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LEGAL STUDIES RESEARCH PAPER SERIES
RESEARCH PAPER 10-29
July 2, 2010

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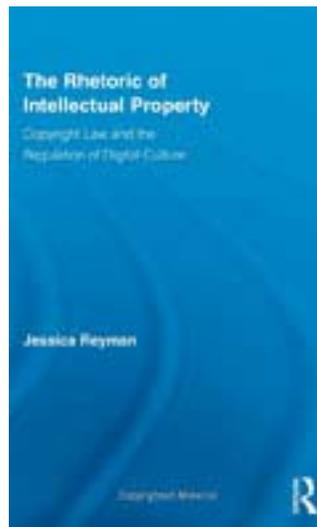
SUFFOLK UNIVERSITY LAW SCHOOL | BOSTON, MASSACHUSETTS
120 Tremont Street, Boston, MA 02108-4977 | www.law.suffolk.edu

The IP Law Book Review

Published by the IP Law Center
Golden Gate University School of Law
San Francisco, CA

ISSN 2154-6452

Vol. 1 No. 1 (June 2010)



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IP Law Center, Golden Gate University School of Law

Vol. 1 No. 1 (June 2010) pp. 27-33

THE RHETORIC OF INTELLECTUAL PROPERTY: COPYRIGHT LAW AND THE REGULATION OF DIGITAL CULTURE, by Jessica Reyman. Routledge, 2009. 177 pp. Cloth \$95.

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Jessica Reyman's *THE RHETORIC OF INTELLECTUAL PROPERTY: COPYRIGHT LAW AND THE REGULATION OF DIGITAL CULTURE* is a book whose time has come. As a book about the rhetorical divide between the content industry and copyright activists, it analyzes the deep rifts between the language of incentives and exclusivity and the counterdiscourse of cooperation and the commons. And as a piece about the upheaval in the socio-legal landscape of intellectual property rights, it is in good company. There are multitudes of recent books and articles that seek a solution to the divide that animates disputes about owners and users (many of whom Reyman cites, so I won't cite here). What Reyman does that is different from the developing scholarship on the "second enclosure movement"¹ is focus on a solution based on language rather than regulation. Recognizing that language is power – that rhetoric constitutes the culture we inhabit – Reyman analyzes in eight very manageable chapters the discursive landscape of the intellectual property culture wars and proposes a grammar for its armistice.

Reyman considers the discursive battle as one being fought over competing values: "one of control, which relies heavily on comparisons of intellectual property to physical property and emphasizes ownership, theft, and piracy; and another the value of community participation, seen in the implementation of new concepts such as that of an intellectual 'commons,' which emphasizes exchange, collaboration, and responsibility to a public good" (p.5). Reyman sees in the opposing discourses a potentially insurmountable problem of irreconcilability. In some very recent articles, intellectual property scholars have said similar things.² James Grimmelman, for example, describes an ambiguity in the language of sharing and the

commons that could either be harmonized with the default ethical vision of copyright (a model of voluntary commercial exchange) or could be in tension with that default vision. This ambiguity threatens the copyleft movement and potentially entrenches the default vision further. Grimmelman ends his essay with some suggestions for getting beyond the impasse, suggestions that Reyman was already taking up in the writing of her book: “We can complicate our conversations about copy norms by studying how ethical rhetoric is used to build up norms and to tear them down. We can craft more compelling copyright reforms by framing them in ethically appealing ways.”³ Reyman’s book is a study of the ethical rhetoric and a proposal for the reframing of that language to take advantage of the “democratic potential of a networked society” (p.25).

Central to Reyman’s project is the notion that language constitutes our world. “[L]anguage ... does not reflect intrinsic values or represent a fixed, objective truth about copyright law but rather constitutes the meaning and values arising from the specific conditions of a particular time in the history of cultural production” (p.26). Building from Foucault’s *Archaeology of Knowledge* and *The Order of Things*, Reyman describes a theoretical structure of discourse, power, and resistance through which she understands the copyright debates, specifically “how legal structures for copyright law are reified and resisted through acts of discourse, and how meaning is negotiated among dispersed points of power in the digital copyright debate” (p.34). Onto this, she adds a layer of narrative theory and metaphor that shape the copyright wars, drawing on scholars such as James Boyd White, Anthony Amsterdam and Jerome Bruner, Debora Halbert, Phillip Eubanks, George Lakoff and Mark Johnson as guidance.

Reyman does not need to convince me that language constitutes our culture and thus that legal reform can and must happen through self-conscious crafting of our aspirations with words, slogans, and stories. I have spent all of my professional academic life making a case for the interdisciplinary approach to law as the inevitable mode of advocacy and reform.⁴ I have always found it ironic that in a discipline and practice so deeply entwined with the literary, law ferociously maintains its purity from other disciplines. This is the by-now well-known argument of Stanley Fish, picked up by others, that “law wishes to have a formal existence.”⁵ The eruption of the “law and...” disciplines since the 1980s and the particular dominance of some of the fields today (e.g., law and economics or law and history) has dashed the hopes of law for its immunity to other fields.

Reyman's good book is yet another example of why legal analysis cannot and should not be undertaken without recourse to a diversified set of intellectual tools. With this book and her lens of rhetoric and composition studies, she has helped us better understand how certain legal arguments become entrenched and how we might find our way out of the trenches. If I were to offer any sustained critique of the book, it would be that it does not draw on the literature devoted to systematizing the cultural analysis of law.⁶ This literature could bridge the gap between discourse theory and organizational behavior (between the language of the law and the way legal actors or systems interact with each other). A cultural analysis approach, drawing on theories of cultural production or the sociology of organizations, might more thoroughly connect individual language choices and social structure. It may help explain more "thickly" how singular cases, such as *MGM Studios v. Grokster* (the subject of Reyman's Chapter 6), aggregate to instantiate systemic institutional power.⁷

Nonetheless, *THE RHETORIC OF INTELLECTUAL PROPERTY* is a well conceived book. It proceeds logically in eight chapters with two helpful appendices. Chapters 1 and 2 introduce the overarching concept of the project and make the case for the usefulness of a study of rhetoric to understanding the law and policy of digital copyright for society. Chapter 3 begins a historical discussion of U.S. copyright law as it comes into conflict with the digital age. Chapter 3 is geared toward those less familiar with copyright than intellectual property lawyers and scholars, but the clear prose, short length and helpful subsections make it a very readable and teachable chapter in this book.

Chapter 4 pulls from the content owner industry (mostly the music and movie industries) a dominant narrative of the importance of individual reward that is linked to the artificial creation of scarcity through intellectual property rights. Reyman calls this the "property stewardship narrative" (p.59). Digital technology arises in conflict with this narrative as a method for disseminating without pay and thus allegedly destroying the facilitation of cultural production. This chapter, along with Chapter 5, reconnects with Chapter 2's articulation of rhetorical forms and functions to demonstrate how the content industry's discourse develops characters and story structures describing "victimized businesses versus predatory technology developers and their opportunistic consumers" (p.59). Reyman also describes frequent metaphors used in the content industries' persuasive stories of just ownership and exclusion, such as that novels are like land or copyists are like pirates (p.67). The data for Chapter 4 draws from court filings, public relation campaigns and promotional materials.

Chapter 5 focuses on the rhetoric of the counterdiscourse as built around the metaphor of “the commons” and as building up a narrative of “the cultural conservancy” (p.75). Chapter 5 highlights the counterdiscourse’s core principle that digital networks and open access enhance democracy and social welfare (p.89). Reyman concludes this chapter by critiquing the ambiguity in the “cultural conservancy” narrative. She says that it insufficiently distinguishes between consuming copyrighted content for free and accessing that content to build up an information commons (pp.24, 92). This threatens the movement’s moral righteousness and its logical integrity. She also says that the counterdiscourse might fail because of its lack of fit with actual practices of peer-to-peer filing sharing (p.93).⁸ Data for Chapter 5 is drawn from organizational literature, scholarship and court filings.

Chapters 6 and 7 are case studies illustrating the conflicting narratives outlined in Chapters 4 and 5. Chapter 6 examines the rhetoric of *MGM Studios v. Grokster* – the case, the court documents, and the news coverage. This chapter highlights the competing values in *Grokster* exemplified by the “property stewardship” and the “cultural conservancy” narratives. Reyman asserts in this chapter that traditional intellectual property law furthers its narrative coherence by (1) eliding creative activity with monetary incentives and (2) oversimplifying complex cultural networks as the binary relationship between business person (author) and consumer (reader) (pp.97, 112). These refinements of the rhetoric of the intellectual property wars are important contributions to understanding the resistance to narrative change in law generally. Reyman shows how the legal stories of justice and desert are rooted in part on deep structural myths in our culture of individual incentives, consensual business relations, and creativity originating for individuals rather than groups.⁹ Chapter 7 picks up this theme and focuses on the RIAA and MPAA anti-piracy campaigns. Relying on public relations material and promotional advertising, this chapter discusses the campaign narratives that “teach[] respect [for private property]” and virtuous digital citizenship, framing these stories as about anti-theft rather than about control or anti-access. As in Chapter 6, Chapter 7 demonstrates how the “property stewardship” narrative builds upon the binary of owner and consumer and culminates in the resolution of the consumer as ethical digital citizen who protects the future of art by compensating the artist (p.131). Both of these chapters could stand on their own as independent essays to illuminate *Grokster* or the anti-piracy campaigns. They nonetheless fit nicely into the book’s progression and demonstrate the logic of the intellectual property wars as built on well-defined and competing rhetorical structures.

Chapter 8, “Toward a New Rhetoric of Copyright: Defining the Future of Cultural Production,” is a collection of thoughts on the weaknesses of the second enclosure movement as well as some broad suggestions for facilitating its advancement. Reyman suggests that we refocus the debate on users of technology (not a new idea, but certainly a good one) and the contextualization of use as either helpful or harmful. Technology is not neutral, she reminds us; it can be used for good or for ill. Counteracting the default intellectual property discourse with the bald statement that “technological advances are signs of progress” will not satisfy the traditionalists. Reyman’s more interesting contribution to the advancement of the access movement is to highlight its diverse and dispersed participatory base (p.140). She calls for more specific examples of harm caused by denial of access, examples that can serve as the cornerstones of new stories about why and how the commons and sharing are the preferred modes for both artists and audiences. Voices need to be “user-based” and “unified” around these examples that express a need for digital technologies, such as peer-to-peer (p.148). She also calls for more precise descriptions of the practices of cultural production that rely on digital sharing and mixing and a clearer articulation of the good these technologies produce (148). “[T]echnology developers and copyright activities face the very serious challenge of having not only to present a compelling argument regarding the utility of digital technology for cultural production, but they also have to define and defend a cultural shift in values in cultural production” (p.141). This reminds me of Julie Cohen’s very smart warning that the success of the movement requires at least two things: to “do the science” (produce detailed descriptions of cultural environment the movement seeks to obtain) and “generate a normative theory ... a story about what makes th[e] [cultural environment that this movement creates] good.”¹⁰ Reyman hasn’t done the science in this book, but she contributes to the growing call to action, which can only help the success of the movement actors, as long as they are paying attention.

In the end, I am not sure that changing the language of intellectual property rights from exclusivity to sharing, and from private ownership to the commons, is enough to shift perceptions and values that undergird our regulatory schemes. I do think it is one important facet of that change, however. And I am convinced that narrative structure facilitates the strength of the dominant legal regime as much as I believe that a really good counternarrative might lend doubt to the dominant story’s truth.¹¹ Importantly, I do not think that wholesale changing of our language – a counterdiscourse – can produce a revolution in baseline assumptions about

the value of and motivation for cultural production.¹² What can – and has – achieved revolutionary change is the ground-up development and incremental expansion of non-profit organizations and initiatives, such as Creative Commons (whose licenses number 130 million after only seven years) and open access initiatives as the default policy for institutions and governmental bodies (see, e.g., the National Institute of Health’s Open Access Policy). Contrary to the court cases, which are often narrow victories and limited to particular circumstances, and legislative reform, which can take decades and require a perfect confluence of political factors, institutional transformation or organizational founding can occur readily with small numbers of individuals and relatively small capital output.¹³ The catch is that these changes happen in situ – already in relation to the existing formal or informal organizational structures or constraints that have built into them traditional intellectual property default rules and values. But when culture is in contention, as it is in terms of the access movements and intellectual property’s future, truly engaging with the situation may be the best way to be heard.¹⁴

ENDNOTES

¹ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *Law and Contemporary Problems*, 33-74 (2003).

² James Grimmelman, *The Ethical Visions of Copyright Law*, 77 *Fordham L. R.* 2005, 2014, 2034 (2009). See also Jessica Silbey, *Comparative Tales of Origins and Access: The Future for Intellectual Property and the Rhetoric of Social Change*, 61 *Case Western L.R.* __ (forthcoming 2010).

³ Grimmelman, *supra* note 2 at 2036.

⁴ See, e.g., Jessica Silbey, *What We Do When We Do Law and Popular Culture?*, 27 *L & Soc. Inquiry* 139 (2002); Jessica Silbey, *The Politics of Law and Film Study: An Introduction to the Symposium on Legal Outsiders in American Film*, 42 *Suffolk L. R.* 755 (2009). For article dealing with intellectual property specifically, see Jessica Silbey, *Mythical Beginnings of Intellectual Property*, 15 *Geo. Mason L. R.* 319 (2008) and Silbey, *supra* note 2.

⁵ Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *THERE’S NO SUCH THING AS FREE SPEECH—AND IT’S A GOOD THING*

TOO at p.141 (Oxford University Press, 1994). For a more recent incarnation of this argument, see Peter Goodrich, *Intellection and Indiscipline*, 36 *J. of L. & Soc'y* 460 (2009).

⁶ See, e.g., Austin Sarat and Jonathan Simon (eds.) *CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM* (Duke University Press, 2003); Paul Kahn, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (University of Chicago Press, 1999); Susan S. Silbey, "Making A Place for Cultural Analyses of Law," 17 *L. & Soc. Inquiry* 39 (1992).

⁷ Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* at pp.3-30 (Basic Books, 1973).

⁸ This is something James Grimmelman discusses as well. See Grimmelman, *supra* note 2 at 2034.

⁹ See Jessica Silbey, *Mythical Beginnings*, *supra* note 4 (describing how traditional intellectual property law is based around "origin myths" that valorize beginnings in the individual and based on consent).

¹⁰ Julie Cohen, *Network Stories, Cultural Environmentalism @ 10*, 70 *Law & Contemp. Probs* 91 (2007).

¹¹ Silbey, *Mythical Beginnings*, *supra* note 4.

¹² Jessica Silbey, *supra* note 2 (making the argument that changing language is one step, but is not enough).

¹³ This is the theory of "structuration" from Anthony Giddens, in *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* (University of California Press, 1984).

¹⁴ For a more in depth argument expanding on this last paragraph, see Jessica Silbey, *supra*, note 2.

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