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Jessica Silbey

Boston University School of Law

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Centering Black Women in Patent History

Author : Jessica Silbey

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Kara W. Swanson, [Centering Black Women Inventors: Passing and the Patent Archive](#), 25 **Stan. Tech. L. Rev.** 305 (2022).

Professor Kara Swanson's latest article is a remarkable example of legal historical scholarship that excavates stories from the past to illuminate the present. It is chock full of archival evidence and historical analysis that explains gaps and silences in the United States patent registry as evidence of marginalized inventors—particularly Black women—who should be named inventors but are not.

The article is arresting reading for anyone interested in antebellum history, intellectual property, and the intersection of racism and sexism in law. Mostly, I am grateful to Professor Swanson for doing the obviously very hard work of digging through archives, reading microfiche, and scouring other primary and secondary sources for what she calls the “whispers” of Black women inventors of our past whose stories need to be told to change the narrative of U.S. inventorship.

The main focus of Professor Swanson's archival research is discovering the “true inventors” of certain patented inventions. Doctrinally, patents are only supposed to be issued to the “true inventor”—the person who conceived and reduced to practice the invention. Unlike in copyright law, there is no “work for hire” doctrine that constructively names the hiring entity or the supervisor as the “author,” or in this case the “inventor.” Patents issue in the name of the inventor and must be assigned afterwards to an employer or business entity or partner. Patents with incorrect inventorship—or false inventorship—are invalid.

Professor Swanson explains that the “true inventor” doctrine has been a rule honored in the breach, especially in the early years of the patent system. Many patents were filed in the name of businessmen who were not inventors and who were permitted by the true inventor to file the patent in another name in exchange for money or later benefits. That is, a true inventor would let another person—a more “believable” person—file the patent in their own name (becoming as Swanson calls them a “false inventor”). This would avoid the later hassle of an assignment and the possible trouble of being second-guessed in the patent office if you didn't “look” like an inventor (because you were Black or female, for example).

Swanson characterizes this behavior of true inventors with marginalized identities as “situational passing,” in the vein of a marginalized identity passing as a dominant one—Black as white, or gay as straight—in order to experience benefits that should otherwise be rightly theirs, like equal treatment or fair pay. Swanson's claim is that “situational passing” in the context of patent inventorship happened with surprising frequency and certainly much more often than the current record suggests, which is hardly ever, because “passing is intended to leave no trace” as she eloquently writes. (P. 54.)¹

One true inventor whom Swanson surmises made such a strategic choice was Ellen Eglin, a Black woman who worked as a laundress, who “sometime during or before 1888,...reportedly sold the rights to her improved clothes-wringer to ‘an agent’ for \$18.” (P. 2.) Eglin explained: “You know I am black and if it was known that a [Black] woman patented the invention, white ladies would not buy the wringer”.²

Elgin's few words are “one whisper that tells a story of a Black woman who found a way to contribute to U.S. invention and participate in the patent system.” (Pp. 6-7.) Swanson's article brings to life the whispers of dozens more,

“upend[ing] our understanding of the patent archive itself.” (P. 9.)

Swanson contrasts Eglin’s story with those of Black male inventors and white female inventors, who also used race and gender passing to achieve personal and professional goals and avoid discrimination on the basis of their race and sex. For example, Swanson describes Black men who filed patents but reasonably kept their race hidden by keeping a physical distance from the patent office and relying on the presumption that all inventors were white men. One such man, Thomas Jennings, was known to be one of the first Black U.S. patent inventors (his patent dated 1821) only because of his obituary more than thirty years later in 1859. (P. 39.) As Swanson explains, it took an obituary to “giv[e] voice to a silence in the patent record.” (*Id.*)

Women inventors had the added problem of *couverture*, that is, a legal rule that denied them the right to own property, and thus have a patent in their name. For married women, one solution was including their husbands as co-inventors, even when this was not really true. This diluted their contribution while not entirely erasing their role in the creative feat. For example, Florence Layman, nee Parpart, married her financial backer Hiram Layman who was named on patents she filed both before marriage and after. (P. 50.)

Women also faced the problem of “notoriety” which Swanson describes as “incompatible with femininity...[and] womanly modesty.” (P. 52.) To counteract this, women sometimes tried to obfuscate their role or erase themselves from the patent records by omitting their names in favor of their husbands or other business agents. Swanson scoured the patent archive for traces of married couples or for husbands alone whose patents were for household inventions (dusters and other cleaning tools or sewing machines) where wives alone more likely conceived and reduced to practice the invention.

By digging into the archives this way, and by better understanding the life details of dozens of marginalized inventors, some who were Black and some who were female, Swanson schematizes the strategic circumstances of intersectional identities, here *Black women* like Ellen Elgin. This helps explain how and why Black women like Elgin acted as they did. Swanson posits the existence of many, many more Black women inventors like her.

What does all this history tell us about today? First, it should make us skeptical of the patent archive and its conventional narrative of who is and who is not an inventor. Swanson’s historical analysis demonstrates the very strong likelihood of systematic underrepresentation in the patent archive of Black people and women who were true inventors and overrepresentation of white men inventors who were not. Related, “each inventor who passed as a white man strengthened the plausibility of the false but widespread belief that marginalized peoples were incapable of invention.” (P. 54.)

Importantly, the absences in the patent archive do not indicate a lack of inventiveness by those not represented there, but, to the contrary, when combined with archives elsewhere strongly suggest profoundly inventive behavior of marginalized people who in the face of “bias, inequality and painful self-denial” demonstrated “agency, accomplishment, and pride.” (P. 68.) What Swanson calls “false truths” of inventorship have “consequences...because of the authority of patent records.” (P. 69.)

The story of who is or who is not an inventor influences who will become an inventor or who considers inventorship a possible or desirable status. The importance of this legal history for today is to promote widespread and inclusive innovation because false truths of white male inventorship “discourage marginalized people from invention [which] is a national loss, harming ‘America’s long-standing economic prosperity and global leadership in innovation’ by failing to include all who can contribute to technological creation. That loss is symbolic as well as actual.” (P. 71.)

After reading Swanson’s article, no one can read the patent archive the same way again.

1. Swanson also describes in detail another form of “false inventorship” in decidedly non-consensual transactions

such as when an enslaved person's invention was patented by their enslaver. (P. 55.)

2. Language in brackets modernized by Professor Swanson for purposes of publication.

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