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We're All Pirates Now: Making Do in a Precarious IP Ecosystem

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WE'RE ALL PIRATES NOW: MAKING DO IN A PRECARIOUS IP ECOSYSTEM♦

JESSICA SILBEY*

ABSTRACT

Fifteen years after The Piracy Paradox explained how most anti-copying protection is unnecessary for a thriving fashion industry, we face another piracy paradox: with broader and stronger IP laws and a digital economy in which IP enforcement is more draconian than ever, what explains the ubiquity of everyday copying, sharing, re-making, and re-mixing practices that are the lifeblood of the Internet's expressive and innovative ecosystems? Drawing on empirical data from a decade of research, this short essay provides two examples of this "new piracy paradox": a legal regime that ostensibly punishes piracy in a culture in which it is unavoidable. The examples show how everyday creators and innovators negotiate the necessity of copying others' work with the desire for control over their own work in ways largely orthogonal to IP law. I describe these "adaptations" that combine a narrower scope of rights with qualitative metrics for protection and attribution norms with references to interview data. Both broaden the public domain while building resiliency within creative and innovative communities. Neither lack controversy or contestation, but together they explain how everyday creators and innovators make their way in an IP system that largely fails to adapt or reflect their own values or practices in the Internet age.

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INTRODUCTION

The Piracy Paradox: Innovation and Intellectual Property in Fashion Design challenged the orthodox utilitarian justification for intellectual property by examining the thriving fashion industry that largely lacks strong intellectual property (IP) protection. “Copying is rampant, [yet] innovation[] and investment [are] vibrant,” the authors wrote.¹ Since publication of that article and the subsequent book by the same authors, intellectual property research and scholarship has provided many more examples of other creative and innovative industries thriving despite rampant copying or the absence of IP protection.² This is perhaps unsurprising because copying is essential to creativity and innovation. Copying and dissemination of copies are also required to learn and communicate, perhaps more so today in the Internet age than ever before. We are all pirates, and perhaps always have been.

The Internet and digital technology make the fact of inevitable copying and dissemination even more ubiquitous as they rapidly spread the effects of everyday ordinary copying. This viral spread may mean quicker innovation and preparation of derivatives. It may also mean that first mover advantages that help establish reputation and market leverage are smaller and markets are more competitive. Because of the Internet and rapidly multiplying and diversifying work, the proper authors and inventors are harder to trace and remunerate under settled intellectual property law and traditional business arrangements.³ We can debate the welfare implications of these presumed effects of digital-age technology.⁴ And

¹ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1689 (2006).

² For studies on the creativity or innovation that persists in the absence of IP, see for example Elizabeth L. Rosenblatt, *Intellectual Property’s Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441 (2013); KATE DARLING & AARON PERZANOWSKI, CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY (2017); Michela Giorcelli & Petra Moser, *Copyrights and Creativity: Evidence from Italian Opera in the Napoleonic Age*, 128 J. POL. ECON. 4163 (2020). For examples of industry-specific norms in the shadow of the law, see Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008); LAURA J. MURRAY, S. TINA PIPER & KIRSTY ROBERTSON, PUTTING INTELLECTUAL PROPERTY IN ITS PLACE: RIGHTS DISCOURSES, CREATIVE LABOR, AND THE EVERYDAY (2014) (with chapters on knitting, newspapers, and the legal profession); BRETT M. FRISCHMANN, MICHAEL J. MADISON & KATHERINE J. STRANDBURG, GOVERNING KNOWLEDGE COMMONS (2014) (with chapters on rare disease development, citizen science, roller derby, and the airplane industry).

³ U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION 3 (June 2015), <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> [<https://perma.cc/LG6F-KKCN>].

⁴ Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 460 (2015) (describing the challenges of IP law and there in an internet age that has “reduced the cost of production and distribution of informational content effectively to zero”); Jessica Silbey, *Against Progress: Interventions About Equality in Supreme Court Cases About Copyright Law*, 19 CHI.-KENT J. INTELL. PROP. 280 (2020) [hereinafter Silbey, *Against Progress*] (describing how current IP disputes center on fundamental values such as equality and distributive justice despite increased reproduction and distribution, which should presumably expand access and opportunity).

we can enumerate many other benefits and challenges endemic to a digital age state-of-affairs in which every click makes a copy and the most valuable and crowded Internet spaces are those that facilitate widespread copying and sharing.

Today, the “piracy paradox” spurs us not only to further identify the other diverse fields in which its mechanism exists—and thus continues to weaken the orthodox justification for IP protection⁵—but also to investigate with particularity its effects in specific industries and communities. IP law (and all law, really) needs to be justified as an exertion of governmental power over people. What justifies IP law in the form it currently takes and in the industries it regulates when we understand—better than ever before—that copying, sharing, re-making, and remixing is how we communicate and thrive in the twenty-first century?

The Piracy Paradox explains the “creative dynamics of the apparel industry” and specifically how the industry’s “swift cycle of innovation” is in part a response to fashion’s broader public domain and lack of strong IP exclusivity.⁶ The article modeled the creative and business practices of the fashion industry describing its productive copying mechanisms, such as induced obsolescence and anchoring, which form a crucial part of its momentum.⁷ *The Piracy Paradox* is both a descriptive and theoretical article that provoked critical responses proposing alternative theories explaining the fashion industry’s successes despite weak IP protection and suggesting that stronger protection would be better.⁸

Missing from these important debates is the everyday life of creativity and innovation as practiced in the shadow of intellectual property law. This is not to find fault with *The Piracy Paradox* or the responses it spawned. (By necessity, all research is constrained by objective parameters as a function of the production and verifiability of the knowledge it produces.) But *The Piracy Paradox* and its responses neither proposed nor answered the question of what we should do when piracy is inherent in everyday digital-age creativity and innovation. *The Piracy Paradox* made clear that IP may be less vital to promoting “Progress of Science and useful Arts”⁹ than orthodox economic and property theories propose. But how do we square that with current U.S. intellectual property laws that are stronger and broader than decades past and a digital-age economy

⁵ At the end of the article, Raustiala and Sprigman list industries with “potential low-IP equilibria to examine.” See Raustiala & Sprigman, *supra* note 1, at 1769–74. A legacy of this particular article has been the abundance of research and scholarship that took up the call for further investigation.

⁶ *Id.* at 1691.

⁷ *Id.* at 1718–31.

⁸ See, e.g., C. Scott Hemphill & Jeannie Suk, *Law, Culture, and the Economics of Fashion*, 61 STAN. L. REV. 1147 (2010).

⁹ U.S. CONST. art. I, § 8, cl. 8.

in which the enforcement of IP rights is more draconian in light of digital rights management systems that secure informational goods and easily detect infringement?¹⁰ How do we explain that, simultaneously with stronger and broader IP laws, we are all pirates, skirting infringement liability while remaining stubbornly ignorant of the IP laws that could restrain our everyday copying, sharing, re-making, and remixing practices that are essential to creativity and innovation today? This new piracy paradox arises from the old one. It asks whether the current state of affairs renders many aspects of IP law itself—not just as applied to fashion or food—obsolete or otherwise intolerable for most everyday creators and innovators.

What follows is a brief explanation of this tension between intolerably broad intellectual property laws and their leaky, haphazard application or enforcement in our twenty-first century digital-age ecosystem.¹¹ The explanation draws from empirical research on creative and innovative communities that aims to understand the practical effect of IP laws on the everyday practices of science and art.¹² The empirical data comes from over one hundred interviews conducted over the past decade with a wide range of creators and innovators.¹³ Previous writings describe specific findings in more detail.¹⁴ Here, briefly, I highlight two of the consistent themes across the interviews that make sense of the tension, or

¹⁰ For scholarship on problems of increasing scope in IP, see Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123 (2018); Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197 (2016); Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587 (2008). The “right of publicity” and trade secrets have also experienced expansion over the twentieth century. See generally JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018) (tracing the evolution of the right of publicity as an expanded right of privacy through the twentieth century); see also Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 493 (2010) (discussing the evolution of trade secret law from common law to the enactment of Uniform Trade Secret Act). For a discussion of this broadened IP scope and more types of IP over the twentieth century as progress under the U.S. Constitution’s intellectual property clause, U.S. CONST. art. I, § 8, cl. 8, see Silbey, *Against Progress*, *supra* note 4.

¹¹ For a different explanation and possible solution along copyright doctrinal lines, see, e.g., Tim Wu, *Tolerated Use*, 31 COLUM. J. L. & ARTS 617, 617 (2008) (describing “contemporary spread of technically infringing, but nonetheless tolerated, use of copyrighted works” and proposing “a solution to the issue of widespread illegal use . . . —an ‘opt-in’ system for copyright holders, that is in property terms a rare species of ex post notice . . . right”).

¹² JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015) [hereinafter SILBEY, *THE EUREKA MYTH*].

¹³ *Id.* at 287–303 (describing empirical data and method of collection and analysis); see also Jessica Silbey, Eva E. Subotnik & Peter DiCola, *Existential Copyright and Professional Photography*, 95 NOTRE DAME L. REV. 263 (2019) (empirical qualitative research on digital photographers); Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405 (2019) [hereinafter Silbey, *Justifying Copyright*]; Jessica Silbey, *Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment*, 42 COLUM. J.L. & ARTS 351 (2019) [hereinafter *Control over Contemporary Photography*]; Jessica Silbey & Mark McKenna, *Investigating Design* (unpublished manuscript) (on file with authors) (empirical qualitative research on designers).

¹⁴ See sources cited *supra* note 13.

what I identify here as a “new piracy paradox”: a legal regime that ostensibly punishes piracy in a culture in which it is unavoidable.¹⁵

Creative and innovative communities negotiate the necessity of copying others' work with the desire for control over their own work in ways largely orthogonal to intellectual property law. I describe two of these thematic “adaptations” with reference to the interviews below. The first theme concerns professional standards of creativity and innovation establishing qualitative judgments which, while erecting hierarchies among authors and inventors, nonetheless leaves less work exclusively owned and thus more breathing room for all. The second theme describes reliance on attribution norms as a framework for mutual respect and thus also a basis for community resiliency. When misattribution or non-attribution is more of an affront than copying without payment or permission, more work is free to borrow and build upon for the small price of recognition. Neither of these themes lack controversy or contestation, but together they explain how everyday creators and innovators make their way in an intellectual property legal system that has largely failed to adapt or reflect their own values or practices in the Internet age.

I. QUALITATIVE HIERARCHIES AND BROADER ACCESS

Everyday creators and innovators maintain qualitative hierarchies for their work, acting as if only the “truly new” or “original” work will or should be exclusively protected. This would leave more in the public domain and establish more freedom and breathing room within innovative and creative ecosystems. The imposition of standards, whether aesthetic or utilitarian, contradicts long-standing doctrine in IP. Since 1903, copyright law has prohibited “aesthetic discrimination,” and copyright's originality standard is notoriously low.¹⁶ Patent law's utility doctrine is similarly low, presuming not to discriminate between diverse notions of utility.¹⁷ Its novelty bar is also not high.¹⁸ Only obviousness, which is itself controversial in its loosening standard over time, is considered a

¹⁵ Themes in my first book-length study, *The Eureka Myth*, *supra* note 12, include the role of reputation, the many manners of distribution that assume some unauthorized copying, and the role of labor and time. Themes in *Against Progress*, *supra* note 4, include privacy and distributive justice.

¹⁶ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (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.”). For the originality standard, see *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”) (citation omitted).

¹⁷ *Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364 (Fed. Cir. 1999).

¹⁸ 35 U.S.C. § 102 (2018) requires that a patent applicant demonstrate the invention is new. This has come to mean that the invention is not identical to inventions disclosed by prior art. *Titanium Metals Corp. of Am. v. Banner*, 778 F.2d 775 (Fed. Cir. 1985).

substantial bar to patentability.¹⁹ These democratic impulses of IP law, while lowering the bar to entry for more work, end up restricting public access and shrinking the public domain, contrary to reliance interests, expectations, and established practices of everyday creators and innovators.²⁰

Interviewed creators and innovators describe qualitative standards as meaningfully moderating exclusivity in two ways. Many people expressly defined quality on a spectrum, distinguishing work that is ordinary or “good” from stand-out or “terrific.” And, as part of their practice, everyday creators and innovators expected that only use of the high-quality work in exact or near-exact copies was properly restricted.²¹ In other words, many people describe avoiding or criticizing the assertion of exclusivity for work that is not “rare” in the field or otherwise meaningfully different from other work already circulating. Here are some examples of these behaviors and attitudes.

Felice Frankel is a science photographer whose photographs are mysterious and aesthetically breathtaking for their revelation of the physical world unavailable to the naked eye.²² She aims for accuracy and beauty, staying true to the science she pictures with her camera in a manner similar to how photojournalists worry about staying true to the events and people whose lives are represented in their photographs.²³ Given easy access to cameras these days, Frankel is keenly interested in preserving the integrity of information conveyed through photographs by developing the skills and awareness of those who make and share pictures with digital equipment. This not only distinguishes the photographer but also the quality of the photograph. She says:

I’m now making pictures on my phone And so I now see that making pictures is democratic, you know? But . . . what I’d like to think is that you could tell the difference between a good picture, a good-enough picture[,] and a terrific picture. I mean, that’s why I’m making this book. I want to raise the standards of what should be demanded . . . of images.²⁴

¹⁹ 35 U.S.C. § 103. For recent scholarship on the challenges of obviousness in patent law, see, e.g., Dmitry Karshedt, *Nonobviousness: Before and After*, 106 IOWA L. REV. (forthcoming 2021); Laura G. Pedraza-Farina & Ryan Whalen, *A Network Theory of Patentability*, 87 CHI. L. REV. 63 (2020).

²⁰ Silbey, *Against Progress*, *supra* note 4, at 282.

²¹ Silbey, *Justifying Copyright*, *supra* note 13, at 442 (describing restricting only verbatim or exact copying).

²² FELICE FRANKEL, <https://www.felicefrankel.com/> [<https://perma.cc/9XYL-N7MD>].

²³ Interview with Felice Frankel, *quoted in* Silbey, *Justifying Copyright*, *supra* note 13, at 434–35 (2019).

²⁴ *Id.* at 435 (alterations in original).

Different aesthetics may demand different quality standards, but those quality measures nonetheless persist across genres to police what is owned from what is in the public domain. Elizabeth, a writer and novelist, explains her standards for excellence and in doing so, also draws the line between permissible copying and telling a distinctive story that is an author's own:

[C]onditions . . . of human nature . . . do change, have changed And there are always these specific details that are new. So come up with a new story to tell me about those things I think . . . using people as models, and to comfort yourself and . . . feel like you have the confidence to do this thing, [is fine] And so I think there's a line between that, imitating the masters until you find your feet, and just taking somebody's scaffolding for your own.²⁵

Implicit in this explanation is that copying is expected and normal—even if it may technically be infringement—and that at some point the writer comes up with something new. Only then is the work their own. But this is not how copyright law works, and “imitating the masters” would be infringement. When I explained this to Elizabeth, she smiled and shrugged as if to say, “Really? How silly.”

Dennis, an IP lawyer in a pharmaceutical company, explains an attitude toward innovation that echoes Elizabeth's.²⁶ His description below emphasizes how there is much more that is ordinary about everyday science that is nonetheless important for its progress, but most is not “true innovation” and is not (or should not be) subject to exclusive control:

[I]t's really rare to have true innovation. Steve Jobs and Wozniak created the personal computer, all right? Cohen and Boyer created biotechnology . . . [b]ut most of the rest of us mere mortals just—you know, you learn from other people, and then the frontiers of science are pushed back gradually through similar ant-like persistence by scientists.²⁷

In this explanation, Dennis distinguishes between “true innovation” and work that progresses bit by bit, like ants working on an anthill. Like the other two interviewees quoted, Dennis is not denigrating the role exclusive rights could play in a market economy in which creativity and

²⁵ Interview with “Elizabeth,” *quoted in* Jessica Silbey, *Fairer Uses*, 96 B.U. L. REV. 857, 861 (2016) (“Elizabeth” is a pseudonym, which was required as part of the research protocol under Institutional Review Board guidelines); *see also* SILBEY, *THE EUREKA MYTH*, *supra* note 12, at 301.

²⁶ Interview with “Dennis” (a pseudonym), SILBEY, *THE EUREKA MYTH*, *supra* note 12, at 2–4, 299.

²⁷ *Id.* at 2.

innovation are highly valued, but he is adjusting the metric by which exclusivity is measured.

All three people, in their own fields, would prefer more freedom to maneuver, learn, and experiment than an IP law enforced to the letter allows and whose scope of what counts as copying extends to iterations and attenuated derivatives instead of only to close copies. They would move the line that distinguishes the public domain and exclusivity to allow for more copying of less original or novel work in order to promote learning and craft. The value of “piracy” in these examples is its role in developing quality output and professional standards. Allowing some copies but prohibiting others is not a paradox to them—it is simply the way good work gets done.²⁸

II. RECOGNITION AND RESPECT AS FEATURES OF COMMUNITY-BASED RESILIENCY

Another way creators and innovators adapt their practice to an ill-fitting legal regime is by insisting on attribution and credit instead of paid use for copies. Copying may be rampant and perhaps unavoidable, but proper recognition of others remains possible and desirable. Intellectual property law is largely agnostic about attribution and credit.²⁹ Attribution is not required by law and it does not mitigate liability. This legal state-of-affairs usually surprises everyday creators and innovators for whom credit and attribution are important parts of their professional practice. In fact, most creators and innovators describe proper attribution and credit as central to ethical behavior and fairness in their field.

Those I interviewed describe attribution’s importance in several ways. Some recalled awkward but necessary interactions to clear the air after instances of non-attribution among acquaintances. Mary, a musician, describes addressing a subconscious-copying incident with directness and collegiality:

There are a couple awkward moments where one person will have worked on a song for a while, but then another person puts out a record

²⁸ For more examples of permissive flexibility regarding use of authored or invented work, see Silbey, *Fairer Uses*, *supra* note 25; see also SILBEY, THE EUREKA MYTH, *supra* note 12, at 221–73 (analyzing data from fifty interviews). In a forthcoming book, *Against Progress: Intellectual Property and Fundamental Values in the Internet Age*, I analyze this question with an enlarged data set from more than one hundred interviews in the fourth chapter called “Distributive Justice.” JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* (Stanford University Press forthcoming 2022).

²⁹ *But see* 17 U.S.C. § 106A (2018) (the Visual Artists Rights Act, which is part of the Copyright Act, requires attribution in a very small set of circumstances).

and there's imagery from that song on their record but the record comes out first so it looks like the other person is copying [A fellow songwriter] came up to me and was like "Oh my God, I think I stole a line from you for this song." So we just chat amongst ourselves when we notice that stuff, it clears the air. But no one's ever a creep about it.³⁰

As it turns out, not being "a creep" and tolerating the inevitable copying is central to fluid and productive creativity and innovation.

By following cultural norms of borrowing and credit, authors and inventors avoid anachronistic practices; they are able to communicate within genres of expression and categories of innovation by drawing on each other and participating in cultural and scientific exchanges. Attribution is not only a nice thing to do, but also a professional practice that facilitates conversation and development within creative and innovative fields.

When those norms are violated, even if a law has not been broken, anger can lead to professional disputes. Ann, an award-winning documentary filmmaker with her own film production company, said she accepts that copying norms shift with rapid technological change.³¹ She says, "[N]o matter how much technology we invent, and reinvent [to prevent unlawful copying and distribution] . . . basically technological distribution will always be ahead of us, and basically we will be distributing our films for free."³² But she says she accepts this state of affairs because:

As long as it's attributed, you know, I think that's the trend. So I expect that more and more that will happen. I don't like it, because when you cut and paste and mash up, it's very hard to tell what is yours and what isn't, and so there's a slippery slope in the claim of ownership. But, I'm not gonna go crazy about that.³³

While reluctantly accepting copying—which is all but unstoppable given the Internet's lifeblood of networked dissemination—Ann said she draws the line at misattribution or at the failure to credit others' work (including her own). Lisa, an award-winning novelist, describes how she is "flattered to be quoted" but that "failure to ask permission" angers many writers.³⁴ Going further than Ann but justifying her expectations on

³⁰ Interview with "Mary" (a pseudonym), *quoted in* Silbey, *Fairer Uses*, *supra* note 25, at 862 (alterations in original); *see also* SILBEY, *THE EUREKA MYTH*, *supra* note 12, at 301.

³¹ Interview with "Ann" (a pseudonym), *quoted in* Silbey, *Fairer Uses*, *supra* note 25, at 862; *see also* SILBEY, *THE EUREKA MYTH*, *supra* note 12, at 303.

³² Interview with "Ann" (a pseudonym), in Watertown, Mass. (Oct. 25, 2011), *interviewed for* SILBEY, *THE EUREKA MYTH*, *supra* note 12, at 303.

³³ Interview with "Ann," *supra* note 31, at 862; *see also* SILBEY, *THE EUREKA MYTH*, *supra* note 12, at 303.

³⁴ Interview with "Lisa" (a pseudonym), *quoted in* SILBEY, *THE EUREKA MYTH*, *supra* note 12, at 254.

the same basis of respect and sustainability, Lisa explains that asking permission shows respect for the author and that failure to do so is impertinent and also usually unnecessary. She says:

I bet if people asked permission, a lot of writers would either charge a small amount of money, or they would say, “Sure.” You know, it could be free. “Take it, and I’m glad.”³⁵

Most artists and innovators need or seek to earn a living. They do not expect to work for free, and low-cost permissions facilitate reliable revenue streams. However, they accept unpaid copying and borrowing as part of their craft (to say nothing of everyday life) as long as work, when copied, is recognized and the author or innovator attributed.

Indeed, creators and innovators whom I interviewed consider failure to credit profoundly insulting, if not also sometimes personally assaultive. Karen, a visual artist who does installation work and complex ink drawings, likened the anger and agitation around misattribution or lack of credit to the fear and anxiety that a burglary or other personal invasion would generate.³⁶ She says:

The bottom line with a lot of this stuff, is that if somebody—if they—if you have communication with them, and you are asked, and you are part of the process, then it’s not like somebody just walking in, robbing something, and you don’t see them in the dark of night.³⁷

These fervid sentiments cross domains and professions. Some interviewees recounted how failure to properly attribute caused deep rifts in working relationships, weakening communities and productivity. Robert, an academic chemist and co-founder of a company that develops clinical trial improvements, vividly describes fights about attribution in his field:

I mean, there’s people who are just hysterical about citation, and about “I did it first.” . . . [T]he competition for credit is vicious . . . for most people. It’s pretty horrible. I mean, I find myself wanting to throw up in half the conversations because it’s so ferocious.³⁸

These kinds of “piracy” insults—copying without credit—paradoxically intrude on the free speech and creative autonomy of others. Creators and innovators assert rights of control (“credit me or you can’t use the work”), which compels or restricts the speech of others. These are not

³⁵ *Id.*

³⁶ Interview with “Karen” (a pseudonym), in New York, N.Y. (Feb. 6, 2010), *interviewed for SILBEY, THE EUREKA MYTH*, *supra* note 12, at 301.

³⁷ *Id.*

³⁸ Interview with “Robert” (a pseudonym), in New York, N.Y. (July 8, 2010), *interviewed for SILBEY, THE EUREKA MYTH*, *supra* note 12, at 302.

complaints about market injuries from copying (e.g., “if you don’t pay me for the copy, I can’t make a living”), but about dignitary harms from failure to be recognized.

To be sure, sometimes creators and innovators will not give permission even with proper attribution. This usually occurs when the new use distorts the old work or puts it to “bad” use, whatever that may mean.³⁹ This kind of complaint is related both to the above theme of qualitative standards as well as to attribution norms: the new use does not reflect the quality of work or the intention of the original creator or innovator despite being associated with them. Again, this is an identity or dignity harm, and sometimes it also injures the professional standards that sustain the working community itself. It is less a commercial harm typically associated with piracy and the utilitarian justification for intellectual property regulations.

Requiring attribution and credit as part of a legal regime that must honor free speech rules may be untenable.⁴⁰ I raise it here as an adaptation by everyday creators and innovators precisely for this reason: it is an extra-legal, voluntary norm that plugs holes and otherwise compensates for unsatisfying legal rules. As an extra-legal norm, when followed, it also expands the public domain within creative and innovative fields because proper credit and attribution is usually cheap and straightforward, and thus provides more opportunities for productivity and progress. It also helps build professional communities of creators and innovators, sustaining them through their own standards and expertise, which should render them more resilient.

However, the digital age and the Internet may make proper credit and attribution more difficult or complex—as we have seen in the journalism and photography fields—threatening professional norms of everyday creators and innovators.⁴¹ When this happens, we see disputes over intellectual property rights that may resemble piracy and unauthorized

³⁹ See, e.g., Interview with “Leo” (a pseudonym), *quoted in* SILBEY, THE EUREKA MYTH, *supra* note 12, at 76, 303 (“Ultimately . . . I paint because I want to share . . . my sense of how I see the world, how I see color, with other people. I think I’ve got to . . . not be totally possessive about that . . . [A]s long as someone was [copying me] in a way that I felt was up to the quality [it might be OK] . . . but if you think they are degrading your work, that’s [another] thing.”) (alterations in original).

⁴⁰ The scholarship on attribution and intellectual property is vast. See, e.g., Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41 (2007); Laura A. Heymann, *The Trademark/Copyright Divide*, 60 S.M.U. L. REV. 55 (2007); Rebecca Tushnet, *Naming Rights: Attribution and the Law*, 2007 UTAH L. REV. 789 (2007); Catherine L. Fisk, *Credit Where It’s Due: The Law and the Norms of Attribution*, 95 GEO. L.J. 49 (2006); see also U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES (April 2019), <https://www.copyright.gov/policy/moralrights/> [<https://perma.cc/5D4X-Z2YR>] (recognizing the challenges of the First Amendment in this area).

⁴¹ Silbey, *Control over Contemporary Photography*, *supra* note 13 (analyzing the problem of photographic copyright and control over images in light of fake news and skepticism of truth in media).

copying claims (the complaint will surely allege infringement). But these are better understood as disputes about fundamental values that sustain diverse and democratically organized communities, values such as privacy, equal dignity, or distributive justice and fairness.⁴² These allegations concern invasions of intellectual privacy, identity theft, and taking credit for another person's work, all disputes which erode creative and innovative communities, and which IP law is ill-equipped to resolve.

CONCLUSION

I conclude with some thoughts on who benefits from the “new piracy paradox” and whether the fact that we are all pirates is a sustainable state-of-affairs.

More than a decade after *The Piracy Paradox* and its productive investigation of related research, I wish we could have clearer explanations for what is really at stake in “piracy” as such.⁴³ If the interview data that I have collected and analyzed so far is any measure of the stakes, the debates in fashion industry about knock-offs and fast-fashion are a small piece of a much larger and more complex cultural context. Copying and “piracy” have many benefits and many drawbacks depending on, among other things, socio-economic position, institutional affiliation and structure, and professional identity and practices. Law reform and legal doctrine should more closely attend to these other dimensions of everyday life if contemplating adjustments to intellectual property regulation.

There is also the new digital-age problem of scale. Internet platforms that dominate the e-commerce system today thrive on the ability to scale rapidly and effectively, relying on everyday copying and promiscuous sharing norms. Aggregators and intermediaries will say they disapprove of piracy,⁴⁴ but they require some form of it to persist.⁴⁵ Everyday

⁴² See, e.g., Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 2019 BYU L. REV. 929 (2020) (describing the trends of reconfiguring privacy harms in terms of copyright disputes); NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* (2015) (describing how expression and free speech require a meaningful measure of privacy); Jessica Silbey, *Intellectual Property Harms: A Paradigm for the Twenty-First Century*, 99 B.U. L. REV. 2447 (2019) [hereinafter Silbey, *Intellectual Property Harms*] (re-characterizing intellectual property harms in the age of digital capitalism and networks as institutional and structural more than individual and personal).

⁴³ Some recent interesting empirical work on the benefit of copying of music includes Glynn S. Lunney Jr., *Empirical Copyright: A Case Study of File Sharing, Sales Revenue, and Music Output*, 24 SUP. CT. ECON. REV. 261 (2016), and GLYNN LUNNEY, *COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE U.S. RECORDING INDUSTRY* (2018).

⁴⁴ See, e.g., Cedric Manara, *Protecting What We Love About the Internet: Our Efforts to Stop Online Piracy*, GOOGLE: THE KEYWORD (Nov. 7, 2018), <https://www.blog.google/outreach-initiatives/public-policy/protecting-what-we-love-about-internet-our-efforts-stop-online-piracy/> [https://perma.cc/62PG-K5QX]; Claire Atkinson, *Amazon and Netflix Are Heading up a New Anti-Piracy Group*, N.Y. POST (June 13, 2017), <https://nypost.com/2017/06/13/amazon-and-netflix-are-heading-up-a-new-anti-piracy-group/> [https://perma.cc/8GZZ-HZCJ].

⁴⁵ See, e.g., JP Mangalindan, *The Tech Giants that Made Billions Copying Others*, YAHOO!

creators and innovators will also say they disapprove of piracy, but they mean something else by the label. Most everyday creators and innovators are concerned about equitable wages not market usurpation, recognition not copying, and professional standards and opportunities to develop their practice not protecting themselves from competition.

Perhaps these variations of piracy's meanings and roles in digital-age creativity and innovation will generate the next stage of the research into piracy paradoxes, pursuing questions about the integrity of socio-political institutions that promote our basic rule of law values (such as fairness, proportionality, transparency, and accountability) instead of focusing specifically on industry-specific economics measuring quantitative output.⁴⁶ The research that *The Piracy Paradox* can promote now is not about supply-side or demand-side markets for creative or innovative outputs, but how to assess and promote general welfare, quality over quantity, and sustainability within communities where people live and work.⁴⁷ These are big questions, to be sure, but they involve interests that policymakers share. And in the year 2021 we should not avoid confronting digital-age effects on democratic values, the planet's environment, or socio-economic equality. *The Piracy Paradox* may have focused on the fashion industry specifically, but in this light, it helps pose foundational questions about our shared fates in the digital age and how we will regulate for the public good into the future.

FINANCE (June 6, 2017), <https://sports.yahoo.com/news/tech-giants-made-billions-copying-others-135519772.html> [<https://perma.cc/MBC4-83TK>].

⁴⁶ I begin this investigation in Silbey, *Intellectual Property Harms*, *supra* note 42, in which I suggest that the focus of intellectual property harms in the digital age is the failure of our institutions to promote rule of law values (accountability, transparency, proportionality, and fairness).

⁴⁷ I am perhaps too obliquely referring to human flourishing and capabilities literature here, which has of course been part of the conversation in intellectual property for a while but is marginalized as compared to utilitarian theories of intellectual property. See, e.g., Margaret Chon's work: *Post-modern 'Progress': Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993); *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006); *Intellectual Property 'from Below': Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007); *Intellectual Property Equality*, 9 SEATTLE J. FOR SOC. JUST. 259 (2010). See also MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012).