

Humanizing Intellectual Property: The Language of Law, Creativity, Innovation, the Individual, and the Community

Review of: *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property*

Jessica Silbey

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“[Intellectual property] law primarily serves to facilitate the retention or alienation of work to which people are deeply attached. Its purpose may be partly economic, but the attachment itself is based on human attributes . . . People crave work and relationships that are remote from wealth. When it comes to [intellectual property], therefore, we need to rethink the opposition of the individual and the business organization and thus also the unique focus on economic growth as ‘progress.’”¹

Challenging the fundamental principles on which intellectual property law in the United States rests upon, calling out the assumptions, and begging for a deeper, conscious effort to understand *how* the current intellectual property framework works (or doesn't) for the individuals and communities it is designed to protect and incentivize was the focus of Jessica Silbey's latest work, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* [hereinafter *The Eureka Myth*].

To tackle this ambitious, scholastic task, Silbey recruited the help of fifty individuals to be interviewees in order to gather information from the source: the individuals doing the creating, inventing, writing, painting, engineering, etc. *The Eureka Myth* was a research piece, to say the least, and was refreshingly scientific, albeit palatable, compared to the assigned readings of a typical law school curriculum.

¹ See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY*, 284.

Silbey is a Professor of Law at Suffolk University Law School, teaching Constitutional Law in addition to an array of IP courses such as Copyright Law, Trademark Law, and Advanced Topics in Intellectual Property Law. Prior to earning her JD and PhD (Comparative Literature) at the University of Michigan, Silbey earned a BA at Stanford University. Silbey is an accredited co-editor to *Law and Justice on the Small Screen* (Hart Publishing: 2012), an interdisciplinary text which used a collection of essays to harp on the relationship between law and sociocultural understandings of television. Additionally, Silbey is a published author of numerous law journal articles on topics such as IP in a digital age, language studies and the humanities, as well as constitutional law.

The Eureka Myth was organized into six chapters.² Each chapter discussed a broader theme that Silbey identified as overlapping across the several interviews.³ Within each chapter, sub-topics were explored in greater detail. Blocks of concise, modified text permeated the work, offering direct quotes taken from interview transcripts. These substantive snippets of raw, qualitative data were sandwiched in between Silbey's own words and analysis, used as support in identifying overlapping themes and constructing meaningful questions and conclusions on law and IP policy.

Appendix A of The Eureka Myth discussed the "Research Methods and Data Analysis" wielded and was attached in order to clarify the means by which the interviews were arranged and organized, evaluated, and analyzed as briefly explained in the work's Introduction.⁴ Silbey asserted, with conviction, that the research approach employed was

² See *id.* at Contents.

³ See *id.* at 18-19.

⁴ See *id.* at 287.

a qualitative empirical method, and it was chosen in consideration of the lack of “qualitative studies of the experiences of creators and innovators.”⁵

Chapter 1, “Inspired Beginnings,” evaluated the interviewees’ responses to questions pertaining to initial intrinsic and extrinsic motivations to create or innovate, the “spark” or eureka moment, and thoughts on creation and innovation as built off of the work preceding it.⁶ What Silbey discovered, contrary to her expectations (and one of the more profound assumptions of IP law), was that interviewees expressed diverse sentiments with respect to the early beginnings of their craft, opposed to “the monolithic language of monetary incentives.”⁷ The idea or concept of eureka as we know it, Silbey suggested, was discredited by the creators and innovators use of language of “accidents, randomness, and happenstance” *alongside* language implying certain degrees of control or material conditions and factors.⁸ It was noted, however, that whether or not an individual experiences the “aha” moment, it is equally important that the individual: 1) recognizes the value of the moment; and 2) acts on the moment by “taking advantage of the opportunities presented to them.”⁹

Silbey, through the interviewees’ responses, identified two primary stimuli, whether intrinsic or extrinsic, that create an environment which may foster creation or innovation: problem-solving scenarios (e.g., a painter goes on an international trip but forgets to bring her paint, so she learns to create sculptures using materials found on a beach) and “freedom to play” (e.g., a Manhattan lawyer who became a well-known visual

⁵ *See id.*

⁶ *See id.* at 25, 35, 41 (offering examples of questions posed to interviewees such as “How did you become an artist?” and “What influenced your path towards scientific research?”).

⁷ *See Silbey, The Eureka Myth*, at 28.

⁸ *See id.* at 33.

⁹ *See id.* at 35.

artist got his start in painting purely for the joy of experimentation and meditative relief).¹⁰

The work fluidly transitioned into Chapter 2, a discussion of the trials and tribulations of day-to-day life for creators and innovators.¹¹ Silbey posited that the “analysis of the accounts of how one begins and works daily in a life of art and science, shows that actors describe *multiple* motivations for initiating, engaging in, and building a life and a business around innovative and creative practices.”¹² Motivations are dynamic and change over time depending on the individual, the community they interact with, and the individual’s professional, economic, and working environment, notably the individual’s degree of autonomy and workplace freedom.¹³

Somewhat of an outlier, Chapter 3 discussed IP law from a financial or asset management and business practices perspective.¹⁴ What this chapter does is illustrate the degree to which law and business are integrated – how business decisions are impacted by the legal landscape, and vice versa.¹⁵

In Chapter 4’s discussion of the role of reputation, Silbey recognized the importance of reputation to her interviewees despite IP law’s shortcomings in protecting reputation and attribution.¹⁶ Establishing and developing a glowing reputation reaffirmed the interviewees’ sense of self-identity as an individual player within the context of their respective, larger communities.¹⁷ Additionally, interviewees consistently characterized

¹⁰ *See id.* at 37, 42.

¹¹ *See id.* at 55.

¹² *See id.* at 80.

¹³ *See Silbey, The Eureka Myth*, at 56.

¹⁴ *See id.* at 81-86.

¹⁵ *See id.*

¹⁶ *See id.* at 150, 166.

¹⁷ *See id.*

the emotional connection to their work or creations through offspring metaphors (e.g., “people compare works of art, innovation, and even goods or bespoke services to their ‘baby’”).¹⁸

Explaining that intellectual property law is a legal construct, a bi-product of creative or innovative work, Chapter 5 discussed the role of lawyers and businesspeople in IP practice. Primarily, Silbey concludes that IP is “harvested” by these industry players by: 1) disrupting work; 2) instructing the law; and 3) justifying their intervention “by appealing to economic interests, among others.”¹⁹ Appropriately so, Silbey concluded at the end of this chapter that prospective IP reform should be constructed for flexibility in order to adapt to the varying communities which use or rely on IP law and IP rights.²⁰ Rather than focusing on economic incentive theory, Silbey suggested that law reform should take into consideration “the primary and precious interests of individual creators and innovators and their communities” of which financial incentives represents “only small slices of industry behavior.”²¹

The final substantive chapter of the text, Chapter 6, covered distribution of intellectual property; or, in essence, “how disseminating work is inextricably entwined with IP’s public function, which explicitly speaks to the constitutional goals of ‘progress’ for copyright and patent law.”²² Silbey concluded, based on interviewees’ responses that intellectual property law may be working with respect to dissemination goals.²³ Creators or innovators are able to easily relinquish control over their IP rights as well as tighten

¹⁸ See *id.* at 154, 156-60.

¹⁹ See Silbey, *The Eureka Myth*, at 184.

²⁰ See *id.* at 220.

²¹ See *id.*

²² See *id.* at 221.

²³ See *id.* at 220.

control through enforcement or a “holdout.”²⁴ However, a key distinction was made in that this sort of control by creators or innovators does not apply when the creator or innovator is working as an employee within the scope of their employment or if they are working as an independent contractor. Silbey noted, “[i]n these circumstances, IP... serves only as corporate capital.”²⁵

It is abundantly clear that the purpose of *The Eureka Myth* is not to solve U.S. or global IP issues, but to advance and contribute to a humble dialogue about the role and purpose of IP law as it relates to and interacts with unassuming creators and innovators. Before exploring the possibilities of IP law’s intended effects or how and where it can improve, Silbey brilliantly takes a step back to get a mere glimpse into the world of IP from the perspective of the creator and innovator. How can we generate and facilitate sound IP policy if we do not know what the individuals whom IP is intended to protect want or need?

This book is a breath of fresh air from the often repetitious rhetoric of IP law discourse and proudly asked the important questions while sufficiently pushing the audience to think more critically about the disconnect between what the law is intended to do and what the law actually does. Hardly esoteric, *The Eureka Myth* is a suitable read for anyone interested in the arts and sciences, intellectual property law, business administration and asset management, client advocacy, policymaking, as well as humanities and social sciences.

²⁴ See *id.* at 269-72.

²⁵ See Silbey, *The Eureka Myth*, at 272.