analyzes them for what they say about the inevitability of competing origin stories in law and culture. In contrast to Parts II, III, and IV, in which I take seriously the claim that each intellectual property regime is structured around an origin myth, the conclusion outlines current intellectual property debates that undercut the heuristic role of these origin myths to demonstrate instead the myth of origins.

This Article participates in the growing body of interdisciplinary legal scholarship that takes as its premise the inseparability of law and culture. In this vein, the Article’s aim is threefold. Primarily, the Article provides a new explanation for intellectual property protection in light of a novel theory of the narrative structure of the origin myth. Secondarily, the Article discerns from a comparative analysis of the contemporary debates concerning the three federal intellectual property regimes competing narratives of value, which reveals an inherent uncertainty about the origins of human creation. And lastly, the Article aims to demonstrate how close attention to narrative theory and cultural tropes enriches the analysis of law.\textsuperscript{20}


\textsuperscript{19} For debates about the “right of attribution” under current U.S. intellectual property regimes, see, for example, Jane C. Ginsburg, The Right to Claim Authorship in U.S. Copyright and Trademarks Law, 41 Hous. L. Rev. 263 (2005). For a royalty-free, non-exclusive license, see, for example, Creative Commons, Attribution-Noncommercial-Sharealike 1.0 License, § 4(d), at http://creativecommons.org/licenses/by-nc-sa/1.0/legalcode (last visited Nov. 5, 2007) (requiring attribution of authorship upon exercise).

\textsuperscript{20} In writing an origin story (this Article) about origin stories (the origin myths that structure intellectual property law), I am participating in, as much as I am critiquing, the law’s facilitation of origin stories. Unpacking the significance of this recursivity is beyond the scope of this project, but the irony is not lost on me.
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I. ORIGIN MYTHS

A. AS A HIEURISTIC FOR AN INDIVIDUAL AND COMMUNITY

Origin myths are a special kind of narrative. “The retelling of myths about origins represents an attempt to transcend historical time, with its relentless linear progression, its ‘irreversibility’. The return to primal events allows humans to clarify existential meanings that are sometimes obscured by the misfortunes and suffering that drain everyday life of its value and direction.” Origin myths have explanatory force, collapsing the inquiries of ‘who are we?’ with ‘where did we come from?’ They are so foundational to human existence and society that as cultural narratives they come “as close to a universal phenomenon as might be imagined.” Moreover, the study of origin stories is not relegated to literature and cultural anthropology. Spanning religious studies, archeology, evolutionary biology, astronomy, chemistry, and political theory, “[o]ur origins preoccupy us.” In these ways, origin stories are heuristic, “explor[ing] fundamental questions and problems and . . . assign[ing] meaning to our human existence.”

Origin myths are not necessarily narratives of bygone eras either. The creation and perpetuation of myth is as much part of our contemporary culture as it was part of Ancient Greece. Myths are essential to most cultures and communities precisely because they establish “deeper meanings and . . . archetypes rather than . . . objective certainty. [Myth] starts with the materials of human experience but transforms their particularities into narratives that speak more broadly about the essential nature of self and society.”

21 This Part relies on Wright’s analysis of the political origin myth. But the origin myth is a common genre of narrative used by anthropologists and sociologists as well as political scientists such as Wright (to say nothing of literary theorists) as a basis of analysis. See, e.g., Engel, supra note 9 (sociological study of origin myths).


23 Wright, supra note 10, at 3.

24 Id.

25 Id. at 8; see also Steven Goldberg, Kennewick Man and the Meaning of Life, 2006 U. Chi. LEGAL F. 275, 287 (2006) (“Questions concerning human origins and the origin of life matter a great deal to all of us because they speak not only to where we come from, but also to whether and how our lives have meaning.”).

26 Wright, supra note 10, at 24-53 (discussing Greek origin stories, which she calls Plato’s “Creation Politics”).

27 Engel, supra note 9, at 791; see also id. at 791 n.5 (“[M]yth, though determined in its form by its immediate historical context, transcends any historical moment, being at the fundamental level the quest for the self.” (alteration in original) (quoting Norman Austin, Meaning and Being in Myth 2 (1990))).
Origin myths bring order to social relations by explaining the nature of the self and her entitlements, role in, and relation to her society.\textsuperscript{28} One ubiquitous origin story is the political origin myth, the story that explains how a society or civilization came into existence.\textsuperscript{29} These narratives are not only stories about the literal birth of a society but about the political outlines of social life as well.\textsuperscript{30} They designate a “script[] of citizenship”\textsuperscript{31} and concern themselves with “the beginnings of politics and power.”\textsuperscript{32} Genesis is one such origin myth, establishing the beginning of human civilization with God’s creation of man in His image and the subordination of Eve through her birth (“origin”) in Adam’s rib.\textsuperscript{33} The story of Romulus and Remus, mythological founders of Rome who were fathered by Mars (the god of war) but raised by a wolf, stresses the divine status of Rome and was used to justify Roman domination.\textsuperscript{34} Thomas Hobbes’ \textit{Leviathan} is another political origin story, describing a brutal, warring, “anarchic and presocial state that is ultimately transcendened by a social contract” that establishes the security of individuals in society through the control of the (English) sovereign.\textsuperscript{35}

Plato’s Myth of the Metals is a well-known political origin story. According to that myth, “The earth moulds its children carefully, fashioning each for a specific role in the city. Those who rule are composed primarily of gold, those who protect the city, silver, and the farmers and artisans have iron and brass in their constitution.”\textsuperscript{36} Socrates explains the need for this “‘noble lie’ to persuade the inhabitants of the city to accept the logic of its organization.”\textsuperscript{37} As Plato’s Myth of the Metals was meant to “quell uprisings and disorder, and to ensure conformity to his envisioned hierarchy,”\textsuperscript{38} Genesis legitimates the politics of gender hierarchies. Likewise, the story of Romulus and Remus justifies Rome’s violent aggression towards and control over its neighbors. And Hobbes’ \textit{Leviathan} justifies inequality in civil society and absolute obedience to the sovereign.

Origin myths are heuristic because they answer fundamental questions about and assign meaning to our lives. The heuristic benefits do not only

\textsuperscript{28} Wright, supra note 10, at 7.
\textsuperscript{29} Id. at 3.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 19.
\textsuperscript{32} Id. at 3.
\textsuperscript{33} Cf. id. at 8 (discussing the abolition of Lilith from the Garden of Eden for her subordination toward Adam and the rebirth of woman as the submissive Eve, a variation of the Genesis origin story).
\textsuperscript{34} See Henry Tudor, \textit{Political Myth} 97, 134-35 (1972).
\textsuperscript{35} Wright, supra note 10, at 56-57.
\textsuperscript{36} Id. at 4.
\textsuperscript{37} Id. (quoting Plato, \textit{Republic}, in \textit{The Collected Dialogues of Plato Including the Letters} 414b-c (Edith Hamilton and Huntington Cairns eds., Lane Cooper et al. trans., Pantheon Books, 1961)).
\textsuperscript{38} Id. at 4-5.
apply at an individual level, but on a societal one as well. An origin story reflects a society’s image of itself, its central values and goals. Consider some of the United States’ national heroes who are intimately tied to the United States’ origin story: George Washington (the quintessential commander-in-chief, mastermind of the Revolutionary War, humble, yet strong and victorious), Thomas Jefferson (asserting the divine right to equality, a master of letters, and a defender of states’ rights), Benjamin Franklin (representing American innovation and independence), Abraham Lincoln (establishing the right to racial equality and asserting the unity of the nation above all in its rebirth after the Civil War). They each exemplify the spirit and pride that many people believe the United States represents and display characteristics that citizens believe explain the nation’s successes.

B. As a Measure of Authenticity

Origin stories are about the “how” of political beginnings, just as much as they are about the “why” of those beginnings. Origin myths authorize the initial social structure by appealing to authenticity. They do so in two related ways: through essentialism and being first-in-time.

Origin stories often explain and legitimate certain social relations by hinting at a theory of human nature. For example, Genesis describes the “natural” differences between the sexes to justify hierarchical gender relations. Plato’s Myth of the Metals describes the “natural” difference among people who are either reasonable (made of gold) and thus legitimate members of the ruling class, spirited (made of silver) and thus the best kind of protectors, or all body (made of brass), and thus industrious but dim and worthy only of laborer status.

Origin stories also convincingly describe a person or circumstance that existed “in the beginning” and thus that is sufficiently blessed or wise to originate this society. This person (or circumstance) therefore garners the authority and legitimacy necessary to wield power and control and to exert the force of law. “[P]olitical origins discourse assumes that origins contain essential and indispensable data from which political solutions are moulded.” In this way, invocation of a political origin, such as the Found-

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39 Id. at 73-75.
40 We see recourse to “human nature” with regard to certain discourses concerning evolutionary biology. From scientific theories concerning evolution and human biology, we learn facts about our biological make-up (facts that are presumably amoral and apolitical) that are then explained as inevitable features of our sociality. See, e.g., ANNE MORR AND DAVID JESSET, BRAIN SEX: THE REAL DIFFERENCE BETWEEN MEN AND WOMEN (1991) (explaining that the reason men have been the dominant sex throughout human history lies in the difference in their fetal brain development).
41 Cf. WALTER BENJAMIN, ILLUMINATIONS 220 (Harry Zohn trans., Schocken Books, 1969) (1936) (“The presence of the original is the prerequisite to the concept of authenticity.”).
42 WRIGHT, supra note 10, at 9.
ing Fathers of the United States and their intent in drafting the Constitution, can justify present circumstances and assertions of right with an appeal to the past. 43 "Origin stories, then, are essentialist narratives that do more than simply uncover beginnings: they authorize implicitly particular solutions." 44

C. As Establishing Consent

Origin myths authorize certain political and social arrangements through narratives of consent or by manufacturing consent through their repetition. 45 The social contract is the quintessential example of an origin story that justifies absolute obedience to a government with a story of consent. 46 Consent comes in all forms in origin stories—written and explicit political contracts (constitutions), oral or civil contracts (the marriage contract, "I do"), tacit consent or acquiescence (as in parental relations with children). 47 As we will see infra, the origin stories that circulate about intellectual property protection span all three forms. 48 The repetition of these stories of consent throughout the case law, the litigation that becomes case law, and the statutory and constitutional history behind the law, serves to further reinforce the message of consent. As each person, community, or court repeats the origin myth that explains and justifies the particular intellectual property protection, that person, community, or court has signaled acceptance of that particular political arrangement. 49

In addition to legitimate political, civil, or social arrangements that explain a community’s identity and purpose, or “uncover an elusive primor-

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44 WRIGHT, supra note 10, at 9-10.

45 Id. at 5-6.

46 Id. at 57. “The foundation of Hobbes’s social contract is consent. Men make a choice to consent to absolute power rather than to continue to exist in an unlivably insecure condition of war.” Id. at 58.

47 Cf. id. at 86-89 (analyzing Hobbes’s rhetorical strategy of supporting his notion of tacit consent to political rule with what he characterizes as tacit consent to patriarchal rule).

48 See discussion infra Parts II-IV.

49 This is what Mircea Eliade calls “the eternal return.” See ELIADE, supra note 22, at 34. Eliade writes that “an object or an act becomes real only insofar as it imitates or repeats a archetype.” Id. at 34. Eliade further says that “this repetition, by actualizing the mythical moment when the archetypal gesture was revealed, constantly maintains the world in the same auroral instant of the beginnings.” Id. at 90. Repetition thus helps to fashion consent in the contemporary community as it binds the community through its evocation to the distinctive and exceptional character of the originating moment.
dial truth” about human nature or civilization, origin stories also mask the violence of beginnings. This is Hannah Arendt’s theory of origin myths: that all political beginnings are “intimately connected with violence” and that “no beginning could be made without using violence, without violating.” To be sure, some origin myths might be told to avoid further violence. A court that invokes an origin story to justify a certain property arrangement relies on narrative to avoid or quash further conflict between the parties (be it violent or otherwise). And some origin myths might be told to uncover originary violence, such as the reemergence of Lilith in radical feminism in the 1970s. In any case, studying the relation of origin myths to violence may help to better understand the motivation behind the telling and re-telling of origin myths in society generally and law specifically.

In sum, origin myths are a heuristic, explaining fundamental questions about and assigning meaning to our lives. They authorize or confer authority on preconceived political solutions, deriving (and thus justifying) society’s extant power relations and hierarchies with homage to authenticity and through narratives of consent. As Roland Barthes has written, “Myth . . . purifies [things], it makes them innocent, it gives them a natural and eternal justification.” It does so to hide or avoid violent human conflict. Retelling the mythic narrative assures consent to the arrangement, either explicitly as a form of contract or implicitly through acquiescence. The “truth” of origin stories is not important for this analysis. As with most analyses of narrative, the point is to discern how these stories function to order social relations (here, intellectual property relations) through the development and maintenance of narrative authority.

II. PATENT LAW

A. Patent Origins

The origin myth that structures United States patent law has as much to do with the “what” of patents (the invention) as with the “who” of patents (the inventor). Although the property right granted by a patent may be dressed in the trappings of real property like Blackacre—granting its owner

50 Wright, supra note 10, at 11.
52 Wright, supra note 10, at 8, 11. Wright explains, “Feminist origins theorists bring to the surface the violence of a patriarchal war, and of an original rape and/or matricide. They replace the myth of consent between the genders with the ‘truth’ of war and violence.” Id. at 11.
the right to exclude others from making, using, selling, or offering to sell the property during a specific period of time\textsuperscript{55}—it also has mystical underpinnings.

1. As a Measure of Authenticity to Legitimate Hierarchy

Patents describe inventions that must originate in the mind of the inventor. As one early court said, "Invention is not the work of the hands, but of the brain."\textsuperscript{56} An inventor is one who is the first to conceive of the invention.\textsuperscript{57} Conception—itself a loaded term concerning origins and mythical moments—is:

the complete performance of the mental part of the inventive act. All that remains to be accomplished in order to perfect the act or instrument belongs to the department of construction, not invention. It is therefore the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice that constitutes an available conception within the meaning of the patent law.\textsuperscript{58}

Indeed, mental conception is so central to being an inventor by law that courts no longer require reduction to practice:\textsuperscript{59}

The primary meaning of the word ‘invention’ in the Patent Act unquestionably refers to the inventor’s conception rather than to a physical embodiment of that idea. The statute does not contain any express requirement that an invention must be reduced to practice . . . .

It is well settled that an invention may be patented before it is reduced to practice.\textsuperscript{60}

\textsuperscript{55} 35 U.S.C. § 154(a) (2000); see also Philip C. Swain, The One Thing Judge Rich Wanted Everybody to Know About Patents, 9 Fed. Cir. B.J. 97, 100 (1999) ("This right to exclude others is the essence of any property right, including an 'intellectual property' right, as well as a land owner's real property right to keep someone from trespassing in his or her backyard.").

\textsuperscript{56} Edison v. Fote & Randall, 1871 Dec. Comm'r Pat. 80 (1871).

\textsuperscript{57} See 35 U.S.C. § 102 (2000) (prescribing who is entitled to a patent); see also Erben v. Yardley, 267 F. 345, 346 (D.C. Cir. 1920) (stating that "the first to conceive and first to reduce to practice" is the inventor); 2 R. Carl Moy, MOY'S WALKER ON PATENTS §§ 10.11 (4th ed. 2003) ("Courts have repeatedly asserted that the person who conceives of the invention is the inventor regardless of who else contributes to the invention finally being completed. . . . [U]nder the usual view inventorship does not attach from the act of accomplishing a reduction to practice.").

\textsuperscript{58} Townsend v. Smith, 36 F.2d 292, 295 (C.C.P.A. 1929).


\textsuperscript{60} Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 60-61 (1998); see In re Hardee, 223 U.S.P.Q. 1122, 1123 (Comm'r Pat. & Trademarks 1984) ("The threshold question in determining inventorship is who conceived the invention . . . . Insofar as defining an inventor is concerned, reduction to practice per se is irrelevant.").
In this way, patent law is not the right to own your own labor or a system of law and community that guarantees and values that right. The labor of invention (reduction to practice)—performed by those made of silver or brass in Plato’s Myth of the Metals—is trivial compared to conception—achieved by those with gold in their constitution. Brain, not brawn, is essential in patent law. Moreover, whatever your genius output, you must be the first to conceive it, as being first indicates the genuine and authentic inventor.61 Being the “first and true inventor”62 is so critical to patent law that once the patent issues in an inventor’s name, the law blesses that inventor with a presumption of authenticity (the patent is presumed valid and the inventorship correct) such that any subsequent challenge to inventorship can only succeed with clear and convincing evidence.63

2. Establishing Consent (to Legitimate Power and Property Relations)

The patent’s presumption of validity would make sense were inventorship subject to critical review at the Patent and Trademark Office (“PTO”). But instead, sworn declarations alone primarily determine inventorship.64 In other words, each inventor’s “creation story” is left to faith.65 For example, in the absence of disagreement, the PTO takes the inventor’s word at face value even if it lacks corroborating evidentiary support.66 As evidence of this trust, each patent applicant must sign the declaration of inventorship under penalty of perjury. The declaration is, in fact, an “oath” executed by the inventor and made true by her signing.67

61 See infra note 84 and accompanying text (noting the importance of chronology in the novelty analysis).
62 This language comes from the first U.S. patent statute, requiring that the subject of the invention was “not before known or used” and that the applicant be the “first and true inventor.” An Act to Promote the Progress of Useful Arts (1790 Patent Act), §§ 1, 5, 1 Stat. 109.
63 Hess v. Advanced Cardiovascular Sys., Inc., 106 F.3d 976, 980 (Fed. Cir. 1997).
64 See 37 C.F.R. § 1.63 (2007); see also Frisch v. Lin, 21 U.S.P.Q.2d 1737, 1739 (B.P.A.I. 1991) (“[S]tatement in patent application as to sole or joint invention are prima facie evidence of such fact; and a party, relying upon his application, does not have to prove such facts.”).
65 Even in interference cases, when the PTO is the first tribunal to adjudicate the legality of the patent, which would include the correctness of inventorship, the PTO considers its job to be to determine priority of inventorship, not inventorship itself. Ellsworth v. Moore, 61 U.S.P.Q.2d 1499, 1500 n.1 (B.P.A.I. 2001) (“This interference is not a typical interference where a party seeks to establish priority of invention vis-a-vis an opponent who may have independently made a patentable invention. Rather, the interference is an inventorship contest.”).
66 See Frisch, 21 U.S.P.Q.2d at 1739; see also Brader v. Schaeffer, 193 U.S.P.Q. 627, 631 (B.P.A.I. 1976) (stating, regarding correction of inventorship, that “[a]s between inventors their word is normally taken as to who are the actual inventors” when there is no disagreement).
67 See 37 C.F.R. § 1.63 (2007) (requiring an “oath or declaration [stating that the declarant] believes the named inventor or inventors to be the original and first inventor or inventors of the subject
Sympathetically, one might ask how the PTO would precisely investigate claims to inventorship when the requirement for that status is “the complete performance of the mental part of the inventive act.”68 How else but by reliance on a sworn declaration? What kind of evidence would substantiate the fabled eureka moment—the “flash of creative genius”?69 To be sure, Congress has amended the Patent Act and courts have further modernized it through common law to reflect the prevailing realities of scientific research to include collaborative science and joint inventorship70 through which inventions are the product of social interactions rather than isolated meditation.71 However, the language of conception and the stories told about inventors still manifest the solo mad scientists flying kites in lightening-filled skies and whose inventions appear like a cloud of smoke above their heads.72 This mythical moment of invention, the “aha” moment of discovery that only a single person in a quiet but stunning moment of reflection can experience, remains the “heart” of what it means to be an inventor.73 As such, the PTO and courts are left to consider only the inventor’s story of creation, his sworn testimony that legitimates the patent: an originary contract binding the inventor, her collaborators, and the United States government to the terms therein.

69 Cuno Eng’g Corp. v. Automatic Devices Corp., 314 U.S. 84, 91 (1941); cf. Abraham Lincoln, Second Lecture on Discoveries and Inventions (Feb. 11, 1859), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 356, 363 (Roy P. Basler ed., 1953) (“The patent system . . . added the fuel of interest to the fire of genius, in the discovery and production of new and useful things.”).
70 See 35 U.S.C. § 116 (2000); see also 130 Cong. Rec. 28,069-71 (1984) (reflecting the legislative history of the 1984 amendments to the Patent Act, including the addition of Section 116, which added a provision for joint invention “recognizing the realities of modern team research”); Ethicon, Inc. v. U.S. Surgical Corp., 135 F.3d 1456, 1469-70 (Fed. Cir. 1998) (describing the purpose of the new § 116 as, among others, “to remedy the increasing technical problems arising in team research, for which existing law, deemed to require simultaneous conception as well as shared contribution by each named inventor to every claim, was producing pitfalls for patentees, to no public purpose”); id. at 1469 (“The progress of technology exacerbated the inventorship problems. Patents were invalidated simply because all of the named inventors did not contribute to all the claims . . . . ”).
72 See infra Part I.B.
73 Id. at 179.
3. As a Heuristic of an Individual and a Nation

When considering inventive subject matter, rather than the inventive moment, courts have attempted to bring patent law down to earth by honing the scope of patentable subject matter. Doing so would ideally add a measure of consistency and fairness to the process. Indeed, one impetus behind the United States patent system was to create a system of rights and entitlements as distinct from the discretionary monopolistic privileges conferred under the English monarchy.\(^{74}\) Importantly, “[t]here is no discretion on the part of the PTO as to whether or not to grant the patent—if the statutory requirements are met, a patent is issued.”\(^{75}\) Some of the earliest known debates surrounding the intellectual property clause in the Constitution\(^{76}\) and the first Patent Act of 1790 go as far as to suggest that “each American citizen has a constitutional right to his property in the product of his genius and that it should be secured by the National Legislature.”\(^{77}\)

What is the patentable subject matter from which inventors have a right to exclude all others? The Supreme Court has attributed to Congress the intention that “anything under the sun that is made by man” can be patented,\(^{78}\) suggesting anyone may earn the privilege. However, the Patent Act requires that inventions be novel, useful, and non-obvious.\(^{79}\) Despite attempts at clarity, defining these three categories remains almost as elusive as determining the moment of conception.

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\(^{76}\) U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . [t]o promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ”).

\(^{77}\) Oren Bracha, *supra* note 74, at 218 (quoting JOSEPH BARNES, TREATISE ON THE JUSTICE, POLICY AND UTILITY OF ESTABLISHING AN EFFECTUAL SYSTEM FOR PROMOTING THE PROGRESS OF USEFUL ARTS BY ASSURING PROPERTY IN THE PRODUCTS OF GENIUS 16 (Phila. 1792)). Bracha calls this “the patent-rights model.” Id. at 182. The man asserting the existence of patent rights in early America (as opposed to patent privileges) was Joseph Barnes, attorney to James Rumsey, who was fighting with John Fitch in the early 1790s over certain riverboat engine technology. Edward C. Walterscheid, *Priority of Invention: How the United States Came to Have a “First-To-Invent” Patent System*, 23 AIPLA Q. J. 263, 270-273 (1995). As patent protection was a right, rather than a privilege, Barnes simply had to prove that he was the “first and true inventor” of patentable subject matter and the patent would have to issue. Conception would be taken on faith as long he was the first to conceive the invention and as long as the invention described was within the parameters of patentable subject matter. Rumsey was originally backed by George Washington, BARNES, *supra*, at 270, 277, and Fitch by Benjamin Franklin (interestingly enough, both considered originary founders of the United States), neither of whom disputed the “first to invent” model of patent rights. See BARNES, *supra*, at 276.


The requirement of novelty feeds the ideology of the patent inventor as investigating previously untraveled terrain—the brave and curious explorer. To prove novelty, the inventor must distinguish the invention from prior art, showing how the invention makes a new contribution to the field. This requirement makes sense from a traditional patent policy perspective. “If patent applicants did not have to demonstrate that their inventions were previously unknown, they would . . . be able to withdraw information [machines, and processes, etc.] from the public domain by securing patents on pre-existing devices and industrial processes, and the patent system would degenerate into a race to secure monopolies on existing technologies.” This would frustrate the constitutional prerogative “to promote the Progress of Science and useful Arts” by changing the incentive from innovation to acquisition.

Persuading a patent examiner or court that an invention is novel is not as technical as it may seem. Generally speaking, unless the prior art discloses all of the elements of the claimed invention (i.e., “anticipates” the invention), the invention is novel. Indeed, novelty determinations often devolve into questions of chronology: to defeat prior art references that might anticipate the claimed invention, the inventor must show that she conceived her invention before the date of the prior art. Given the etherealty of conception, substantiating it requires a persuasive creation story describing in words, more often than proving through tangible evidence, how the inventor originated the invention from her own mind first. The novelty requirement thus values both the authenticity of actually being the first to invent as well as an innovator who is a persuasive storyteller, one with the talent and allure to seduce and conquer his audience.

Of the three requirements, non-obviousness has been called “the ultimate condition for patentability.” It is the newest of the three require-

81 ROBERT SCHECHTER, INTELLECTUAL PROPERTY 265 (2006).
82 U.S. CONST. art. I, § 8, cl. 8.
83 Diversitech Corp. v. Century Steps, Inc., 850 F.2d 675, 677 (“Every element of claimed invention must be identically shown in a single reference.”). The disclosure must also be enabling to one skilled in the art, Novo Nordisk Pharm., Inc., v. Bio-Tech. Gen. Corp., 424 F.3d 1347, 1355 (Fed. Cir. 2005), the relevance of which I will discuss infra.
84 SCHECHTER, supra note 81, at 266 (“Novelty is all about chronology.”).
85 On the seduction of storytelling, see CHAMBERS, supra note 54, at 205-22. “[T]he further claim is now made that such [narrative] seduction, producing authority where there is no power, is a means of converting (historical) weakness into (discursive) strength.” Id. at 212. Certainly, most successful litigation requires persuasive and seductive storytellers. My assertion here is that the touchstone of patent protection (conception) depends on a good origin story above most else.
ments but serves important policy functions that are said to underlie the patent system.\textsuperscript{87}

The requirement ensures that patent protection is not given to inventions that have no social benefit because they are of minimal advance over what has already been done and "others would have developed the idea even without the incentive of a patent." Providing a protection for obvious ideas is socially harmful because it can lead to "a proliferation of economically insignificant patents that are expensive to search and to license."\textsuperscript{88}

Nonetheless, like the novelty requirement, non-obviousness has roots in the mythical aspects of invention and inventorship. Grasping the meaning of non-obviousness and its application in determining patentability inevitably requires contemplation of the quality of genius.

Although the standard for obviousness is whether the invention "would have been obvious at the time the invention was made to a person having ordinary skill in the art"\textsuperscript{89} ("PHOSITA"), the PHOSITA standard is neither ordinary nor common. As John Duffy has recently chronicled, the non-obviousness standard has roots in the United States as far back as the first Patent Act of 1790 when the invention or discovery had to be "sufficiently . . . important."\textsuperscript{90} The 1793 Act amended this language, stating that "simply changing the form or the proportions of any machine . . . in any degree, shall not be deemed a discovery."\textsuperscript{91} Merely changing form or proportion is not a "sufficiently . . . important" invention to garner a monopoly.\textsuperscript{92} Instead, a change "in principle" is required, and no such change will have occurred if it was "obvious . . . to any mechanic."\textsuperscript{93} This became the Hotchkiss standard, in 1851, which required for patentability a showing of more "ingenuity and skill . . . than . . . possessed by an ordinary mechanic acquainted with the business."\textsuperscript{94} Here are signs of that mythic mad scientist as a "heroic figure."\textsuperscript{95} As Corynne McSherry has written, this is not anach-
ronistic, but very much part of our national story. "By the late seventeenth century . . . inventors were being represented as heroic figures who wrestled with material nature to dislodge its secrets, and legal theorists were suggesting that patents could be claimed 'as the natural rights of genius.'" 96

Compare the description of the inventor whose invention is worthy of a patent monopoly with that of the mechanic. The inventor has "ingenuity," the mechanic only "ordinary" skill.97 The inventor possesses "genius," even a "flash of creative genius,"98 whereas the mechanic is described as a "mere artisan[]."99 To be sure, the 1952 Patent Act ratcheted down this high standard of patentability, requiring only that the difference between the new subject matter and the prior art not be "obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."100 But the application of this standard has been fraught with difficulty. The Supreme Court requires that courts determine the level of ordinary skill in the pertinent art, but does not say how.101 This leaves the lower courts, and in particular the Federal Circuit, to define this "mysterious personage."102

For thirty years, the Supreme Court stayed out of the debate. In 2007, however, it decided KSR International Co. v. Teleflex Inc.104 to address the criticism that becoming an inventor was too easy (i.e., the obviousness threshold was too low).105 In other words, the critics believed the PTO and the Federal Circuit erred too often on the side of ordinary rather than inno-

96 Id. (citations and internal quotation marks omitted) (quoting W. Kendrick, An Address to the Artists and Manufacturers of Great Britain (1774)). Mario Biagioli argues persuasively that the U.S. patent system with its novelty and non-obviousness requirements (as represented in the patent specification) are part and parcel of the developing political constitution of the new nation. Biagioli, supra note 59, at 1140 ("That specifications were absent in the colonial period, but began to emerge after the Declaration of Independence to become eventually codified in the first US Patent Act supports a correlation between political representation and patent representations.").

97 Hotchkiss, 52 U.S. at 267.
98 Reckendorfer v. Faber, 92 U.S. 347, 357 (1876) ("inventive genius").
99 Cuno Eng’g Corp v. Automatic Devices Corp., 314 U.S. 84, 91 (1941).
103 Joseph P. Meara, Just Who is This Person Having Ordinary Skill in the Art? Patent Law’s Mysterious Personage, 77 WASH. L. REV. 267 (2002); see also Cotropia, supra note 87, at 918 (describing recent criticism of the Federal Circuit’s nonobviousness jurisprudence); Meara, supra, at 286 ("Current Federal Circuit factors for determining the level of ordinary skill should be abandoned or modified because they do not advance the nonobviousness inquiry."); Duffy, supra note 90, at 42 ("It would have been better if the Court had tried to articulate a [sic] much greater detail the circumstances under which the obviousness doctrine was important for barring patents on novel developments.").
105 See id. at 1734-35.
vative. The Supreme Court agreed, ratcheting up the non-obviousness standard and attempting to clarify the distinction between an obvious mechanical change and an innovative creation or development over the prior art:

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103.\(^\text{107}\)

With *KSR*, the Supreme Court has affirmed the myth of the genius scientist who illuminates discoveries with the light bulb over the head, returning us to where we started: distinguishing the ordinary, predictable, and the common sense from the stuff of patents, “real innovation,” and extraordinary creativity.\(^\text{108}\)

Who is this “first and true” inventor whose new and useful creation comes not of nature but of his mind and is non-obvious to the ordinary person skilled in the particular art at issue? Consider that this special person did not merely discover some law of nature or product of nature, however new or useful to human society.\(^\text{109}\) The inventor is a creator. Secondary considerations—indicia of non-obviousness, such as the prior failure of others skilled in the art to solve the same technical problem or unexpected results that show the invention is counterintuitive in some way—further distinguish the invention and its creator from all the others (mechanics?) as someone special, unordinary.\(^\text{110}\) In this way, patent law describes a person and a community, his nature and its values:

As inventors became owners they also became guarantors for several foundational dualisms: monopoly/freedom, creator/work, and . . . public/private . . .

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\(^{106}\) Cotropia, *supra* note 87, at 913 (discussing two reports that claim that “the Federal Circuit has improperly relaxed the nonobviousness requirement”). The criticism was mainly directed at the teaching, suggestion or motivation test, which is one part of the obviousness inquiry. See *id.* at 917-18.

\(^{107}\) *KSR*, 127 S.Ct. at 1742.

\(^{108}\) *Cf. id.* at 1741 (“Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility.”).

\(^{109}\) *Chakrabarty*, 447 U.S. at 309 (“[A] new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter.”).

If this sounds like the individual citizen at the heart of John Locke’s theory of civilization or Thomas Hobbes’ theory of government and sovereignty, then the origin myth of patent law (and its heuristic function for describing the American individual and her nation) has emerged clearly. Indeed, one scholar has recently argued that the development in the United States of the persona of the inventor as genius directly parallels the birth of republican government in the United States, and, to a lesser extent in France.

The patent law origin story, therefore, explains how and why we grant certain people and not others this special and valuable monopoly. It justifies the distinction between the haves and the have-nots with allusion to differences between people, those who are ordinary, mere artisans, and those who are not. The patent law protects the creative output of the uncommon or remarkable person. Moreover, invocation of conception and description

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111 McSherry, supra note 71, at 45.
112 Grossly simplified, John Locke’s theory of the origin of property located that origin in the right to own the product of one’s own labor. For recent discussions on John Locke and the U.S. intellectual property regime, see, for example, Robert Merges, Locke Remixed —., 40 U.C. Davis L. Rev. 1259, 1265 (2007); and Adam Mossoff, Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context, 92 Cornell L. Rev. 953, 971-72 (2007).
113 For Hobbes, state power and control (e.g., the state’s regulation of property) was a prerequisite to civil stability. See, e.g., Helen Stacy, Relational Sovereignty, 55 Stan. L. Rev. 2029, 2032-33 (2003) (citing Thomas Hobbes, Leviathan 186 (C.B. Macpherson, ed. 1968) (1651)).
114 Biagioli, supra note 59, at 1142, 1147. The irony is rich here. Whereas the birth of the American inventor might arise from contemporary political developments valuing representation and transparency (“disclosure” in patent terms) in a government promising a role or place for everyman, this American inventor is defined by that which distinguishes him from everyone else. Indeed, just as voting rights were severely curtailed in the early republic by race and property despite the move to representative democracy, the inventor-identity as American citizen was a right reserved for only those who could represent themselves in the polity (or through the patent specification) as unique. Id. at 1140-42, 1147.
115 “Identification of conception as the heart of invention links the discourse of inventorship, . . . to the idealized individual originary genius. . . . Invention . . . is the province of heroic individuals who are able to observe the works of nature and man and recombine those works to nonobvious, novel, and useful effect.” McSherry, supra note 71, at 179 (footnote omitted).
116 Who are examples of remarkable people that supported the “first to invent” system? George Washington and Benjamin Franklin were among the first (the story goes) to battle behind the scenes in the first-priority contest for a patented invention. See Adam B. Jaffe & Josh Lerner, Innovation And Its Discontents 163 (2004). Jaffe and Lerner write:

Perhaps the most compelling explanation for this decision [of the United States to adopt a first-to-invent system] lies in historical accident: at the time the Patent Act of 1793 was enacted, two dueling inventors, James Rumsey and John Fitch, were locked in a battle over the ownership of riverboat engine technology. Each had made several patent applications, but the orders of application and invention differed. So the particular design of the patent system would have an enormous influence on their individual fortunes. Not surprisingly, the men—and their financial backers, who had included both George Washington and Benjamin Franklin—exerted heavy influence to try to shape the system for their benefits.
of this “first and true” inventor as memorialized in the patent itself (the oath of inventorship, a contract between relevant parties\(^\text{17}\)) substantiates present circumstances of rights and entitlements (e.g., a right to exclude and a royalty stream under the patent) with an appeal to the past and mythical beginnings.

B. **Patent Stories**

Consider how the following recent inventorship dispute mobilizes the origin myth of patents described above.\(^\text{18}\) The patent at issue arose out of a joint collaboration between Massachusetts General Hospital (“MGH”), Massachusetts Eye and Ear Infirmary (“MEEI”), and a small biotech firm in Vancouver named QLT.\(^\text{19}\) The drug developed, called Visudyne, is the first of its kind to treat age-related macular degeneration ("AMD"), which is the leading cause of blindness in people over the age of 50.\(^\text{20}\) Since the FDA approved the drug for medical use, it has been a multi-million dollar product, turning the small Canadian biotech company into a very profitable one.\(^\text{21}\) One reason the drug is so special is its unique delivery system. The drug is photosensitive and activated by light.\(^\text{22}\) It is administered intravenously and travels throughout a patient’s body, but it treats only the very delicate eye blood vessels when a very precise, non-thermal laser beam is directed into the eye.\(^\text{23}\)

The dispute concerned the division of the profits from the drug.\(^\text{24}\) The inventors had assigned their rights to their respective institutions.\(^\text{25}\) And as joint-owners, each institution could separately make, use, or sell the invention without accounting to the other owners.\(^\text{26}\) QLT sought exclusive rights

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\(^{17}\) See Biagioli, supra note 59, at 1131-32 (describing the "patent bargain" as one between the inventor and his fellow citizens).

\(^{18}\) Although I was part of a large team representing QLT during the early phases of this litigation (which lasted over eight years), everything I say about this case is based on public record. Nothing contained herein should be construed to be the view of any of the parties or attorneys in the case, other than myself.


\(^{20}\) Id. at 221.

\(^{21}\) Id. at 223; see also Mass. Eye & Ear Infirmary v. QLT, Inc., 495 F. Supp. 2d 188, 204 (D. Mass. 2007).


\(^{23}\) Id.

\(^{24}\) Mass. Eye & Ear, 412 F.3d at 229-34.

\(^{25}\) Id. at 224.

in the patent, however, and so it negotiated with both MGH and MEEI for a transfer of their exclusive rights in exchange for a royalty on the sale of the drug, which QLT was prepared to market world-wide.\textsuperscript{127} QLT reached a license agreement with MGH, but MEEI wanted a larger royalty than MGH agreed to.\textsuperscript{128} When QLT and MEEI could not reach an agreement on a royalty term,\textsuperscript{129} QLT, with patent rights equal to those of MEEI, began selling the drug and paying royalties to MGH under their license, but paid nothing to MEEI.\textsuperscript{130}

MEEI sued, angry that it received none of the invention’s royalties. One of its claims was that QLT’s scientist, Julia Levy, was not a real inventor of the invention described by the patent.\textsuperscript{131} Removing Levy from the patent would return the control of the invention and its profits to MEEI and MGH.

Throughout the litigation, the parties wrestled with the above-mentioned mystical underpinnings of inventorship law. In particular, what does “conception” mean, and who is the “first and true” inventor of Visudyne? QLT would need to tell a convincing story about how Julia Levy conceived of the invention, and why she deserved to be named on the patent. After all, a well-regarded Harvard-affiliated teaching hospital sued QLT, a Canadian pharmaceutical company, in Boston. While Levy may have begun the research on photosynthetic delivery of the drug, MEEI would say that its clinical studies transformed the idea of the photosensitive drug into a reality, by determining the drug’s effective dosage.\textsuperscript{132} Its work cured the disease.\textsuperscript{133}

If MEEI has a persuasive argument, it lies in the changing world of collaborative research that the 1984 amendments to the Patent Act were meant to address.\textsuperscript{134} The 1984 amendments “remed[ied] the increasing technical problems arising in team research, for which existing law, deemed to require simultaneous conception as well as shared contribution by each inventor to every claim, was producing pitfalls for patentees . . . [T]he amendment ‘recognizes the realities of modern team research.’”\textsuperscript{135} In a world of collaborative research that spans the globe, where scientists in Bologna and Boston can jointly contribute to an invention claimed in a patent without working together in the same laboratory, the notion of inventor is changing. Inventors under the law are not the mad scientists of myth. As

\textsuperscript{127} Mass. Eye & Ear, 412 F.3d at 224.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 214.
\textsuperscript{131} Mass. Eye & Ear, 353 F. Supp. 2d at 174; see also Mass. Eye & Ear, 495 F. Supp. 2d at 206-09.
\textsuperscript{132} Mass. Eye & Ear, 495 F. Supp. 2d at 201-03.
\textsuperscript{133} Id. at 203.
\textsuperscript{135} Id. at 1467-69 (quoting 130 CONG. REC. 28,071 (1984)).
the 1984 amendments recognized, inventors of the twentieth and twenty-first centuries exist in teams, and inventions are made over the course of years and not in the poof of a moment.

In support of its equitable argument, MEEI relied on Judge Newman’s dissent in Ethicon v. United States Surgical Corporation, in which Newman, relying on the history behind the 1984 Amendments, berates the majority for reading Sections 116 and 262 of the Patent Act together to mean that even if someone contributed only a single claim to a patent that person was nonetheless an inventor of the entire invention who could make, use, or sell the invention without accounting to the other owners. Newman complained that prior to the 1984 amendments only “a person who had fully shared in the creation of the invention [as a whole] was deemed to be a joint owner of the entire patent property . . . on a legal theory of tenancy in common.” Drawing on the history of patent ownership prior to 1984, Newman explained that “[t]he law had never given a contributor to a minor portion of an invention a full share in the originator’s patent.” Newman argued that courts are mistakenly applying Section 262 of the Patent Act “to treat all persons, however minor their contribution, as full owners of the entire property as a matter of law.”

In light of MEEI’s arguments, QLT would have to tell a persuasive story about how Julia Levy was an inventor who had fully shared in the creation of the invention, how she was the “first and true” inventor. It would be an origin story, with homage to authenticity and reliance on evidence of consent, that would legitimate her claim to the patent and justify the apparent inequities in the division of the royalties in the way that myths do. This was QLT’s story.

When Julia and her husband were raising their young children, they had a cottage on a remote island off the coast of Vancouver. There her children often played in fields covered with cow parsley, a low-growing ground cover. She noticed that after playing in the fields, her children’s skin was more susceptible to sunburn. She spoke with a botanist friend and learned that cow parsley has photodynamic qualities—it exudes an oil that absorbs sunlight. Fascinated with this chemical process as a biochemist, she wondered if the process could enrich her biomedical research. When her mother

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137 Ethicon, 135 F.3d at 1469-70.
138 Id. at 1471 (citation omitted).
139 Id.
140 Id.
developed macular degeneration and no cure was available, in part because targeting and treating the delicate blood vessels behind the eye is so difficult, Julia began developing a drug bearing photosynthetic qualities (i.e., one activated by light like the precise point of a laser). She conceived of a biochemical structure that would bind especially well to the small blood vessels of the eye such that when a doctor shined a non-thermal laser through the eye, the drug-bearing photosynthetic qualities would operate only on those vessels and nowhere else in the body. Visudyne originated, QLT argued, in the cow parsley patches of Julia Levy’s summer cottage and was fully conceived in the mind of the biochemist as she searched for a drug to cure her mother’s illness. Her collaboration with MEEI came much, much later.

This is a good origin story. Despite the fact that the law of inventorship supported QLT, this story alone explained and justified Julia’s inclusion on the patent as an inventor. It had all the qualities of an origin myth.

Levy’s inventor status is rooted in authenticity, essential truths buried in the beginning of the idea of Visudyne. Julia is the person who originated the idea of photodynamic therapy to treat AMD, and thus she garners the authority and legitimacy necessary for the law’s protection. The beginning of Visudyne lay with her in her summer retreat and her relationship to her mother.

This origin story is also political in nature, justifying a particular hierarchy of people and outcomes. It is not a “noble lie” as is based entirely on fact if one is to believe Julia Levy, and there is no reason not to. But it nonetheless refutes the perceived inequities in claiming Levy as an inventor on the same patent as MGH and MEEI scientists. After all, according to the patent, Levy contributed to only two claims on a patent that had more than a dozen claims. And MGH and MEEI’s clinical work, or so they claimed, over the course of many years honed the administration of the drug so that it could treat people. Nonetheless, Levy conceived of the drug’s chemical structure and provided the compound with which MEEI clinicians experimented. She was the mind controlling the body, the brain to MEEI’s brawn. MEEI’s complaints of unfairness and disadvantage rely on incredible assertions of vulnerability (the small, nonprofit teaching hospital up against a big pharmaceutical company), which sound in emotion rather than

142 But cf. Wright, supra note 10, at 5 (characterizing Plato’s Myth of the Metals as a “self-consciously political” means to “ensure[] conformity to his envisioned hierarchy”).
143 Recall that conception of an invention begins as a matter of faith. See supra note 77.
Levy’s story of her inspired moment—the story of the formation in her mind of a definite and permanent idea of the invention—resonates with her high status (her gold, rational status) as an inventor. This origin story relies not only on authenticity in conception to naturalize certain wealth and power relations, but also a narrative of consent. MEEI cannot complain that QLT and its founding scientist took power unfairly (notoriety and riches backed by the force of a legal document, the patent), because MEEI signed a declaration of inventorship attesting to the correctness of inventors listed on the patent, which included Julia Levy. The status hierarchies or different financial positions, in which the institutions and inventors eventually found themselves, was a direct result of the agreed-to relations between the parties. That MEEI and QLT failed to reach an agreement later as to a license has nothing to do with inventorship. Like the social contract, the parties agreed to this property arrangement and should be loath to protesting now, years later, when they cannot reach a licensing deal.

MEEI has a response: it only consented to the patent filing because QLT promised it a better situation in return. In other words, its consent was quid pro quo for a reasonable royalty, which QLT failed to offer. Here, we see the origin myth as a reflection of a perennial social and cultural preoccupation: equality. QLT’s story of the beginning—the initial patent discussion—describes scientists who were all equally situated in relation to the invention. All were on the patent and all contributed to at least one of its claims. But MEEI deconstructs this origin myth claiming that the story QLT tells entrenches its status as originator with, in Wright’s words, “the permanence of nature.” MEEI says, in the beginning, hierarchies existed, not equality. MEEI is a nonprofit teaching hospital; QLT is a big pharmaceutical company. QLT always had the upper hand and used that power to get its jointly-invented patent and prevent MEEI from reaping its fair share of the profits. That was MEEI’s theory of the case.

Although a twenty-first century battle over a path-breaking drug, the stories QLT and MEEI told were about inventors and power, laborers and disparate wealth, and they resonate with the stuff of legends. They rehearse the origin myth of patents, the difference between the genius and the mechanic, the person who is first and true and those that merely implement

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147 MEEI is a very successful and well-respected hospital affiliated with Harvard University. Massachusetts Eye and Ear Infirmary, http://www.meei.harvard.edu/ (last visited Nov. 17, 2007). QLT began in 1981 as a collaboration between Levy and just four other scientists. Baum, supra note 141.


149 Id. at 224, 234.

150 Id.

151 WRIGHT, supra note 10, at 10 (“Contingent political arrangements, arrangements that are the result of accident and dissension . . . are invested with truth and essence in origin myths.”).
previous orders, all to justify the intellectual property arrangement at the
center of the dispute.  

III. COPYRIGHT LAW

A. Copyright Origins

Of all three statutory intellectual property regimes, copyright may be
most obviously structured around an origin myth, because original creation
is the touchstone of copyright protection. The Copyright Act provides copy-
right protection for “original works of authorship fixed in any tangible me-
edium of expression.” Key to this protection is defining “originality” and
“work of authorship” and understanding what these terms exclude.

1. As a Measure of Authenticity to Legitimate Hierarchy

Much like the inventor of a patent, an author of a copyrightable work
has been variously described as having a “creative genius” and as being
taken hold of by a “creative spark.” Authors reap the “creative powers of
the[ir] mind” using their “fancy or imagination,” and “intellect.” Although many people have written that the early copyright acts benefited
booksellers and not writers, the cult of the romantic author (much like that
of the hero-inventor) runs deep in the history of United States copyright
law.  

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154 United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948); see also Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 55, 58 (1884) (noting that a copyright was “the exclusive right of a man to the production of his own genius or intellect . . . .”).


156 In re Trade-Mark Cases, 100 U.S. 82, 94 (1879).

157 See id. (describing how trademarks differ from other types of intellectual property because they do not require the use of fancy or imagination).


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An author, although left undefined by the Copyright Act, straddles the domains of the human and divine. As a model of human ingenuity, the author "wr[ites] a 'self'" possessing the unique qualities of an individual, owning his words and thus owning himself. He is nonetheless divinely inspired. The author as a concept began with the author as a vessel for independent, God-like forces. Indeed, the metaphor of the author as divinely gifted is an active metaphor in copyright case law. Roberta Kwall has traced this parallel between authorship and God calling it a "mirroring argument," comparing the first creation narrative in Genesis to the wonders of artistic creation: "man’s capacity for artistic creation mirrors or imitates God’s creative capacity.”

The co-existence of these dual qualities in the author, the human and the divine, functions as an ideology of uniqueness to underwrite the authority that authorship garners. An author is the creator of an original work, but "original" does not necessarily mean novel; it means only independently created by the author himself. The work must literally have originated from him and not from anyone else. As the Supreme Court said in one of the more famous copyright cases, an author is "in that sense . . . he to whom anything owes its origin; originator; maker; one who completes a work of science or literature." This turns out to be a very low threshold for originality—only the merely "trivial" contributions are excluded from copyright protection—and yet it seems to embed within it the ideological notion of the uniqueness of each individual. Each person has something to contribute that is "recognizably his own.” This is a common American narrative: the


160 See CATHY N. DAVIDSON, REVOLUTION AND THE WORD: THE RISE OF THE NOVEL IN AMERICA 52 (1986) (discussing John Locke’s theory of property that “saw every mind as a blank page upon which experience wrote a 'self').

161 Peter Jast, Toward a Theory of Copyright: The Metamorphosis of “Authorship,” 1991 DUKE L.J. 455, 469-70 (describing the rise of the concept of authorship as part of the eighteenth century theory of “possessive individualism”).

162 Genius and Copyright, supra note 159, at 427.

163 See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co. 499 U.S. 340, 362-64 (1991) (“[There is a] minimal creative spark required by the Copyright Act and the Constitution.”); Mark Rose, Copyright and Its Metaphors, 50 UCLA L. REV. 1, 11 (2002) (referring to the opinion in Feist and noting that the "creative spark . . . if unpacked could be shown to carry a numinous aura evocative ultimately of the original divine act of creation itself.”).


165 L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976).

166 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (internal quotation marks omitted).

167 Feist, 499 U.S. at 359.

168 L. Batlin & Son, 536 F.2d at 490 (quoting Alfred Bell & Co. v. Caralda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951)).
rugged individuality of each person contributing to the nation’s economic, social, and political successes.\textsuperscript{169}

Consider that copyright law will protect two identical poems under separate copyright as long as each work originates with a separate individual, allowing for the theoretical possibility that the exact same expression can arise from two different authors.\textsuperscript{170} This is only a theoretical possibility, of course,\textsuperscript{171} because the cult of the author, like the myth about snowflakes, assumes that no two people will create the exact same work because no two authors are exactly alike.\textsuperscript{172} “Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone.”\textsuperscript{173} The origin myth of copyright begins with this heuristic about human nature: the belief in the singular essence of each person (whether from God or nature), which then develops into the right of ownership that each of us has, or should have, over that which is uniquely our own.

Authorship is expressly linked to authority, the authority and control each author has or should have over that which originates from him or herself.\textsuperscript{174} This is not necessarily because of the premium placed on owning oneself but because of the value placed on authenticity. An original work of authorship is inauthentic (lacks originality) if it is copied from somewhere else. Independent creation thus justifies authority over the work.\textsuperscript{175} A copy

\textsuperscript{169} See supra note 16. By comparison, some countries such as Japan that embrace sweat-of-the-brow principles may have different concepts of individualism and the role of the individual in society. See, e.g., \textsc{Yamazaki Masakazu, Individualism and the Japanese: An Alternative Approach to Cultural Comparison} 88, 89-91 (Barbara Sugihara trans., 1994) (describing Japanese society as revolving around the notion of the “contextual” or cooperative individual who is characterized by “interdependence, mutual trust, and the view of interpersonal relations as intrinsically valuable”), see Kenneth Port, \textit{Dead Copies Under the Japanese Unfair Competition Prevention Act: The New Moral Right}, 51 \textsc{St. Louis U. L.J.} 90, 109 (2006) (“In the name of harmonization, the Japanese protect the very same 'sweat of the brow' that has long been discounted as justification for intellectual property protection in the United States.”).

\textsuperscript{170} Feist, 499 U.S. at 345-46.

\textsuperscript{171} SCHENK, \textit{supra} note 81, at 168 (“Such situations [of parallel independent creation] rarely come up in the real world, because it is highly unlikely two authors will create identical works of any complexity.”).

\textsuperscript{172} Alan L. Durham, \textit{The Random Muse: Authorship and Indeterminacy}, 44 \textsc{Wm. & Mary L. Rev.} 569, 619 (2002) (“Every author who does not slavishly copy from another source is likely to introduce something unique.”).

\textsuperscript{173} Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903); see also Feist, 499 U.S. at 350 (“Copyright is limited to those aspects of the work . . . that display the stamp of the author’s originality” (quoting Harper & Row v. Nation Enters., 471 U.S. 539, 547 (1985))).

\textsuperscript{174} To be sure, this is circular reasoning, but it is nonetheless an on-going justification for copyright protection. MCDONALD, \textit{supra} note 71, at 40 (“In a feat of circular reasoning, the radically autonomous individual author-genius was confirmed by the work’s uniqueness, while the uniqueness of the work was confirmed by the individuality of the author.”).

\textsuperscript{175} In \textit{Batlin}, the court discussed the importance of independent creation in the context of copyright law. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (“Originality is . . . distin-
is the antithesis of the authentic work and lies at the core of the infringement right of action.176

2. Establishing Consent (to Legitimate Power and Property Relations)

Originating an expression is not the only means to legitimate the power of exclusion through copyright. Joint-authorship and works-for-hire create a situation where originating an expression is not enough. Indeed, in the latter case it does not matter.177 What is of consequence is that the parties agree regarding the status and ownership of the finished product. In the case of co-authored works, the individual asserting joint-authorship must establish that each of the co-authors made independent copyrightable contributions to the work and that they each fully intended to be co-authors.178 This standard, unexamined by the Supreme Court but widely embraced throughout the Circuits,179 “creates a great deal of mischief, for it allows one collaborator—the dominant party—to lure others into contributing material to a unitary work, all the while withholding the intent to share in its economic and reputational benefits.”180 The standard’s requirement for consent is exacting, demands certainty, and disregards the amount or quality of the putative co-author’s creative contribution to the original work.181 As explained more fully below, consent is not easily given by authors (or found by courts).182 Consent must originate from he who had the authority or control over the initial creative arrangements. He is the genius as be-

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177 17 U.S.C. §§ 101, 201(b) (2000) (stating that the employer owns the copyright in works made by an employee within the scope of his employment).
178 Thomson v. Larson, 147 F.3d 195, 200-01 (2d Cir. 1998). The language of intent, which goes to consent, is in the statute, 17 U.S.C. § 101, although there is a difference between the language of the statute and the language in Thomson. Compare 17 U.S.C. § 101 (“a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”), with Thomson, 147 F.3d at 201 (“all participants fully intend to be joint authors” (quoting Childress v. Taylor, 945 F.2d 500, 509 (2d. Cir. 1991))).
181 Aalmuhammed, 202 F.3d at 1235. See generally Jaszi, supra note 159, at 50-52 (1992) criticizing the doctrine of joint authorship and its reliance on an individualistic notion of authorship.
182 See infra Part III.A.3.
tween contenders and only by his grace may others participate. Without his consent, they cannot. 183

Works-for-hire wreak a similar injustice that can be explained away with homage to consent, a central feature of political origin myths. When an employee originates a copyrightable work of authorship, the work belongs to the employer.184 As long as an employee produced the work within his scope of employment, he has impliedly consented to transfer authorship (and therefore ownership) of it to the employer.185 An employee, or independent contractor, can also explicitly consent to sign away his authorship status through contract.186 These provisions of the Copyright Act are justified by relying on several of copyright law’s founding goals: encouraging and efficiently disseminating creative output.187 “The work for hire doctrine is . . . best understood as a way to put decisions on disseminating, revising, or building on works in the hands of the entity that will maximize creative value.”188 But these provisions make certain assumptions about the employer-employee relationship that may frustrate these and other goals of copyright law. In particular, employees or potential employees may not have any meaningful control over the scope of their employment, nor may frank discussion of authorship occur regularly and honestly.189 Likewise, when a work-for-hire requires a contract, often times “parties have other relationships with one another that turn the signature into an inadequate bargaining tool.”190

183 I am grateful to Rebecca Tushnet for the phrasing behind this idea and its placement at this point in the argument.


185 Id.; see also Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (ascertaining the scope of employment through agency law).

186 A work-for-hire can also be created explicitly through contract and such a work falls into a specific category designated by the statute. 17 U.S.C. § 101(2) (2000).


188 Dreyfuss, supra note 180, at 1202; see also id. 1200-02 (“In this way, all exploitation decisions are put in the hands of a single entity.”).

189 See id. at 1204 (describing how the work-for-hire doctrine works poorly in a research university setting); McSherry, supra note 71, at 89-90 (reporting that collaborators describe discussions of authorship as “embarrassing” and “uneasy” and thus often avoid the topic altogether or resolve the question with attention not to original contribution, but rather to human relations).

190 Dreyfuss, supra note 180, at 1204 (“In the university setting . . . untenured faculty may have difficulty refusing to sign. Certainly the students and research fellows who are often protagonists in these disputes might be too concerned about getting their degrees or employment references to negotiate forcefully.”).
3. As a Heuristic of an Individual and a Nation

Respect for the ideal act of consent that originates the collaborative and creative project smoothes the wrinkles from these doctrines. As already mentioned, consent is a central justification for the inequities that might result from works-for-hire and joint-works of authorship. But why should that be? What work does the parable of consent do for the vitality of the origin myth of copyright? If we believe that original and creative expression is sufficiently valuable to designate it as property of its maker, and if copyright law serves to incentivize authors to create more original works, why redirect that incentive and the ownership right to the dominant co-author or to the employer? 191

The answer lies in the origin story copyright law tells about the nature of authorship. The doctrines of joint authorship and work-for-hire do not protect an “author” as a literal source but instead as a functional origin of expression. Instead of privileging one who actually wrote the words or shaped the sculpture, these copyright doctrines ask who propelled and encouraged the inspiration. This is a theory of patronage, suggesting that without it, no creative expression would take place in the first instance. In this way, the origin myth of copyright expressly embodies a theory of the American citizen, his nature and his possibility. The law confers the privilege of copyright (e.g., the power to exclude) only on an author who has the capacity to originate (through manufacture, promotion, influence or superior management) creative work.

Regardless of who produced the original arrangement, it was the individual or firm who could claim 'authorship' to the work's initiative 'motivating factor' and inspiration. In effect, the visionary component of Romantic 'authorship' was disaggregated from the associated component of intellectual and physical labor. The employer was cast as the visionary, and the employee as a mere mechanic following orders. 192

This origin myth explains why the author of a work-for-hire is not the writer/employee but the employer, because the employer has already fulfilled the American dream of ownership and command, albeit over only a small dominion—a single mind or a community of people. The origin myth explains the rule of joint-authorship: the individual who controls the terms of the relationship will determine whether or how the work is co-

191 See Jaszi, supra note 161, at 490 (describing problems with the work-for-hire doctrine that follow from the Supreme Court's decision in Community for Creative Non-Violence v. Reid and saying that the Court's "particular version of the 'authorship' construct emphasized in the 'work-for-hire' cases may, in practice, be inimical to the concrete pecuniary and moral interests of writers, photographers, sculptors and other flesh-and-blood creative workers").

192 Id. at 488-89 (discussing Picture Music Inc. v. Bourne, Inc., 457 F.2d 1213 (2d Cir. 1972), and later amended work-for-hire provisions to the Copyright Act in 1976).
Courts justify the potential inequity that might result from the joint-authorship rule by explaining that the doctrine as it currently exists "prevents...spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author." Concern over unjust enrichment claims of one putative co-author at the expense of another has led to a rule that favors the party who already is a property owner. The clarity of this rule might effectively minimize conflict (in the language of origin myths, it forestalls violence), but it also quite explicitly sanctions the extant power relations and hierarchies that are based on controlling the means of reproduction (labor) that shape our post-industrial society.

These doctrines, and their governing narratives, produce the same status hierarchy that operated in patent law. In patent law, they distinguish the genius from the mechanic to discriminate, and in copyright law they divide authors and all others. Indeed, the language of the "mechanic" (as compared to the artist-author) also runs throughout copyright law. As one often-cited treatise writer said: "[o]ne who has slavishly or mechanically copied from others may not claim to be an author." Otherwise put: copying, while laborious, is not inspired. Labor is not necessarily rewarded under the copyright regime. That we protect only the authentic or original works of authorship, and not the product of significant labor, reflects our society’s hierarchy of values and underscores certain fundamental propositions about who we are and what kind of expression is meaningful. In Plato’s terms, “authors” are made of gold, not brass. The brass—the laborers—are felled by Feist Publications Inc. v. Rural Telephone Service Co.’s “sweat of the brow” doctrine. We embrace this story of human originality because we want to believe we are each unique and thus each capable of creating copyright-protected expression. This mythic narrative of rugged individualism is a motor behind our market theories, our republican form

193 Dreyfuss, supra note 180, at 1204-09; Jaszi, supra note 159, 314-16.
194 Childress v. Taylor, 945 F.2d 300, 507 (2d Cir. 1991).
195 See Dreyfuss, supra note 180, at 1218 (suggesting that the joint-authorship test announced in Childress is animated by the “concern that secondary contributors would receive too rich a reward—an undivided half interest in the entire collaborative product”).
196 Keith Aoki has persuasively argued that the “author trope” serves to reify preexisting property regimes not only within a country but between nations as well. He says that authorial property is a form of, or is at least closely related to, the concept of national sovereignty (which includes notions of cultural, economic and political ascendancy and dominance). Keith Aoki, (Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship, 48 STAN. L. REV. 1293, 1297-1299 (1996).
197 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.06[A] (2006).
198 Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’”) (quoting U.S. CONST. art 1, § 8, cl. 8); see also id. at 353 (describing the flaws of the “sweat of the brow” doctrine).