2022

Whose Progress?

Laura A. Heymann

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Napoleon Sarony, as students of copyright law know, was a New York studio photographer with a burgeoning career in celebrity photography in the 1860s. When a local department store used his photograph of Oscar Wilde without permission in an advertisement, Sarony sued the store's printer, Burrow-Giles Lithographic Company, for copyright infringement.[1] Before the U.S. Supreme Court, Burrow-Giles argued that photographs were ineligible for copyright protection because a photograph did not constitute a work of authorship but was the "mere mechanical reproduction of the physical features or outlines of some object," involving "no originality of thought."[2]

While expressing no judgment as to the "ordinary production of a photograph," the Court held that the Wilde photograph evidenced Sarony's hand throughout: the way that Wilde was posed, his outfit and accessories, the lighting, and even Wilde's expression.[3] Photographers today are no doubt grateful that Sarony prevailed before the Court. Coupled with the Court's later decision in *Bleistein v. Donaldson Lithographing Co.*,[4] which conveyed that courts should not express aesthetic preferences in determining copyrightability,[5] it is likely the rare photograph today that would not be eligible for U.S. copyright protection.

And yet, as Professor Silbey's *Against Progress* reveals in interviews with professional photographers, the availability of technology that enables high-quality photography by amateurs gives rise to some nostalgia for the more discriminating eye that the Court displayed in *Burrow-Giles*. Professor Silbey's interview subjects highlight the distinction between "*making* photographs" and merely "*taking* photographs" and lament the devaluation of professional aesthetics and judgment.[6] A commercial photographer in New York City notes in Chapter 1 that while his production costs are the same no matter the eventual use of the photograph, the expectations around value have changed, such that

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[1] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54 (1884).

[2] *Id.* at 59.

[3] *Id.* at 60.

[4] 188 U.S. 239 (1903).

[5] *Id.* at 251 ("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.").

[6] JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE 51 (2022).

potential licensees ask about the possibility of paying only for "eight-second rights" for use of his work on Snapchat.[7] For these photographers, the progress set in motion by *Burrow-Giles* might not feel unequivocally like progress.

Article I, Section 8, Clause 8 of the U.S. Constitution provides that Congress shall have power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[8] These words have been the subject of countless books and scholarly articles. Professor Silbey's engaging contribution to the conversation focuses on one word—progress—and what it should mean as we think about intellectual property law's motivations and justifications in the twenty-first century.

Should "progress" be thought of simply as an origin story for copyright law and patent law, or should it be deemed a kind of constitutional yardstick against which the appropriateness of intellectual property law and policy should be measured? (Trademark law in the United States derives its constitutional legitimacy from the Commerce Clause,[9] which makes no mention of progress, but the book understandably includes trademark law and related fields to make its broader point.) Professor Silbey is not attempting to answer this question as a matter of constitutional interpretation; she is making the case for what the answer should be. In her view, we should not simply think of progress as *more* without also thinking of progress as *better*. She notes, "[I]t is hard to imagine the constitutional goal of progress of science and the useful arts demanding anything but substantive, qualitative outcomes" because "[i]ntellectual property aims to improve society, not just to promote the production of *more* intellectual property separate from the things or experiences to which the intellectual property label is attached."[10]

But even if we reimagine the goals of intellectual property to be not about (or not simply about) creative incentives but about basic fundamental values such as dignity, privacy, and distributive justice, as Professor Silbey quite appropriately encourages us to do, we must inevitably struggle with what it means to achieve progress in a legal regime where parties might very easily find themselves on either side of a dispute. Thus, the question subsequent to "What is intellectual property law for?" must be "*Who* is intellectual property law for?" Is it for those who create and invent, such that progress should be measured by how well the law supports the dignity and self-realization of those engaging in such activities? Is it for those in the audience, such that progress should be measured by how well the law facilitates access on equal terms? And if the answer is "both," how should we resolve the inevitable tensions that arise?

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[7] *Id.* at 33.

[8] U.S. CONST. art. I, § 8, cl. 8.

[9] *Id.* cl. 3 (giving Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[10] SILBEY, *supra* note 6, at 227.

Indeed, this tension can sometimes arise in the resolution of a single case. Among the many cases that Professor Silbey expertly discusses is *New York Times Co. v. Tasini*,[11] in which the U.S. Supreme Court held that *The New York Times* could not license its content for reproduction in electronic databases such as LEXIS/NEXIS without obtaining permission from its freelance writers.[12] After describing the diverging views of the majority and the dissent as to which result would best serve authors, Professor Silbey writes, "But was it the court's job to decide what's best for authors, when by filing suit they had named their injuries and desired remedies?"[13] This might be true for the named plaintiffs (six freelance authors who wrote the twenty-one articles involved in the case), but there were, not surprisingly, historians and other researchers and authors who supported *The New York Times*, as Justice Stevens noted in his dissent.[14] (Indeed, it would not be surprising to find any of these authors on the other side of the case from the one they joined, depending on the nature of their work at the time.) Professor Silbey concludes her discussion by noting that by strengthening authors' hand against publishers, the majority's decision "subordinates the public to copyright ownership. And that is exactly backwards."[15] But the opposite decision would have subordinated the authors' claim to be paid fairly for their work by a major publishing company. Which is it to be?

Is it progress if the public learns more about a well-known figure through the publication of her private letters, or is it progress if we allow her to vindicate her privacy interests through copyright law? Was the decision in *Matal v. Tam*,[16] in which the U.S. Supreme Court deemed unconstitutional under the First Amendment the Lanham Act's prohibition on the registration of trademarks that are seen to disparage persons or groups,[17] a harm to the dignity interests of marginalized groups or a win for members of those groups who want to reclaim power through language, as plaintiff Simon Tam has suggested? These are questions that seem to be less easily resolved—even when guided by fundamental values—than the constitutional cases not involving intellectual property law that Professor Silbey offers as a comparison throughout the book.

Professor Silbey's interviews with individual creators reflect this tension. These creators want both the right to build on others' work and the right to control uses of their own work they don't like. They praise the democratization of creativity that a digital world has fostered, and they mourn the disintegration of a shared set of norms, norms that resulted in large part from the exclusivity of a bounded community. They lament a system that "provides benefits only for

[11] 533 U.S. 483 (2001).

[12] *Id.* at 496-97.

[13] SILBEY, *supra* note 6, at 145.

[14] *Tasini*, 533 U.S. at 522-24 (Stevens, J., dissenting).

[15] SILBEY, *supra* note 6, at 147.

[16] 137 S. Ct. 1744 (2017).

[17] *Id.* at 1750.

a select few," but they also hope for the return to a world that once again relies on artistic judgment and expertise to determine whose work is most worthy rather than a system of clicks and likes.[18] Indeed, we are currently seeing the tradeoffs between increased access and the challenges of maintaining community norms as entrants to the world of non-fungible tokens ("NFTs") attempt to negotiate the (perceived) legal significance of their activities.[19]

To be clear, none of these observations are intended as criticism—indeed, these dilemmas are what makes the book both compelling and challenging. These tensions are natural and inevitable, and we cannot begin to think through them without a more robust framework. Professor Silbey provides us with a much-needed vocabulary. We should talk of intellectual property law not only in terms of a return on investment but also in terms of a return to fundamental values of justice and equity. Given the centrality of creativity to human flourishing, intellectual property law should be concerned about the extent to which its doctrines foster or frustrate self-realization, dignity, and similar values. But we should also recognize that even with this important backdrop, progress in achieving those values will sometimes remain difficult to assess even when we listen to creators' narratives. Creators might see intellectual property law as a Möbius strip, in a constant process of advancing and returning. But they might not always see that, at any given moment, they are traveling on only one side.

[18] SILBEY, *supra* note 6, at 294.

[19] *See, e.g.*, Tanusree Sharma, Zhixuan Zhou, Yun Huang & Yang Wang, *"It's a Blessing and a Curse": Unpacking Creators' Practices with Non-Fungible Tokens (NFTs) and Their Communities*, 1 ASS'N COMPUTING MACH. 1 (2022).