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Jessica M. Silbey

Suffolk University, jsilbey@suffolk.edu

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THE MYTHICAL BEGINNINGS OF INTELLECTUAL PROPERTY

*Jessica Silbey**

INTRODUCTION

People commonly justify intellectual property protection with homage to utilitarianism (protecting the incentive to create, invent, or produce quality goods to maximize net social welfare)¹ or natural rights (people should own the product of their creative, inventive, or commercial labor).² Despite the ongoing dominance of these theories, a dissatisfying lack of a comprehensive explanation for the value of intellectual property protection remains.³ One reason for this failure is that economic analysis of intellectual property law tends to undervalue its humanistic element.⁴ Whereas utilitarianism and natural rights theories are familiar, at least one other basis for intellectual property protection exists. This Article explains how intellectual

* Associate Professor of Law, Suffolk University School of Law, jsilbey@suffolk.edu. Ph.D., University of Michigan (Comparative Literature), J.D., University of Michigan Law School, A.B., Stanford University. For their helpful comments on this developing project, I thank Barton Beebe, Dan Burk, Frank Cooper, Lorie Graham, Michael Madison, William McGeeveran, Stephen McJohn, Robert Merges, Michael Rustad, Miguel Schor, and Rebecca Tushnet. Thanks also to workshop participants and colloquia attendees at the 2006 Intellectual Property Scholars Conference at Boalt Hall, University of Iowa College of Law, the Washington College of Law at American University, and the New England IP Scholars Forum hosted by Northeastern University School of Law. I received excellent research assistance from Andrea DeStefano, Paul D'Agostino, and Steven Dimirsky and from the staff of the John Joseph Moakley Suffolk University Law Library, especially Susan Sweetgall and Sabrina Ash.

¹ See William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 169 (Stephen R. Munzer ed., 2001) (describing utilitarian theory as the "most popular" theory of intellectual property); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005) ("Intellectual property protection in the United States has always been about generating incentives to create.").

² See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296-330 (1988); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523-29 (1990).

³ See Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 260 (2006) ("To put it bluntly, there are no 'giant-sized' intellectual property theories capable of accommodating the full range of human values implicit in intellectual production.") (footnotes omitted).

⁴ *Id.* at 259 ("Intellectual property utilitarianism does not ask who makes the goods or whether the goods are fairly distributed to all who need them."); see also James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161, 172-85 (1987) (criticizing the moral and political implications of economics).

property protection is rooted in narrative theory.⁵ It contends that all of the United States copyright, patent, and trademark regimes are structured around and legitimated by central origin myths—stories that glorify and valorize enchanted moments of creation, discovery, or identity. As a cultural analysis of law,⁶ rather than the more familiar economic theory of law,⁷ this Article seeks to explain how these intellectual property regimes work the way they do.⁸ And as a narrative explanation for the structure of intellectual property protection, this Article enhances the more customary economic or philosophical accounts because narrative, especially one devoted to myth-making in our society, provides “models for human behavior and, by that very fact, gives meaning and value to life.”⁹

An “origin myth” or an “origin story” is a narrative that explains how a culture came into being.¹⁰ Genesis is an origin story, as is the story of the Founding Fathers of the United States Constitution. I will have more to say about the structure and function of origin myths in Part I, *infra*, but at its core an origin story serves both ontological and epistemological functions.¹¹ It infuses everyday life and relations with significance by explaining why things are as they are and by providing guidance for how things should evolve based on what we already understand about our world. As David Engel has written, the “retelling of [origin] myths is . . . many things at

⁵ Understanding law through narrative theory is not a new endeavor, only largely overshadowed by other theories of human understanding and behavior. *See, e.g.*, CAROL M. ROSE, PROPERTY AND PERSUASION 5-6 (1994) (using “norms and narration” to “bridge the gap between economic-based and communitarian approaches to property” and explaining that “if . . . property regimes cannot get over the self-interest problem without imparting some sense of a common good, then narratives, stories, and rhetorical devices may be essential in persuading people of that common good”).

⁶ “[C]ultural analyses of law attempt to describe the processes by which law contributes to the articulation of meanings and values in everyday life.” Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 LAW & SOC. INQUIRY 39, 42 (1992).

⁷ *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003) (discussing copyright and patent rights).

⁸ Although I draw a distinction between explanation and justification, I understand that explanations are not free of normative implications. As the discussion of origin myths below will make clear, origin myths are structured around certain social values and not others. To describe intellectual property protection in terms of origin myths, therefore, is to show how intellectual property law elevates certain principles over others. If we value the principles that origin myths omit or denigrate, then we can argue that the structure of intellectual property protection as a function of origin myths is flawed.

⁹ MIRCEA ELIADE, MYTH AND REALITY 2 (Willard R. Trask trans., 1963) (1963); *see also* David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 LAW & SOC'Y REV. 785, 789 (1993) (“The role of narrative in constructing concepts of self and society has become clear in a multitude of studies, including those addressing a broad range of law-related issues such as race, gender, community, and the practice of law.” (footnote and citations omitted)).

¹⁰ *See* JOANNE H. WRIGHT, ORIGIN STORIES IN POLITICAL THOUGHT: DISCOURSES ON GENDER, POWER AND CITIZENSHIP 3 (2004); *see also* ELIADE, *supra* note 9, at 5-6.

¹¹ Generally speaking, an ontological inquiry is the study of reality or the nature of being and an epistemological inquiry is the study of the methods and limitations of knowledge or ways of knowing.

once: an act of insight, a reinterpretation of the past, a reaffirmation of core values and beliefs, and a ‘reactualization’ of the cosmic order.”¹²

Parts II, III, and IV of this Article investigate the statutory regimes and common law that govern intellectual property protection in the United States in light of the narrative theory of Part I. Patent, copyright, and trademark law each instantiate the importance of origins, albeit in different ways. Patent law protects that which the inventor conceived, the inventor being the first to reduce her conceived invention to practice.¹³ Copyright law protects original works of authorship, the expression originating with the author.¹⁴ Trademark law protects signifiers as distinctive source identifiers.¹⁵ These parts of the Article, when read together, contrast the three statutory intellectual property regimes for their structured valuation and reification of their own origin myth. They also show how the political origin myths structuring intellectual property protection articulate a well-worn story about the origins and continuing vitality of the American republic (rugged individualism and the American dream).¹⁶ Each part also draws on popular cultural stories about intellectual property and a recent intellectual property dispute to illuminate how origin myths structure the respective discourses of these intellectual property systems and explain adjudicative results.

In contrast to the structural importance of the origin story in defining and substantiating intellectual property schemes, the conclusion briefly examines recent developments in patent, copyright, and trademark law that drift away from the protection of origins to alternative sources of value. Trademark law has experienced the federalization of anti-dilution law, which protects less the source identifying function of the mark than it does a right in gross.¹⁷ Congress is currently debating a reformation of the Patent Act that would substantially change the definition of an inventor from one

¹² Engel, *supra* note 9, at 792.

¹³ See *Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456, 1460 (Fed. Cir. 1998).

¹⁴ 17 U.S.C. § 102(a) (2000).

¹⁵ See 15 U.S.C. § 1127 (2000) (defining “trademark” to include “any word, name, symbol, or device . . . [used] to . . . indicate the source of the goods”).

¹⁶ See generally President Herbert Hoover, Speech at Madison Square Garden (Oct. 22, 1928), in *THE NEW DAY: CAMPAIGN SPEECHES OF HERBERT HOOVER* 149, 154 (2d ed. 1929) (“We were challenged with a . . . choice between the American system of rugged individualism and a European philosophy of diametrically opposed doctrines—doctrines of paternalism and state socialism. The acceptance of these ideas would have meant the destruction of self-government through centralization . . . [and] the undermining of the individual initiative and enterprise through which our people have grown to unparalleled greatness.”). The content of the “American Dream” is as diverse as our nation, but the dominant narrative tracing the American Dream has been repeated by numerous political theorists and American presidents. *E.g.*, President Bill Clinton, Remarks to the Democratic Leadership Council (Dec. 3, 1993), in *2 PUB. PAPERS* 2094, 2094 (“The American dream that we were all raised on is a simple but powerful one—if you work hard and play by the rules you should be given a chance to go as far as your God-given ability will take you.”).

¹⁷ The federal anti-dilution statute is 15 U.S.C. § 1125(c) (2000).

who first conceives an invention to one who first files for patent protection.¹⁸ In copyright law, recent debates about the United States' obligations under the Berne Convention (e.g., obligations regarding moral rights, the right of attribution, and the current practice among certain authors who grant royalty-free non-exclusive licenses of digital works on the condition that attribution be granted upon publication and distribution) underscore competing notions of whether and how the originator of a work will be protected by the law.¹⁹ The final part of this Article discusses these changes in the various intellectual property regimes and analyzes them for what they say about the inevitability of competing origin stories in law and culture. In contrast to Parts II, III, and IV, in which I take seriously the claim that each intellectual property regime is structured around an origin myth, the conclusion outlines current intellectual property debates that undercut the heuristic role of these origin myths to demonstrate instead the myth of origins.

This Article participates in the growing body of interdisciplinary legal scholarship that takes as its premise the inseparability of law and culture. In this vein, the Article's aim is threefold. Primarily, the Article provides a new explanation for intellectual property protection in light of a novel theory of the narrative structure of the origin myth. Secondly, the Article discerns from a comparative analysis of the contemporary debates concerning the three federal intellectual property regimes competing narratives of value, which reveals an inherent uncertainty about the origins of human creation. And lastly, the Article aims to demonstrate how close attention to narrative theory and cultural tropes enriches the analysis of law.²⁰

¹⁸ Patent Reform Act of 2007, S. 1145, 110th Cong (2007).

¹⁹ For debates about the "right of attribution" under current U.S. intellectual property regimes, see, for example, Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 Hous. L. Rev. 263 (2005). For a royalty-free, non-exclusive license, see, for example, Creative Commons, Attribution-Noncommercial-Sharealike 1.0 License, § 4(d), at <http://creativecommons.org/licenses/by-nc-sa/1.0/legalcode> (last visited Nov. 5, 2007) (requiring attribution of authorship upon exercise).

²⁰ In writing an origin story (this Article) about origin stories (the origin myths that structure intellectual property law), I am participating in, as much as I am critiquing, the law's facilitation of origin stories. Unpacking the significance of this recursivity is beyond the scope of this project, but the irony is not lost on me.

I. ORIGIN MYTHS

A. *As a Heuristic for an Individual and Community*

Origin myths are a special kind of narrative.²¹ “The retelling of myths about origins represents an attempt to transcend historical time, with its relentless linear progression, its ‘irreversibility The return to primal events allows humans to clarify existential meanings that are sometimes obscured by the misfortunes and suffering that drain everyday life of its value and direction.”²² Origin myths have explanatory force, collapsing the inquiries of ‘who are we?’ with ‘where did we come from?’ They are so foundational to human existence and society that as cultural narratives they come “as close to a universal phenomenon as might be imagined.”²³ Moreover, the study of origin stories is not relegated to literature and cultural anthropology. Spanning religious studies, archeology, evolutionary biology, astronomy, chemistry, and political theory, “[o]ur origins preoccupy us.”²⁴ In these ways, origin stories are heuristic, “explor[ing] fundamental questions and problems and . . . assign[ing] meaning to our human existence.”²⁵

Origin myths are not necessarily narratives of bygone eras either. The creation and perpetuation of myth is as much part of our contemporary culture as it was part of Ancient Greece.²⁶ Myths are essential to most cultures and communities precisely because they establish “deeper meanings and . . . archetypes rather than . . . objective certainty. [Myth] starts with the materials of human experience but transforms their particularities into narratives that speak more broadly about the essential nature of self and society.”²⁷

²¹ This Part relies on Wright’s analysis of the political origin myth. But the origin myth is a common genre of narrative used by anthropologists and sociologists as well as political scientists such as Wright (to say nothing of literary theorists) as a basis of analysis. *See, e.g.*, Engel, *supra* note 9 (sociological study of origin myths).

²² Engel, *supra* note 9, at 792 (citation omitted) (quoting MIRCEA ELIADE, *THE MYTH OF THE ETERNAL RETURN* 75 (Willard R. Trask trans., Princeton Univ. Press 1954) (1949)).

²³ WRIGHT, *supra* note 10, at 3.

²⁴ *Id.*

²⁵ *Id.* at 8; *see also* Steven Goldberg, *Kennewick Man and the Meaning of Life*, 2006 U. CHI. LEGAL F. 275, 287 (2006) (“Questions concerning human origins and the origin of life matter a great deal to all of us because they speak not only to where we come from, but also to whether and how our lives have meaning.”).

²⁶ WRIGHT, *supra* note 10, at 24-53 (discussing Greek origin stories, which she calls Plato’s “Creation Politics”).

²⁷ Engel, *supra* note 9, at 791; *see also id.* at 791 n.5 (“[M]yth, though determined in its form by its immediate historical context, transcends any historical moment, being at the fundamental level the quest for the self.” (alteration in original) (quoting NORMAN AUSTIN, *MEANING AND BEING IN MYTH* 2 (1990))).

Origin myths bring order to social relations by explaining the nature of the self and her entitlements, role in, and relation to her society.²⁸

One ubiquitous origin story is the political origin myth, the story that explains how a society or civilization came into existence.²⁹ These narratives are not only stories about the literal birth of a society but about the political outlines of social life as well.³⁰ They designate a “script[] of citizenship”³¹ and concern themselves with “the beginnings of politics and power.”³² Genesis is one such origin myth, establishing the beginning of human civilization with God’s creation of man in His image and the subordination of Eve through her birth (“origin”) in Adam’s rib.³³ The story of Romulus and Remus, mythological founders of Rome who were fathered by Mars (the god of war) but raised by a wolf, stresses the divine status of Rome and was used to justify Roman domination.³⁴ Thomas Hobbes’ *Leviathan* is another political origin story, describing a brutal, warring, “anarchic and presocial state that is ultimately transcended by a social contract” that establishes the security of individuals in society through the control of the (English) sovereign.³⁵

Plato’s Myth of the Metals is a well-known political origin story. According to that myth, “The earth moulds its children carefully, fashioning each for a specific role in the city. Those who rule are composed primarily of gold, those who protect the city, silver, and the farmers and artisans have iron and brass in their constitution.”³⁶ Socrates explains the need for this “‘noble lie’ to persuade the inhabitants of the city to accept the logic of its organization.”³⁷ As Plato’s Myth of the Metals was meant to “quell uprisings and disorder, and to ensure conformity to his envisioned hierarchy,”³⁸ Genesis legitimates the politics of gender hierarchies. Likewise, the story of Romulus and Remus justifies Rome’s violent aggression towards and control over its neighbors. And Hobbes’ *Leviathan* justifies inequality in civil society and absolute obedience to the sovereign.

Origin myths are heuristic because they answer fundamental questions about and assign meaning to our lives. The heuristic benefits do not only

²⁸ WRIGHT, *supra* note 10, at 7.

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.* at 19.

³² *Id.* at 3.

³³ *Cf. id.* at 8 (discussing the abolition of Lilith from the Garden of Eden for her insubordination toward Adam and the rebirth of woman as the submissive Eve, a variation of the Genesis origin story).

³⁴ See HENRY TUDOR, POLITICAL MYTH 97, 134-35 (1972).

³⁵ WRIGHT, *supra* note 10, at 56-57.

³⁶ *Id.* at 4.

³⁷ *Id.* (quoting Plato, *Republic*, in THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS 414b-c (Edith Hamilton and Huntington Cairns eds., Lane Cooper et al. trans., Pantheon Books, 1961)).

³⁸ *Id.* at 4-5.

apply at an individual level, but on a societal one as well. An origin story reflects a society's image of itself, its central values and goals. Consider some of the United States' national heroes who are intimately tied to the United States' origin story: George Washington (the quintessential commander-in-chief, mastermind of the Revolutionary War, humble, yet strong and victorious), Thomas Jefferson (asserting the divine right to equality, a master of letters, and a defender of states' rights), Benjamin Franklin (representing American innovation and independence), Abraham Lincoln (establishing the right to racial equality and asserting the unity of the nation above all in its rebirth after the Civil War). They each exemplify the spirit and pride that many people believe the United States represents and display characteristics that citizens believe explain the nation's successes.

B. *As a Measure of Authenticity*

Origin stories are about the "how" of political beginnings, just as much as they are about the "why" of those beginnings. Origin myths authorize the initial social structure by appealing to authenticity. They do so in two related ways: through essentialism and being first-in-time.

Origin stories often explain and legitimate certain social relations by hinting at a theory of human nature.³⁹ For example, Genesis describes the "natural" differences between the sexes to justify hierarchical gender relations. Plato's Myth of the Metals describes the "natural" difference among people who are either reasonable (made of gold) and thus legitimate members of the ruling class, spirited (made of silver) and thus the best kind of protectors, or all body (made of brass), and thus industrious but dim and worthy only of laborer status.⁴⁰

Origin stories also convincingly describe a person or circumstance that existed "in the beginning" and thus that is sufficiently blessed or wise to originate this society. This person (or circumstance) therefore garners the authority and legitimacy necessary to wield power and control and to exert the force of law.⁴¹ "[P]olitical origins discourse assumes that origins contain essential and indispensable data from which political solutions are moulded."⁴² In this way, invocation of a political origin, such as the Found-

³⁹ *Id.* at 73-75.

⁴⁰ We see recourse to "human nature" with regard to certain discourses concerning evolutionary biology. From scientific theories concerning evolution and human biology, we learn facts about our biological make-up (facts that are presumably amoral and apolitical) that are then explained as inevitable features of our sociality. *See, e.g.,* ANNE MOIR AND DAVID JESSEL, BRAIN SEX: THE REAL DIFFERENCE BETWEEN MEN AND WOMEN (1991) (explaining that the reason men have been the dominant sex throughout human history lies in the difference in their fetal brain development).

⁴¹ *Cf.* WALTER BENJAMIN, ILLUMINATIONS 220 (Harry Zohn trans., Schocken Books, 1969) (1936) ("The presence of the original is the prerequisite to the concept of authenticity.").

⁴² WRIGHT, *supra* note 10, at 9.

ing Fathers of the United States and their intent in drafting the Constitution, can justify present circumstances and assertions of right with an appeal to the past.⁴³ “Origin stories, then, are essentialist narratives that do more than simply uncover beginnings: they authorize implicitly particular solutions.”⁴⁴

C. *As Establishing Consent*

Origin myths authorize certain political and social arrangements through narratives of consent or by manufacturing consent through their repetition.⁴⁵ The social contract is the quintessential example of an origin story that justifies absolute obedience to a government with a story of consent.⁴⁶ Consent comes in all forms in origin stories—written and explicit political contracts (constitutions), oral or civil contracts (the marriage contract, “I do”), tacit consent or acquiescence (as in parental relations with children).⁴⁷ As we will see *infra*, the origin stories that circulate about intellectual property protection span all three forms.⁴⁸ The repetition of these stories of consent throughout the case law, the litigation that becomes case law, and the statutory and constitutional history behind the law, serves to further reinforce the message of consent. As each person, community, or court repeats the origin myth that explains and justifies the particular intellectual property protection, that person, community, or court has signaled acceptance of that particular political arrangement.⁴⁹

In addition to legitimate political, civil, or social arrangements that explain a community’s identity and purpose, or “uncover an elusive primor-

⁴³ Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* 273 (2005) (unpublished S.J.D. dissertation, Harvard Law School), <http://obracha.net/oi/oi.htm> (“The longing for an ‘original meaning’ laid down by the almost mythical authority of the founding fathers, enshrined as part of the most sacred artifact of American civic religion—the Constitution—and serving as a supposed shield against judicial subjectivism, is a longstanding fixture of American jurisprudence and of the American political ethos in general.”); see also PHILIP ABBOTT, *EXCEPTIONAL AMERICA: NEWNESS AND NATIONAL IDENTITY* 71-91 (1999) (describing the Federalist Papers as a “sacred text” and an origin of American exceptionalism).

⁴⁴ WRIGHT, *supra* note 10, at 9-10.

⁴⁵ *Id.* at 5-6.

⁴⁶ *Id.* at 57. “The foundation of Hobbes’s social contract is consent. Men make a choice to consent to absolute power rather than to continue to exist in an unlivably insecure condition of war.” *Id.* at 58.

⁴⁷ *Cf. id.* at 86-89 (analyzing Hobbes’s rhetorical strategy of supporting his notion of tacit consent to political rule with what he characterizes as tacit consent to patriarchal rule).

⁴⁸ See discussion *infra* Parts II-IV.

⁴⁹ This is what Mircea Eliade calls “the eternal return.” See ELIADE, *supra* note 22, at 34. Eliade writes that “an object or an act becomes real only insofar as it imitates or repeats a archetype.” *Id.* at 34. Eliade further says that “this repetition, by actualizing the mythical moment when the archetypal gesture was revealed, constantly maintains the world in the same auroral instant of the beginnings.” *Id.* at 90. Repetition thus helps to fashion consent in the contemporary community as it binds the community through its evocation to the distinctive and exceptional character of the originating moment.

dial truth” about human nature or civilization,⁵⁰ origin stories also mask the violence of beginnings. This is Hannah Arendt’s theory of origin myths: that all political beginnings are “intimately connected with violence” and that “no beginning could be made without using violence, without violating.”⁵¹ To be sure, some origin myths might be told to avoid further violence. A court that invokes an origin story to justify a certain property arrangement relies on narrative to avoid or quash further conflict between the parties (be it violent or otherwise). And some origin myths might be told to uncover originary violence, such as the reemergence of Lilith in radical feminism in the 1970s.⁵² In any case, studying the relation of origin myths to violence may help to better understand the motivation behind the telling and re-telling of origin myths in society generally and law specifically.

In sum, origin myths are a heuristic, explaining fundamental questions about and assigning meaning to our lives. They authorize or confer authority on preconceived political solutions, deriving (and thus justifying) society’s extant power relations and hierarchies with homage to authenticity and through narratives of consent. As Roland Barthes has written, “Myth . . . purifies [things], it makes them innocent, it gives them a natural and eternal justification.”⁵³ It does so to hide or avoid violent human conflict. Retelling the mythic narrative assures consent to the arrangement, either explicitly as a form of contract or implicitly through acquiescence. The “truth” of origin stories is not important for this analysis. As with most analyses of narrative, the point is to discern how these stories function to order social relations (here, intellectual property relations) through the development and maintenance of narrative authority.⁵⁴

II. PATENT LAW

A. *Patent Origins*

The origin myth that structures United States patent law has as much to do with the “what” of patents (the invention) as with the “who” of patents (the inventor). Although the property right granted by a patent may be dressed in the trappings of real property like Blackacre—granting its owner

⁵⁰ WRIGHT, *supra* note 10, at 11.

⁵¹ HANNAH ARENDT, ON REVOLUTION 10 (1963). “In the beginning was a crime.” WRIGHT, *supra* note 10, at 11 (quoting ARENDT, ON REVOLUTION 10-11).

⁵² WRIGHT, *supra* note 10, at 8, 11. Wright explains, “Feminist origins theorists bring to the surface the violence of a patriarchal war, and of an original rape and/or matricide. They replace the myth of consent between the genders with the ‘truth’ of war and violence.” *Id.* at 11.

⁵³ ROLAND BARTHES, MYTHOLOGIES 143 (Annette Lavers trans., 1972) (1957).

⁵⁴ See, e.g., ROSS CHAMBERS, STORY AND SITUATION: NARRATIVE SEDUCTION AND THE POWER OF FICTION 212-13 (1984).

the right to exclude others from making, using, selling, or offering to sell the property during a specific period of time⁵⁵—it also has mystical underpinnings.

1. As a Measure of Authenticity to Legitimate Hierarchy

Patents describe inventions that must originate in the mind of the inventor. As one early court said, “Invention is not the work of the hands, but of the brain.”⁵⁶ An inventor is one who is the first to conceive of the invention.⁵⁷ Conception—itself a loaded term concerning origins and mythical moments—is:

the complete performance of the mental part of the inventive act. All that remains to be accomplished in order to perfect the act or instrument belongs to the department of construction, not invention. It is therefore the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice that constitutes an available conception within the meaning of the patent law.⁵⁸

Indeed, mental conception is so central to being an inventor by law that courts no longer require reduction to practice:⁵⁹

The primary meaning of the word ‘invention’ in the Patent Act unquestionably refers to the inventor’s conception rather than to a physical embodiment of that idea. The statute does not contain any express requirement that an invention must be reduced to practice

It is well settled that an invention may be patented before it is reduced to practice.⁶⁰

⁵⁵ 35 U.S.C. § 154(a) (2000); *see also* Philip C. Swain, *The One Thing Judge Rich Wanted Everybody to Know About Patents*, 9 FED. CIR. B.J. 97, 100 (1999) (“This right to exclude others is the essence of any property right, including an ‘intellectual property’ right, as well as a land owner’s real property right to keep someone from trespassing in his or her backyard.”).

⁵⁶ *Edison v. Foote & Randall*, 1871 Dec. Comm’r Pat. 80 (1871).

⁵⁷ *See* 35 U.S.C. § 102 (2000) (prescribing who is entitled to a patent); *see also* *Erben v. Yardley*, 267 F. 345, 346 (D.C. Cir. 1920) (stating that “the first to conceive and first to reduce to practice” is the inventor); 2 R. CARL MOY, *MOY’S WALKER ON PATENTS* §§ 10.11 (4th ed. 2003) (“Courts have repeatedly asserted that the person who conceives of the invention is the inventor regardless of who else contributes to the invention finally being completed. . . . [U]nder the usual view inventorship does not attach from the act of accomplishing a reduction to practice.”).

⁵⁸ *Townsend v. Smith*, 36 F.2d 292, 295 (C.C.P.A. 1929).

⁵⁹ Mario Biagioli, *Patent Republic: Representing Inventions, Constructing Rights and Authors*, 73 SOC. RES. 1129, 1138-39 (2006) (briefly tracing the waning of the reduction-to-practice requirement in U.S. patent law from the original patent act to the present).

⁶⁰ *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 60-61 (1998); *see In re Hardee*, 223 U.S.P.Q. 1122, 1123 (Comm’r Pat. & Trademarks 1984) (“The threshold question in determining inventorship is who conceived the invention Insofar as defining an inventor is concerned, reduction to practice per se is irrelevant.”).

In this way, patent law is not the right to own your own labor or a system of law and community that guarantees and values that right. The *labor* of invention (reduction to practice)—performed by those made of silver or brass in Plato’s Myth of the Metals—is trivial compared to *conception*—achieved by those with gold in their constitution. Brain, not brawn, is essential in patent law. Moreover, whatever your genius output, you must be the *first* to conceive it, as being first indicates the genuine and authentic inventor.⁶¹ Being the “first and true inventor”⁶² is so critical to patent law that once the patent issues in an inventor’s name, the law blesses that inventor with a presumption of authenticity (the patent is presumed valid and the inventorship correct) such that any subsequent challenge to inventorship can only succeed with clear and convincing evidence.⁶³

2. Establishing Consent (to Legitimate Power and Property Relations)

The patent’s presumption of validity would make sense were inventorship subject to critical review at the Patent and Trademark Office (“PTO”). But instead, sworn declarations alone primarily determine inventorship.⁶⁴ In other words, each inventor’s “creation story” is left to faith.⁶⁵ For example, in the absence of disagreement, the PTO takes the inventor’s word at face value even if it lacks corroborating evidentiary support.⁶⁶ As evidence of this trust, each patent applicant must sign the declaration of inventorship under penalty of perjury. The declaration is, in fact, an “oath” executed by the inventor and made true by her signing.⁶⁷

⁶¹ See *infra* note 84 and accompanying text (noting the importance of chronology in the novelty analysis).

⁶² This language comes from the first U.S. patent statute, requiring that the subject of the invention was “not before known or used” and that the applicant be the “first and true inventor.” An Act to Promote the Progress of Useful Arts (1790 Patent Act), §§ 1, 5, 1 Stat. 109.

⁶³ *Hess v. Advanced Cardiovascular Sys., Inc.*, 106 F.3d 976, 980 (Fed. Cir. 1997).

⁶⁴ See 37 C.F.R. § 1.63 (2007); see also *Fritsch v. Lin*, 21 U.S.P.Q.2d 1737, 1739 (B.P.A.I. 1991) (“[S]tatements in patent application as to sole or joint invention are *prima facie* evidence of such fact; and a party, relying upon his application, does not have to prove such facts.”).

⁶⁵ Even in interference cases, when the PTO is the first tribunal to adjudicate the legality of the patent, which would include the correctness of inventorship, the PTO considers its job to be to determine *priority* of inventorship, not inventorship itself. *Ellsworth v. Moore*, 61 U.S.P.Q.2d 1499, 1500 n.1 (B.P.A.I. 2001) (“This interference is not a typical interference where a party seeks to establish priority of invention vis-à-vis an opponent who may have independently made a patentable invention. Rather, the interference is an inventorship contest.”).

⁶⁶ See *Fritsch*, 21 U.S.P.Q.2d at 1739; see also *Brader v. Schaeffer*, 193 U.S.P.Q. 627, 631 (B.P.I. 1976) (stating, regarding correction of inventorship, that “[a]s between inventors their word is normally taken as to who are the actual inventors” when there is no disagreement).

⁶⁷ See 37 C.F.R. § 1.63 (2007) (requiring an “oath or declaration [stating that the declarant] believes the named inventor or inventors to be the original and first inventor or inventors of the subject

Sympathetically, one might ask how the PTO would precisely investigate claims to inventorship when the requirement for that status is “the complete performance of the mental part of the inventive act.”⁶⁸ How else but by reliance on a sworn declaration? What kind of evidence would substantiate the fabled eureka moment—the “flash of creative genius”?⁶⁹ To be sure, Congress has amended the Patent Act and courts have further modernized it through common law to reflect the prevailing realities of scientific research to include collaborative science and joint inventorship⁷⁰ through which inventions are the product of social interactions rather than isolated meditation.⁷¹ However, the language of conception and the stories told about inventors still manifest the solo mad scientists flying kites in lightning-filled skies and whose inventions appear like a cloud of smoke above their heads.⁷² This mythical moment of invention, the “aha” moment of discovery that only a single person in a quiet but stunning moment of reflection can experience, remains the “heart” of what it means to be an inventor.⁷³ As such, the PTO and courts are left to consider only the inventor’s story of creation, his sworn testimony that legitimates the patent: an originary contract binding the inventor, her collaborators, and the United States government to the terms therein.

matter which is claimed and for which a patent is sought”); *see also* *Bd. of Educ. v. Am. Bioscience, Inc.*, 333 F.3d 1330, 1334 (Fed. Cir. 2003) (stating that “[i]t is the responsibility of the applicants and their attorneys to ensure that the inventors named in a patent application are the only true inventors” and that patent examiners in the United States normally do not review the correctness of inventor naming, but rely on the solemn inventor declaration or oath that is a required part of a patent application); *Perceptive Biosystems, Inc. v. Pharmacia Biotech, Inc.*, 225 F.3d 1315, 1330 (Fed. Cir. 2000) (“The party or parties executing an oath or declaration under 37 CFR 1.63 are presumed to be the inventors.” (quoting MANUAL OF PATENT EXAMINING PROCEDURE § 2137.01 (7th ed. 1998))).

⁶⁸ *Townsend v. Smith*, 36 F.2d 292, 295 (C.C.P.A. 1929).

⁶⁹ *Cuno Eng’g Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 91 (1941); *cf.* Abraham Lincoln, Second Lecture on Discoveries and Inventions (Feb. 11, 1859), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 356, 363 (Roy P. Basler ed., 1953) (“The patent system . . . added the fuel of *interest* to the *fire* of genius, in the discovery and production of new and useful things.”).

⁷⁰ *See* 35 U.S.C. § 116 (2000); *see also* 130 Cong. Rec. 28,069-71 (1984) (reflecting the legislative history of the 1984 amendments to the Patent Act, including the addition of Section 116, which added a provision for joint invention “recogniz[ing] the realities of modern team research”); *Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456, 1469-70 (Fed. Cir. 1998) (describing the purpose of the new § 116 as, among others, “to remedy the increasing technical problems arising in team research, for which existing law, deemed to require simultaneous conception as well as shared contribution by each named inventor to every claim, was producing pitfalls for patentees, to no public purpose”); *id.* at 1469 (“The progress of technology exacerbated the inventorship problems. Patents were invalidated simply because all of the named inventors did not contribute to all the claims . . .”).

⁷¹ Corynne McSherry describes “invention [as] a social act,” in her book WHO OWNS ACADEMIC WORK?: BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY 154 (2001).

⁷² *See infra* Part I.B.

⁷³ *Id.* at 179.

3. As a Heuristic of an Individual and a Nation

When considering inventive subject matter, rather than the inventive moment, courts have attempted to bring patent law down to earth by honing the scope of patentable subject matter. Doing so would ideally add a measure of consistency and fairness to the process. Indeed, one impetus behind the United States patent system was to create a system of rights and entitlements as distinct from the discretionary monopolistic privileges conferred under the English monarchy.⁷⁴ Importantly, “[t]here is no discretion on the part of the PTO as to whether or not to grant the patent—if the statutory requirements are met, a patent is issued.”⁷⁵ Some of the earliest known debates surrounding the intellectual property clause in the Constitution⁷⁶ and the first Patent Act of 1790 go as far as to suggest that “each American citizen has a constitutional right to his property in the product of his genius and that it should be secured by the National Legislature.”⁷⁷

What is the patentable subject matter from which inventors have a right to exclude all others? The Supreme Court has attributed to Congress the intention that “anything under the sun that is made by man” can be patented,⁷⁸ suggesting anyone may earn the privilege. However, the Patent Act requires that inventions be novel, useful, and non-obvious.⁷⁹ Despite attempts at clarity, defining these three categories remains almost as elusive as determining the moment of conception.

⁷⁴ Oren Bracha, *The Commodification of Patents 1600-1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. L. REV. 177, 184-87 (2004).

⁷⁵ *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 985 n.14 (Fed. Cir. 1995) (citing 35 U.S.C. § 151).

⁷⁶ U.S. CONST. art. 1, § 8, cl. 8 (“Congress shall have Power . . . [t]o promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).

⁷⁷ Oren Bracha, *supra* note 74, at 218 (quoting JOSEPH BARNES, TREATISE ON THE JUSTICE, POLICY AND UTILITY OF ESTABLISHING AN EFFECTUAL SYSTEM FOR PROMOTING THE PROGRESS OF USEFUL ARTS BY ASSURING PROPERTY IN THE PRODUCTS OF GENIUS 16 (Phila. 1792)). Bracha calls this “the patent-rights model.” *Id.* at 182. The man asserting the existence of patent rights in early America (as opposed to patent privileges) was Joseph Barnes, attorney to James Rumsey, who was fighting with John Fitch in the early 1790s over certain riverboat engine technology. Edward C. Walterscheid, *Priority of Invention: How the United States Came to Have a “First-To-Invent” Patent System*, 23 AIPLA Q. J. 263, 270-273 (1995). As patent protection was a right, rather than a privilege, Barnes simply had to prove that he was the “first and true inventor” of patentable subject matter and the patent would have to issue. Conception would be taken on faith as long he was the first to conceive the invention and as long as the invention described was within the parameters of patentable subject matter. Rumsey was originally backed by George Washington, BARNES, *supra*, at 270, 277, and Fitch by Benjamin Franklin (interestingly enough, both considered originary founders of the United States), neither of whom disputed the “first to invent” model of patent rights. *See* BARNES, *supra*, at 276.

⁷⁸ *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (quoting S. Rep. No. 82-1979, at 5 (1952); H.R. Rep. No. 82-1923, at 6 (1952)).

⁷⁹ 35 U.S.C. §§ 101-103 (2000).

The requirement of novelty feeds the ideology of the patent inventor as investigating previously untraveled terrain—the brave and curious explorer. To prove novelty, the inventor must distinguish the invention from prior art, showing how the invention makes a new contribution to the field.⁸⁰ This requirement makes sense from a traditional patent policy perspective. “If patent applicants did not have to demonstrate that their inventions were previously unknown, they would . . . be able to withdraw information [machines, and processes, etc.] from the public domain by securing patents on pre-existing devices and industrial processes, and the patent system would degenerate into a race to secure monopolies on existing technologies.”⁸¹ This would frustrate the constitutional prerogative “to promote the Progress of Science and useful Arts”⁸² by changing the incentive from innovation to acquisition.

Persuading a patent examiner or court that an invention is novel is not as technical as it may seem. Generally speaking, unless the prior art discloses *all* of the elements of the claimed invention (i.e., “anticipates” the invention), the invention is novel.⁸³ Indeed, novelty determinations often devolve into questions of chronology: to defeat prior art references that might anticipate the claimed invention, the inventor must show that she conceived her invention before the date of the prior art.⁸⁴ Given the ethereality of conception, substantiating it requires a persuasive creation story describing in words, more often than proving through tangible evidence, how the inventor originated the invention from her own mind first. The novelty requirement thus values both the authenticity of actually being the first to invent as well as an innovator who is a persuasive storyteller, one with the talent and allure to seduce and conquer his audience.⁸⁵

Of the three requirements, non-obviousness has been called “the ultimate condition for patentability.”⁸⁶ It is the newest of the three require-

⁸⁰ 35 U.S.C. §§ 101, 102(a) (2000).

⁸¹ ROBERT SCHECHTER, *INTELLECTUAL PROPERTY* 265 (2006).

⁸² U.S. CONST. art. I, § 8, cl. 8.

⁸³ *Diversitech Corp. v. Century Steps, Inc.*, 850 F.2d 675, 677 (“[E]very element of claimed invention must be identically shown in a single reference.”). The disclosure must also be enabling to one skilled in the art, *Novo Nordisk Pharm., Inc., v. Bio-Tech. Gen. Corp.*, 424 F.3d 1347, 1355 (Fed. Cir. 2005), the relevance of which I will discuss *infra*.

⁸⁴ SCHECHTER, *supra* note 81, at 266 (“Novelty is all about chronology.”).

⁸⁵ On the seduction of storytelling, see CHAMBERS, *supra* note 54, at 205-22. “[T]he further claim is now made that such [narrative] seduction, producing authority where there is no power, is a means of converting (historical) weakness into (discursive) strength.” *Id.* at 212. Certainly, most successful litigation requires persuasive and seductive storytellers. My assertion here is that the touchstone of patent protection (conception) depends on a good origin story above most else.

⁸⁶ NONOBVIOUSNESS: THE ULTIMATE CONDITION OF PATENTABILITY (John F. Witherspoon ed., 1980). One scholar calls it the “fundamental gatekeeper” to patenting. John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 789 (2003). Utility may be the lowest hurdle of the three requirements, and I do not discuss it here. “[T]he ‘threshold of utility is not high,’ and relatively few

ments but serves important policy functions that are said to underlie the patent system.⁸⁷

The requirement ensures that patent protection is not given to inventions that have no social benefit because they are of minimal advance over what has already been done and “others would have developed the idea even without the incentive of a patent.” Providing a protection for obvious ideas is socially harmful because it can lead to “a proliferation of economically insignificant patents that are expensive to search and to license.”⁸⁸

Nonetheless, like the novelty requirement, non-obviousness has roots in the mythical aspects of invention and inventorship. Grasping the meaning of non-obviousness and its application in determining patentability inevitably requires contemplation of the quality of genius.

Although the standard for obviousness is whether the invention “would have been obvious at the time the invention was made to a person having ordinary skill in the art”⁸⁹ (“PHOSITA”), the PHOSITA standard is neither ordinary nor common. As John Duffy has recently chronicled, the non-obviousness standard has roots in the United States as far back as the first Patent Act of 1790 when the invention or discovery had to be “sufficiently . . . important.”⁹⁰ The 1793 Act amended this language, stating that “simply changing the form or the proportions of any machine . . . in any degree, shall not be deemed a discovery.”⁹¹ Merely changing form or proportion is not a “sufficiently . . . important” invention to garner a monopoly.⁹² Instead, a change “in principle” is required, and no such change will have occurred if it was “obvious . . . to any mechanic.”⁹³ This became the *Hotchkiss* standard, in 1851, which required for patentability a showing of more “ingenuity and skill . . . than . . . possessed by an ordinary mechanic acquainted with the business.”⁹⁴ Here are signs of that mythic mad scientist as a “heroic figure.”⁹⁵ As Corynne McSherry has written, this is not anach-

patents are denied on utility grounds.” SCHECHTER, *supra* note 81, at 286 (citation omitted) (quoting *Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364 (Fed. Cir. 1999)).

⁸⁷ The non-obviousness requirement was not added to the Patent Act until 1952. See Christopher A. Cotropia, *Nonobviousness and the Federal Circuit: An Empirical Analysis of Recent Case Law*, 82 NOTRE DAME L. REV. 911, 916 (2007).

⁸⁸ *Id.* (footnotes omitted) (quoting ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY* 644 (3d ed. 2002)).

⁸⁹ 35 U.S.C. § 103(a) (2000).

⁹⁰ John Duffy, *Inventing Invention: A Case Study of Legal Innovation* 27, (November 11, 2006) (unpublished manuscript) (quoting An Act to Promote the Progress of Useful Arts (1790 Patent Act), 1 Stat. 109, available at <http://www.utexas.edu/law/conferences/ip/DuffyPaper.pdf>).

⁹¹ Act of Feb. 21, 1793, § 2, 1 Stat. 318, 321.

⁹² Duffy, *supra* note 90, at 27 (quoting An Act to Promote the Progress of Useful Arts (1790 Patent Act), 1 Stat. 109).

⁹³ *Hovey v. Stevens*, 12 F. Cas. 609, 612 (C.C.D. Mass. 1846).

⁹⁴ *Hotchkiss v. Greenwood*, 52 U.S. 248, 267 (1851).

⁹⁵ See MCSHERRY, *supra* note 71, at 43.

ronistic, but very much part of our national story. “By the late seventeenth century . . . inventors were being represented as heroic figures who wrestled with material nature to dislodge its secrets, and legal theorists were suggesting that patents could be claimed ‘as the natural rights of genius.’”⁹⁶

Compare the description of the inventor whose invention is worthy of a patent monopoly with that of the mechanic. The inventor has “ingenuity,” the mechanic only “ordinary” skill.⁹⁷ The inventor possesses “genius,”⁹⁸ even a “flash of creative genius,”⁹⁹ whereas the mechanic is described as a “mere artisan[.]”¹⁰⁰ To be sure, the 1952 Patent Act ratcheted down this high standard of patentability, requiring only that the difference between the new subject matter and the prior art not be “obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.”¹⁰¹ But the application of this standard has been fraught with difficulty. The Supreme Court requires that courts determine the level of ordinary skill in the pertinent art, but does not say how.¹⁰² This leaves the lower courts, and in particular the Federal Circuit, to define this “mysterious personage.”¹⁰³

For thirty years, the Supreme Court stayed out of the debate. In 2007, however, it decided *KSR International Co. v. Teleflex Inc.*¹⁰⁴ to address the criticism that becoming an inventor was too easy (i.e., the obviousness threshold was too low).¹⁰⁵ In other words, the critics believed the PTO and the Federal Circuit erred too often on the side of ordinary rather than inno-

⁹⁶ *Id.* (citations and internal quotation marks omitted) (quoting W. Kendrick, *An Address to the Artists and Manufacturers of Great Britain* (1774)). Mario Biagioli argues persuasively that the U.S. patent system with its novelty and non-obviousness requirements (as represented in the patent specification) are part and parcel of the developing political constitution of the new nation. Biagioli, *supra* note 59, at 1140 (“That specifications were absent in the colonial period, but began to emerge after the Declaration of Independence to become eventually codified in the first US Patent Act supports a correlation between political representation and patent representations.”).

⁹⁷ *Hotchkiss*, 52 U.S. at 267.

⁹⁸ *Reckendorfer v. Faber*, 92 U.S. 347, 357 (1876) (“inventive genius”).

⁹⁹ *Cuno Eng’g Corp v. Automatic Devices Corp.*, 314 U.S. 84, 91 (1941).

¹⁰⁰ *Standard Elec. Works v. Manhattan Elec. Supply Co.*, 212 F. 944, 945 (2d Cir. 1914).

¹⁰¹ 35 U.S.C. § 103(a) (2000).

¹⁰² *See Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 17-18 (1966).

¹⁰³ Joseph P. Meara, *Just Who is This Person Having Ordinary Skill in the Art? Patent Law’s Mysterious Personage*, 77 WASH. L. REV. 267 (2002); *see also* Cotropia, *supra* note 87, at 918 (describing recent criticism of the Federal Circuit’s nonobviousness jurisprudence); Meara, *supra*, at 286 (“[C]urrent Federal Circuit factors for determining the level of ordinary skill should be abandoned or modified because they do not advance the nonobviousness inquiry.”); Duffy, *supra* note 90, at 42 (“[I]t would have been better if the Court had tried to articulate a [sic] much greater detail the circumstances under which the obviousness doctrine was important for barring patents on novel developments.”).

¹⁰⁴ 127 S.Ct. 1727 (2007).

¹⁰⁵ *See id.* at 1734-35.

vative.¹⁰⁶ The Supreme Court agreed, ratcheting up the non-obviousness standard and attempting to clarify the distinction between an obvious mechanical change and an innovative creation or development over the prior art:

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103.¹⁰⁷

With *KSR*, the Supreme Court has affirmed the myth of the genius scientist who illuminates discoveries with the light bulb over the head, returning us to where we started: distinguishing the ordinary, predictable, and the common sense from the stuff of patents, “real innovation,” and extraordinary creativity.¹⁰⁸

Who is this “first and true” inventor whose new and useful creation comes not of nature but of his mind and is non-obvious to the ordinary person skilled in the particular art at issue? Consider that this special person did not merely discover some law of nature or product of nature, however new or useful to human society.¹⁰⁹ The inventor is a creator. Secondary considerations—indicia of non-obviousness, such as the prior failure of others skilled in the art to solve the same technical problem or unexpected results that show the invention is counterintuitive in some way—further distinguish the invention and its creator from all the others (mechanics?) as someone special, unordinary.¹¹⁰ In this way, patent law describes a person and a community, his nature and its values:

As inventors became owners they also became guarantors for several foundational dualisms: monopoly/freedom, creator/work, and . . . public/private. . . .

¹⁰⁶ Cotropia, *supra* note 87, at 913 (discussing two reports that claim that “the Federal Circuit has improperly relaxed the nonobviousness requirement”). The criticism was mainly directed at the teaching, suggestion or motivation test, which is one part of the obviousness inquiry. *See id.* at 917-18.

¹⁰⁷ *KSR*, 127 S.Ct. at 1742.

¹⁰⁸ *Cf. id.* at 1741 (“Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility.”).

¹⁰⁹ *Chakrabarty*, 447 U.S. at 309 (“[A] new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter.”).

¹¹⁰ *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18 (1966) (listing factors that indicate non-obviousness); *Allen Archery, Inc. v. Browning Mfg. Co.*, 819 F.2d 1087, 1092 (Fed. Cir. 1987) (same).

[P]atent law . . . assum[es] and invok[es] an autonomous liberal subject, in the persona of the heroic . . . inventor, which a property claim to the product of his or her inventive effort.¹¹¹

If this sounds like the individual citizen at the heart of John Locke's theory of civilization¹¹² or Thomas Hobbes' theory of government and sovereignty,¹¹³ then the origin myth of patent law (and its heuristic function for describing the American individual and her nation) has emerged clearly. Indeed, one scholar has recently argued that the development in the United States of the persona of the inventor as genius directly parallels the birth of republican government in the United States, and, to a lesser extent in France.¹¹⁴

The patent law origin story, therefore, explains how and why we grant certain people and not others this special and valuable monopoly. It justifies the distinction between the haves and the have-nots with allusion to differences between people, those who are ordinary, mere artisans, and those who are not.¹¹⁵ The patent law protects the creative output of the uncommon or remarkable person.¹¹⁶ Moreover, invocation of conception and description

¹¹¹ MCSHERRY, *supra* note 71, at 45.

¹¹² Grossly simplified, John Locke's theory of the origin of property located that origin in the right to own the product of one's own labor. For recent discussions on John Locke and the U.S. intellectual property regime, see, for example, Robert Merges, *Locke Remixed* ;-), 40 U.C. DAVIS L. REV. 1259, 1265 (2007); and Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 971-72 (2007).

¹¹³ For Hobbes, state power and control (e.g., the state's regulation of property) was a prerequisite to civil stability. See, e.g., Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2032-33 (2003) (citing THOMAS HOBBS, *LEVIATHAN* 186 (C.B. Macpherson, ed. 1968) (1651)).

¹¹⁴ Biagioli, *supra* note 59, at 1142, 1147. The irony is rich here. Whereas the birth of the American inventor might arise from contemporary political developments valuing representation and transparency ("disclosure" in patent terms) in a government promising a role or place for everyman, this American inventor is defined by that which distinguishes him from everyone else. Indeed, just as voting rights were severely curtailed in the early republic by race and property despite the move to representative democracy, the inventor-identity as American citizen was a right reserved for only those who could represent themselves in the polity (or through the patent specification) as unique. *Id.* at 1140-42, 1147.

¹¹⁵ "Th[e] identification of conception as the heart of invention links the discourse of inventorship, . . . to the idealized individual originary genius. . . . Invention . . . is the province of heroic individuals who are able to observe the works of nature and man and recombine those works to nonobvious, novel, and useful effect." MCSHERRY, *supra* note 71, at 179 (footnote omitted).

¹¹⁶ Who are examples of remarkable people that supported the "first to invent" system? George Washington and Benjamin Franklin were among the first (the story goes) to battle behind the scenes in the first-priority contest for a patented invention. See ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS* 163 (2004). Jaffe and Lerner write:

Perhaps the most compelling explanation for this decision [of the United States to adopt a first-to-invent system] lies in historical accident: at the time the Patent Act of 1793 was enacted, two dueling inventors, James Rumsey and John Fitch, were locked in a battle over the ownership of riverboat engine technology. Each had made several patent applications, but the orders of application and invention differed. So the particular design of the patent system would have an enormous influence on their individual fortunes. Not surprisingly, the men—and their financial backers, who had included both George Washington and Benjamin Franklin—exerted heavy influence to try to shape the system for their benefits.

of this “first and true” inventor as memorialized in the patent itself (the oath of inventorship, a contract between relevant parties¹¹⁷) substantiates present circumstances of rights and entitlements (e.g., a right to exclude and a royalty stream under the patent) with an appeal to the past and mythical beginnings.

B. *Patent Stories*

Consider how the following recent inventorship dispute mobilizes the origin myth of patents described above.¹¹⁸ The patent at issue arose out of a joint collaboration between Massachusetts General Hospital (“MGH”), Massachusetts Eye and Ear Infirmary (“MEEI”), and a small biotech firm in Vancouver named QLT.¹¹⁹ The drug developed, called Visudyne, is the first of its kind to treat age-related macular degeneration (“AMD”), which is the leading cause of blindness in people over the age of 50.¹²⁰ Since the FDA approved the drug for medical use, it has been a multi-million dollar product, turning the small Canadian biotech company into a very profitable one.¹²¹ One reason the drug is so special is its unique delivery system. The drug is photosensitive and activated by light.¹²² It is administered intravenously and travels throughout a patient’s body, but it treats only the very delicate eye blood vessels when a very precise, non-thermal laser beam is directed into the eye.¹²³

The dispute concerned the division of the profits from the drug.¹²⁴ The inventors had assigned their rights to their respective institutions.¹²⁵ And as joint-owners, each institution could separately make, use, or sell the invention without accounting to the other owners.¹²⁶ QLT sought exclusive rights

Id.; see also Walterscheid, *supra* note 77, at 270-78 (recounting the priority contest).

¹¹⁷ See Biagioli, *supra* note 59, at 1131-32 (describing the “patent bargain” as one between the inventor and his fellow citizens).

¹¹⁸ Although I was part of a large team representing QLT during the early phases of this litigation (which lasted over eight years), everything I say about this case is based on public record. Nothing contained herein should be construed to be the view of any of the parties or attorneys in the case, other than myself.

¹¹⁹ *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 221-22 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2292 (2006).

¹²⁰ *Id.* at 221.

¹²¹ *Id.* at 223; see also *Mass. Eye & Ear Infirmary v. QLT, Inc.*, 495 F. Supp. 2d 188, 205 (D. Mass. 2007).

¹²² *Mass. Eye & Ear Infirmary v. Novartis Ophthalmics, Inc.*, 353 F. Supp. 2d 170, 171-172 (D. Mass. 2005), *rev'd on other grounds*, *Mass. Eye & Ear Infirmary v. Novartis Ophthalmics, Inc.*, 199 Fed. Appx. 960 (Fed. Cir. 2006).

¹²³ *Id.*

¹²⁴ *Mass. Eye & Ear*, 412 F.3d at 229-34.

¹²⁵ *Id.* at 224.

¹²⁶ 35 U.S.C. § 262 (2006).

in the patent, however, and so it negotiated with both MGH and MEEI for a transfer of their exclusive rights in exchange for a royalty on the sale of the drug, which QLT was prepared to market world-wide.¹²⁷ QLT reached a license agreement with MGH, but MEEI wanted a larger royalty than MGH agreed to.¹²⁸ When QLT and MEEI could not reach an agreement on a royalty term,¹²⁹ QLT, with patent rights equal to those of MEEI, began selling the drug and paying royalties to MGH under their license, but paid nothing to MEEI.¹³⁰

MEEI sued, angry that it received none of the invention's royalties. One of its claims was that QLT's scientist, Julia Levy, was not a real inventor of the invention described by the patent.¹³¹ Removing Levy from the patent would return the control of the invention and its profits to MEEI and MGH.

Throughout the litigation, the parties wrestled with the above-mentioned mystical underpinnings of inventorship law. In particular, what does "conception" mean, and who is the "first and true" inventor of Visudyne? QLT would need to tell a convincing story about how Julia Levy conceived of the invention, and why she deserved to be named on the patent. After all, a well-regarded Harvard-affiliated teaching hospital sued QLT, a Canadian pharmaceutical company, in Boston. While Levy may have begun the research on photosynthetic delivery of the drug, MEEI would say that its clinical studies transformed the idea of the photosensitive drug into a reality, by determining the drug's effective dosage.¹³² Its work cured the disease.¹³³

If MEEI has a persuasive argument, it lies in the changing world of collaborative research that the 1984 amendments to the Patent Act were meant to address.¹³⁴ The 1984 amendments "remed[ie]d the increasing technical problems arising in team research, for which existing law, deemed to require simultaneous conception as well as shared contribution by each inventor to every claim, was producing pitfalls for patentees . . . [T]he amendment 'recognizes the realities of modern team research.'"¹³⁵ In a world of collaborative research that spans the globe, where scientists in Bologna and Boston can jointly contribute to an invention claimed in a patent without working together in the same laboratory, the notion of inventor is changing. Inventors under the law are not the mad scientists of myth. As

¹²⁷ *Mass. Eye & Ear*, 412 F.3d at 224.

¹²⁸ *Mass. Eye & Ear Infirmary v. QLT, Inc.*, 495 F. Supp. 2d 188, 210 (D. Mass. 2007).

¹²⁹ *Id.*

¹³⁰ *Id.* at 214.

¹³¹ *Mass. Eye & Ear*, 353 F. Supp. 2d at 174; *see also Mass. Eye & Ear*, 495 F. Supp. 2d at 206-09.

¹³² *Mass. Eye & Ear*, 495 F. Supp. 2d at 201-03.

¹³³ *Id.* at 203.

¹³⁴ *Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456, 1470-71 (Fed. Cir. 1998) (Newman, J., dissenting).

¹³⁵ *Id.* at 1467-69 (quoting 130 CONG. REC. 28,071 (1984)).

the 1984 amendments recognized, inventors of the twentieth and twenty-first centuries exist in teams, and inventions are made over the course of years and not in the poof of a moment.

In support of its equitable argument, MEEI relied on Judge Newman's dissent in *Ethicon v. United States Surgical Corporation*, in which Newman, relying on the history behind the 1984 Amendments, berates the majority for reading Sections 116 and 262 of the Patent Act¹³⁶ together to mean that even if someone contributed only a single claim to a patent that person was nonetheless an inventor of the entire invention who could make, use, or sell the invention without accounting to the other owners.¹³⁷ Newman complained that prior to the 1984 amendments only "a person who had fully shared in the creation of the invention [as a whole] was deemed to be a joint owner of the entire patent property . . . on a legal theory of tenancy in common."¹³⁸ Drawing on the history of patent ownership prior to 1984, Newman explained that "[t]he law had never given a contributor to a minor portion of an invention a full share in the originator's patent."¹³⁹ Newman argued that courts are mistakenly applying Section 262 of the Patent Act "to treat all persons, however minor their contribution, as full owners of the entire property as a matter of law."¹⁴⁰

In light of MEEI's arguments, QLT would have to tell a persuasive story about how Julia Levy was an inventor who had fully shared in the creation of the invention, how she was the "first and true" inventor. It would be an origin story, with homage to authenticity and reliance on evidence of consent, that would legitimate her claim to the patent and justify the apparent inequities in the division of the royalties in the way that myths do. This was QLT's story.¹⁴¹

When Julia and her husband were raising their young children, they had a cottage on a remote island off the coast of Vancouver. There her children often played in fields covered with cow parsley, a low-growing ground cover. She noticed that after playing in the fields, her children's skin was more susceptible to sunburn. She spoke with a botanist friend and learned that cow parsley has photodynamic qualities—it exudes an oil that absorbs sunlight. Fascinated with this chemical process as a biochemist, she wondered if the process could enrich her biomedical research. When her mother

¹³⁶ 35 U.S.C. § 116 (2000) (joint ownership); 35 U.S.C. § 262 (2000) (joint inventorship).

¹³⁷ *Ethicon*, 135 F.3d at 1469-70.

¹³⁸ *Id.* at 1471 (citation omitted).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ The story below comes from Julia Levy's testimony at trial as recounted in the District Court's opinion, *Mass. Eye & Ear Infirmary v. QLT, Inc.*, 495 F.Supp. 2d 188, 200 (D. Mass. 2007) and *Mass. Eye & Ear Infirmary v. QLT, Inc.*, C.A. No. 00-10783-WGY, Trial Tr. Day 12, at 1584-1587 (on file with author); see also Robert Baun, *QLT's Biotech Success Story Emerged from Humble Roots*, ALLBUSINESS.COM, Oct. 1, 2004, <http://www.allbusiness.com/north-america/united-states-colorado/903845-1.html>.

developed macular degeneration and no cure was available, in part because targeting and treating the delicate blood vessels behind the eye is so difficult, Julia began developing a drug bearing photosynthetic qualities (i.e., one activated by light like the precise point of a laser). She conceived of a biochemical structure that would bind especially well to the small blood vessels of the eye such that when a doctor shined a non-thermal laser through the eye, the drug-bearing photosynthetic qualities would operate only on those vessels and nowhere else in the body. Visudyne originated, QLT argued, in the cow parsley patches of Julia Levy's summer cottage and was fully conceived in the mind of the biochemist as she searched for a drug to cure her mother's illness. Her collaboration with MEEI came much, much later.

This is a good origin story. Despite the fact that the law of inventorship supported QLT, this story alone explained and justified Julia's inclusion on the patent as an inventor. It had all the qualities of an origin myth.

Levy's inventor status is rooted in authenticity, essential truths buried in the beginning of the idea of Visudyne. Julia is the person who originated the idea of photodynamic therapy to treat AMD, and thus she garners the authority and legitimacy necessary for the law's protection. The beginning of Visudyne lay with her in her summer retreat and her relationship to her mother.

This origin story is also political in nature, justifying a particular hierarchy of people and outcomes. It is not a "noble lie"¹⁴² as it is based entirely on fact if one is to believe Julia Levy, and there is no reason not to.¹⁴³ But it nonetheless refutes the perceived inequities in claiming Levy as an inventor on the same patent as MGH and MEEI scientists. After all, according to the patent, Levy contributed to only two claims on a patent that had more than a dozen claims.¹⁴⁴ And MGH and MEEI's clinical work, or so they claimed, over the course of many years honed the administration of the drug so that it could treat people.¹⁴⁵ Nonetheless, Levy conceived of the drug's chemical structure and provided the compound with which MEEI clinicians experimented.¹⁴⁶ She was the mind controlling the body, the brain to MEEI's brawn. MEEI's complaints of unfairness and disadvantage rely on incredible assertions of vulnerability (the small, nonprofit teaching hospital up against a big pharmaceutical company), which sound in emotion rather than

¹⁴² *But cf.* WRIGHT, *supra* note 10, at 5 (characterizing Plato's Myth of the Metals as a "self-consciously political" means to "ensure[] conformity to his envisioned hierarchy").

¹⁴³ Recall that conception of an invention begins as a matter of faith. *See supra* note 77.

¹⁴⁴ *See* Mass. Eye & Ear Infirmary v. Novartis Ophthalmics Inc., 353 F. Supp. 2d 170, 172, 176 (D. Mass. 2005) (citing U.S. Patent Nos. 5,798,349 and 6,225,303, the patents in dispute), *rev'd*, 199 F. App'x 960 (Fed. Cir. Oct. 6, 2006).

¹⁴⁵ *See* Mass. Eye & Ear, 353 F. Supp. 2d at 172-73.

¹⁴⁶ *See* Mass. Eye & Ear v. QLT, Inc., 495 F. Supp. 2d 188, 200-03 (D. Mass. 2007).

fact.¹⁴⁷ Levy's story of her inspired moment—the story of the formation in her mind of a definite and permanent idea of the invention—resonates with her high status (her gold, rational status) as an inventor.

This origin story relies not only on authenticity in conception to naturalize certain wealth and power relations, but also a narrative of consent. MEEI cannot complain that QLT and its founding scientist took power unfairly (notoriety and riches backed by the force of a legal document, the patent), because MEEI signed a declaration of inventorship attesting to the correctness of inventors listed on the patent, which included Julia Levy.¹⁴⁸ The status hierarchies or different financial positions, in which the institutions and inventors eventually found themselves, was a direct result of the agreed-to relations between the parties.¹⁴⁹ That MEEI and QLT failed to reach an agreement later as to a license has nothing to do with inventorship. Like the social contract, the parties agreed to this property arrangement and should be loathe to protesting now, years later, when they cannot reach a licensing deal.

MEEI has a response: it only consented to the patent filing because QLT promised it a better situation in return.¹⁵⁰ In other words, its consent was quid pro quo for a reasonable royalty, which QLT failed to offer. Here, we see the origin myth as a reflection of a perennial social and cultural preoccupation: equality. QLT's story of the beginning—the initial patent discussion—describes scientists who were all equally situated in relation to the invention. All were on the patent and all contributed to at least one of its claims. But MEEI deconstructs this origin myth claiming that the story QLT tells entrenches its status as originator with, in Wright's words, "the permanence of nature."¹⁵¹ MEEI says, in the beginning, hierarchies existed, not equality. MEEI is a nonprofit teaching hospital; QLT is a big pharmaceutical company. QLT always had the upper hand and used that power to get its jointly-invented patent and prevent MEEI from reaping its fair share of the profits. That was MEEI's theory of the case.

Although a twenty-first century battle over a path-breaking drug, the stories QLT and MEEI told were about inventors and power, laborers and disparate wealth, and they resonate with the stuff of legends. They rehearse the origin myth of patents, the difference between the genius and the mechanic, the person who is first and true and those that merely implement

¹⁴⁷ MEEI is a very successful and well-respected hospital affiliated with Harvard University. Massachusetts Eye and Ear Infirmary, <http://www.meei.harvard.edu/> (last visited Nov. 17, 2007). QLT began in 1981 as a collaboration between Levy and just four other scientists. Baun, *supra* note 141.

¹⁴⁸ *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 224-25 (1st Cir. 2005).

¹⁴⁹ *Id.* at 224, 234.

¹⁵⁰ *Id.*

¹⁵¹ WRIGHT, *supra* note 10, at 10 ("Contingent political arrangements, arrangements that are the result of accident and dissension . . . are invested with truth and essence in origin myths.").

previous orders, all to justify the intellectual property arrangement at the center of the dispute.¹⁵²

III. COPYRIGHT LAW

A. *Copyright Origins*

Of all three statutory intellectual property regimes, copyright may be most obviously structured around an origin myth, because original creation is the touchstone of copyright protection. The Copyright Act provides copyright protection for “original works of authorship fixed in any tangible medium of expression.”¹⁵³ Key to this protection is defining “originality” and “work of authorship” and understanding what these terms exclude.

1. As a Measure of Authenticity to Legitimate Hierarchy

Much like the inventor of a patent, an author of a copyrightable work has been variously described as having a “creative genius”¹⁵⁴ and as being taken hold of by a “creative spark.”¹⁵⁵ Authors reap the “creative powers of the[ir] mind”¹⁵⁶ using their “fancy or imagination,”¹⁵⁷ and “intellect.”¹⁵⁸ Although many people have written that the early copyright acts benefited booksellers and not writers, the cult of the romantic author (much like that of the hero-inventor) runs deep in the history of United States copyright law.¹⁵⁹

¹⁵² The dispute between QLT and MEEI continues today. U.S. District Court Judge William Young issued a Memorandum and Order on July 10, 2007 affirming a jury verdict in favor of MEEI on the basis of two state law claims (unjust enrichment and unfair business practices). *Mass. Eye & Ear Infirmary v. QLT, Inc.*, 495 F. Supp. 2d 188, 214-15 (D. Mass. 2007). Significant to the origin story, the status of the patent’s inventorship remains stable and uncontested. *Id.* at 191.

¹⁵³ 17 U.S.C. § 102(a) (2000).

¹⁵⁴ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *see also* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (noting that a copyright was “the exclusive right of a man to the production of his own genius or intellect . . .”).

¹⁵⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁵⁶ *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

¹⁵⁷ *See id.* (describing how trademarks differ from other types of intellectual property because they do not require the use of fancy or imagination).

¹⁵⁸ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 347 (1908).

¹⁵⁹ Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29, 31 (Martha Woodmansee & Peter Jaszi eds., 1994); *see* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 *EIGHTEENTH-CENTURY STUD.* 425 (1984) (linking copyright to the romantic construct of authorship) [hereinafter *Genius and Copyright*]. *See generally* Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in *THE*

An author, although left undefined by the Copyright Act, straddles the domains of the human and divine. As a model of human ingenuity, the author “wr[ites] a ‘self’”¹⁶⁰ possessing the unique qualities of an individual, owning his words and thus owning himself.¹⁶¹ He is nonetheless divinely inspired. The author as a concept began with the author as a vessel for independent, God-like forces.¹⁶² Indeed, the metaphor of the author as divinely gifted is an active metaphor in copyright case law.¹⁶³ Roberta Kwall has traced this parallel between authorship and God calling it a “mirroring argument,” comparing the first creation narrative in Genesis to the wonders of artistic creation: “man’s capacity for artistic creation mirrors or imitates God’s creative capacity.”¹⁶⁴

The co-existence of these dual qualities in the author, the human and the divine, functions as an ideology of uniqueness to underwrite the authority that authorship garners. An author is the creator of an original work, but “original” does not necessarily mean novel; it means only independently created by the author himself.¹⁶⁵ The work must literally have originated from him and not from anyone else. As the Supreme Court said in one of the more famous copyright cases, an author is “in that sense . . . he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.”¹⁶⁶ This turns out to be a very low threshold for originality—only the merely “trivial” contributions are excluded from copyright protection¹⁶⁷—and yet it seems to embed within it the ideological notion of the uniqueness of each individual. Each person has something to contribute that is “recognizably his own.”¹⁶⁸ This is a common American narrative: the

CONSTRUCTION OF AUTHORSHIP, *supra*, 15, 27-28; MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993).

¹⁶⁰ See CATHY N. DAVIDSON, *REVOLUTION AND THE WORD: THE RISE OF THE NOVEL IN AMERICA* 52 (1986) (discussing John Locke’s theory of property that “saw every mind as a blank page upon which experience wrote a ‘self’”).

¹⁶¹ Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of “Authorship,”* 1991 DUKE L.J. 455, 469-70 (describing the rise of the concept of authorship as part of the eighteenth century theory of “possessive individualism”).

¹⁶² *Genius and Copyright*, *supra* note 159, at 427.

¹⁶³ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 362-64 (1991) (“[There is a] minimal creative spark required by the Copyright Act and the Constitution.”); Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 11 (2002) (referring to the opinion in *Feist* and noting that the “creative spark . . . if unpacked could be shown to carry a numinous aura evocative ultimately of the original divine act of creation itself.”).

¹⁶⁴ Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1952-53 (2006).

¹⁶⁵ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976).

¹⁶⁶ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (internal quotation marks omitted).

¹⁶⁷ *Feist*, 499 U.S. at 359.

¹⁶⁸ *L. Batlin & Son*, 536 F.2d at 490 (quoting *Alfred Bell & Co. v. Caralda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951)).

rugged individuality of each person contributing to the nation's economic, social, and political successes.¹⁶⁹

Consider that copyright law will protect two identical poems under separate copyright as long as each work originates with a separate individual, allowing for the theoretical possibility that the exact same expression can arise from two different authors.¹⁷⁰ This is only a theoretical possibility, of course,¹⁷¹ because the cult of the author, like the myth about snowflakes, assumes that no two people will create the exact same work because no two authors are exactly alike.¹⁷² "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."¹⁷³ The origin myth of copyright begins with this heuristic about human nature: the belief in the singular essence of each person (whether from God or nature), which then develops into the right of ownership that each of us has, or should have, over that which is uniquely our own.

Authorship is expressly linked to authority, the authority and control each author has or should have over that which originates from him or herself.¹⁷⁴ This is not necessarily because of the premium placed on owning oneself but because of the value placed on authenticity. An original work of authorship is inauthentic (lacks originality) if it is copied from somewhere else. Independent creation thus justifies authority over the work.¹⁷⁵ A copy

¹⁶⁹ See *supra* note 16. By comparison, some countries such as Japan that embrace sweat-of-the-brow principles may have different concepts of individualism and the role of the individual in society. See, e.g., YAMAZAKI MASAKAZU, *INDIVIDUALISM AND THE JAPANESE: AN ALTERNATIVE APPROACH TO CULTURAL COMPARISON* 88, 89-91 (Barbara Sugihara trans., 1994) (describing Japanese society as revolving around the notion of the "contextual" or cooperative individual who is characterized by "interdependence, mutual trust, and the view of interpersonal relations as intrinsically valuable"); see Kenneth Port, *Dead Copies Under the Japanese Unfair Competition Prevention Act: The New Moral Right*, 51 ST. LOUIS U. L.J. 90, 109 (2006) ("In the name of harmonization, the Japanese protect the very same 'sweat of the brow' that has long been discounted as justification for intellectual property protection in the United States.").

¹⁷⁰ *Feist*, 499 U.S. at 345-46.

¹⁷¹ SCHECHTER, *supra* note 81, at 168 ("Such situations [of parallel independent creation] rarely come up in the real world, because it is highly unlikely two authors will create identical works of any complexity.").

¹⁷² Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569, 619 (2002) ("[E]very author who does not slavishly copy from another source is likely to introduce something unique.").

¹⁷³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903); see also *Feist*, 499 U.S. at 350 ("[C]opyright is limited to those aspects of the work . . . that display the stamp of the author's originality" (quoting *Harper & Row v. Nation Enters.*, 471 U.S. 539, 547 (1985))).

¹⁷⁴ To be sure, this is circular reasoning, but it is nonetheless an on-going justification for copyright protection. MCSHERRY, *supra* note 71, at 40 ("In a feat of circular reasoning, the radically autonomous individual author-genius was confirmed by the work's uniqueness, while the uniqueness of the work was confirmed by the individuality of the author.").

¹⁷⁵ In *Batlin*, the court discussed the importance of independent creation in the context of copyright law. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) ("[O]riginality is . . . distin-

is the antithesis of the authentic work and lies at the core of the infringement right of action.¹⁷⁶

2. Establishing Consent (to Legitimate Power and Property Relations)

Originating an expression is not the only means to legitimate the power of exclusion through copyright. Joint-authorship and works-for-hire create a situation where originating an expression is not enough. Indeed, in the latter case it does not matter.¹⁷⁷ What is of consequence is that the parties agree regarding the status and ownership of the finished product. In the case of co-authored works, the individual asserting joint-authorship must establish that each of the co-authors made independent copyrightable contributions to the work *and* that they each fully intended to be co-authors.¹⁷⁸ This standard, unexamined by the Supreme Court but widely embraced throughout the Circuits,¹⁷⁹ “creates a great deal of mischief, for it allows one collaborator—the dominant party—to lure others into contributing material to a unitary work, all the while withholding the intent to share in its economic and reputational benefits.”¹⁸⁰ The standard’s requirement for consent is exacting, demands certainty, and disregards the amount or quality of the putative co-author’s creative contribution to the original work.¹⁸¹ As explained more fully below, consent is not easily given by authors (or found by courts).¹⁸² Consent must originate from he who had the authority or control over the initial creative arrangements. He is the genius as be-

guished from novelty; there must be independent creation, but it need not be invention in the sense of striking uniqueness, ingeniousness, or novelty . . .”).

¹⁷⁶ See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951).

¹⁷⁷ 17 U.S.C. §§ 101, 201(b) (2000) (stating that the employer owns the copyright in works made by an employee within the scope of his employment).

¹⁷⁸ *Thomson v. Larson*, 147 F.3d 195, 200-01 (2d Cir. 1998). The language of intent, which goes to consent, is in the statute, 17 U.S.C. § 101, although there is a difference between the language of the statute and the language in *Thomson*. Compare 17 U.S.C. § 101 (“a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”), with *Thomson*, 147 F.3d at 201 (“all participants fully intend to be joint authors” (quoting *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991))).

¹⁷⁹ *Brown v. Flowers*, 196 Fed. Appx. 178, 186 (4th Cir. 2006); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068-69 (7th Cir. 1994); *BTE v. Bonnezeaux*, 43 F. Supp. 2d 619, 622-23 (E.D. La. 1999); *Papa’s-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1157 (S.D.N.Y. 1996); *Cabrera v. Teatro Del Sesenta, Inc.*, 914 F. Supp. 743, 764 (D.P.R. 1995); see also PAUL GOLDSTEIN, *COPYRIGHT* §§ 4.2.1.1, 4.2.1.2 (2006).

¹⁸⁰ Rochelle Cooper Dreyfuss, *Collaborate Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1206 (2000).

¹⁸¹ *Aalmuhammed*, 202 F.3d at 1235. See generally Jaszi, *supra* note 159, at 50-52 (1992) (criticizing the doctrine of joint authorship and its reliance on an individualistic notion of authorship).

¹⁸² See *infra* Part III.A.3.

tween contenders and only by his grace may others participate. Without his consent, they cannot.¹⁸³

Works-for-hire wreak a similar injustice that can be explained away with homage to consent, a central feature of political origin myths. When an employee originates a copyrightable work of authorship, the work belongs to the employer.¹⁸⁴ As long as an employee produced the work within his scope of employment, he has impliedly consented to transfer authorship (and therefore ownership) of it to the employer.¹⁸⁵ An employee, or independent contractor, can also explicitly consent to sign away his authorship status through contract.¹⁸⁶ These provisions of the Copyright Act are justified by relying on several of copyright law's founding goals: encouraging and efficiently disseminating creative output.¹⁸⁷ "The work for hire doctrine is . . . best understood as a way to put decisions on disseminating, revising, or building on works in the hands of the entity that will maximize creative value."¹⁸⁸ But these provisions make certain assumptions about the employer-employee relationship that may frustrate these and other goals of copyright law. In particular, employees or potential employees may not have any meaningful control over the scope of their employment, nor may frank discussion of authorship occur regularly and honestly.¹⁸⁹ Likewise, when a work-for-hire requires a contract, often times "parties have other relationships with one another that turn the signature into an inadequate bargaining tool."¹⁹⁰

¹⁸³ I am grateful to Rebecca Tushnet for the phrasing behind this idea and its placement at this point in the argument.

¹⁸⁴ 17 U.S.C. §§ 101, 201(b) (2000).

¹⁸⁵ *Id.*; see also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (ascertaining the scope of employment through agency law).

¹⁸⁶ A work-for-hire can also be created explicitly through contract and such a work falls into a specific category designated by the statute. 17 U.S.C. § 101(2) (2000).

¹⁸⁷ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."). Cf. Jessica Litman, *Copyright Myth*, 53 U. PITT. L. REV. 235, 242 (1991) (contrasting the theory of economic incentives in copyright law with author perceptions).

¹⁸⁸ Dreyfuss, *supra* note 180, at 1202; see also *id.* 1200-02 ("In this way, all exploitation decisions are put in the hands of a single entity.").

¹⁸⁹ See *id.* at 1204 (describing how the work-for-hire doctrine works poorly in a research university setting); MCSHERRY, *supra* note 71, at 89-90 (reporting that collaborators describe discussions of authorship as "embarrassing" and "uneasy" and thus often avoid the topic altogether or resolve the question with attention not to original contribution, but rather to human relations).

¹⁹⁰ Dreyfuss, *supra* note 180, at 1204 ("In the university setting . . . untenured faculty may have difficulty refusing to sign. Certainly the students and research fellows who are often protagonists in these disputes might be too concerned about getting their degrees or employment references to negotiate forcefully.").

3. As a Heuristic of an Individual and a Nation

Respect for the ideal act of consent that originates the collaborative and creative project smoothes the wrinkles from these doctrines. As already mentioned, consent is a central justification for the inequities that might result from works-for-hire and joint-works of authorship. But why should that be? What work does the parable of consent do for the vitality of the origin myth of copyright? If we believe that original and creative expression is sufficiently valuable to designate it as property of its maker, and if copyright law serves to incentivize authors to create more original works, why redirect that incentive and the ownership right to the dominant co-author or to the employer?¹⁹¹

The answer lies in the origin story copyright law tells about the nature of authorship. The doctrines of joint authorship and work-for-hire do not protect an “author” as a literal source but instead as a functional origin of expression. Instead of privileging one who actually wrote the words or shaped the sculpture, these copyright doctrines ask who propelled and encouraged the inspiration. This is a theory of patronage, suggesting that without it, no creative expression would take place in the first instance. In this way, the origin myth of copyright expressly embodies a theory of the American citizen, his nature and his possibility. The law confers the privilege of copyright (e.g., the power to exclude) only on an author who has the capacity to originate (through manufacture, promotion, influence or superior management) creative work.

Regardless of who produced the original arrangement, it was the individual or firm who could claim ‘authorship’ to the work’s initiative ‘motivating factor’ and inspiration. In effect, the visionary component of Romantic ‘authorship’ was disaggregated from the associated component of intellectual and physical labor. The employer was cast as the visionary, and the employee as a mere mechanic following orders.¹⁹²

This origin myth explains why the author of a work-for-hire is not the writer/employee but the employer, because the employer has already fulfilled the American dream of ownership and command, albeit over only a small dominion—a single mind or a community of people. The origin myth explains the rule of joint-authorship: the individual who controls the terms of the relationship will determine whether or how the work is co-

¹⁹¹ See Jaszi, *supra* note 161, at 490 (describing problems with the work-for-hire doctrine that follow from the Supreme Court’s decision in *Community for Creative Non-Violence v. Reid* and saying that the Court’s “particular version of the ‘authorship’ construct emphasized in the ‘work-for-hire’ cases may, in practice, be inimical to the concrete pecuniary and moral interests of writers, photographers, sculptors and other flesh-and-blood creative workers”).

¹⁹² *Id.* at 488-89 (discussing *Picture Music Inc. v. Bourne, Inc.*, 457 F.2d 1213 (2d Cir. 1972), and later amended work-for-hire provisions to the Copyright Act in 1976).

authored.¹⁹³ Courts justify the potential inequity that might result from the joint-authorship rule by explaining that the doctrine as it currently exists “prevents . . . spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author.”¹⁹⁴ Concern over unjust enrichment claims of one putative co-author at the expense of another has led to a rule that favors the party who already is a property owner.¹⁹⁵ The clarity of this rule might effectively minimize conflict (in the language of origin myths, it forestalls violence), but it also quite explicitly sanctions the extant power relations and hierarchies that are based on controlling the means of reproduction (labor) that shape our post-industrial society.¹⁹⁶

These doctrines, and their governing narratives, produce the same status hierarchy that operated in patent law. In patent law, they distinguish the genius from the mechanic to discriminate, and in copyright law they divide authors and all others. Indeed, the language of the “mechanic” (as compared to the artist-author) also runs throughout copyright law. As one often-cited treatise writer said: “[o]ne who has slavishly or mechanically copied from others may not claim to be an author.”¹⁹⁷ Otherwise put: copying, while laborious, is not inspired. Labor is not necessarily rewarded under the copyright regime. That we protect only the authentic or original works of authorship, and not the product of significant labor, reflects our society’s hierarchy of values and underscores certain fundamental propositions about who we are and what kind of expression is meaningful. In Plato’s terms, “authors” are made of gold, not brass. The brass—the laborers—are felled by *Feist Publications Inc. v. Rural Telephone Service Co.’s* “sweat of the brow” doctrine.¹⁹⁸ We embrace this story of human originality because we want to believe we are each unique and thus each capable of creating copyright-protected expression. This mythic narrative of rugged individualism is a motor behind our market theories,¹⁹⁹ our republican form

¹⁹³ Dreyfuss, *supra* note 180, at 1204-09; Jaszi, *supra* note 159, 314-16.

¹⁹⁴ *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

¹⁹⁵ See Dreyfuss, *supra* note 180, at 1218 (suggesting that the joint-authorship test announced in *Childress* is animated by the “concern that secondary contributors would receive too rich a reward—an undivided half interest in the entire collaborative product”).

¹⁹⁶ Keith Aoki has persuasively argued that the “author trope” serves to reify preexisting property regimes not only within a country but between nations as well. He says that authorial property is a form of, or is at least closely related to, the concept of national sovereignty (which includes notions of cultural, economic and political ascendancy and dominance). Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1297-1299 (1996).

¹⁹⁷ 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.06[A] (2006).

¹⁹⁸ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’”) (quoting U.S. CONST. art 1, § 8, cl. 8); see also *id.* at 353 (describing the flaws of the “sweat of the brow” doctrine).

¹⁹⁹ Scott Burris, *The Invisibility of Public Health: Population-Level Measures in a Politics of Market Individualism*, 87 AM. J. OF PUB. HEALTH 1607, 1608 (1997) (“As a heuristic, market individu-

of government,²⁰⁰ and many other facets of liberal legalism that dominate American culture.²⁰¹

At certain junctures, copyright law could flatten its hierarchical structure of privilege. Although the term “authorship” may traditionally evoke the image of an artist-writer, pen in hand, pouring over blank pages, the Supreme Court expanded the category to include craftsmen of new technology (photographers)²⁰² and of popular art (circus posters).²⁰³ The study of art and art history has long dissolved the distinction between “high” art and “low” art.²⁰⁴ Copyright law was not immune to this development, indeed it was ahead of its time. In 1903, the Supreme Court explicitly refrained from reinforcing a hierarchy of works of authorship, saying that:

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. At one extreme some works of genius would be sure to miss appreciation.

alism offers three closely related concepts for analyzing the problems of governing: the supremacy of the free market as a regulatory device, a concomitant belief in individual freedom of choice and personal responsibility, and the elevation of individual satisfaction as the chief goal of society.”).

²⁰⁰ Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“The central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule.”); Jonathan Toren, Note, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J. L. & LIBERTY 371, 406 (2007) (“[T]he idea of one-person-one-vote could reasonably be construed as an essential element of a republican form of government.”).

This theory of the author-citizen-employer coincides with the theory of copyright’s origin in Anglo-American law as protecting property owners rather than artists and writers. There are, of course, other theories (some related) of the origin of copyright protection. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430-31 (1984) (“From its beginning the law of copyright has developed as a response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection.”); Rose, *supra* note 159, at 9 (noting that the “historical emergence [of copyright] is related to printing technology”); *id.* at 48 (describing the rise of authorship as centered on notions of honor and reputation); Yen, *supra* note 2, at 529-39 (stressing that natural law concepts are inherent in copyright law); see generally B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920* (2005) (discussing how copyright law developed alongside the nation’s economy); Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67 (2007) (tracing the rise of moral rights and copyright doctrine). But this only shows that origin myths themselves are instable narratives, underscoring the myth of origins.

²⁰¹ By calling these narratives “myths,” I do not mean to call them untrue, I only intend to say they are stories that dominate our culture, bringing order to social relations by explaining the nature of the self and her entitlements, as well as her role in, and relations to, a specific kind of society. See *supra* Part I.A.

²⁰² *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

²⁰³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

²⁰⁴ See e.g., SUSAN SONTAG, *Notes on Camp*, in *AGAINST INTERPRETATION* 275, 275-92 (1961).

Their very novelty would make them repulsive until the published learned the new language in which their 'author' spoke.²⁰⁵

This pronouncement would seem a welcome respite from the language of "geniuses" and "mechanics," except that much copyright doctrine remains preoccupied with valuing certain works of authorship more strongly than others, describing weak copyrights as "thin" where they copy too much from other works²⁰⁶ or are based on information and facts that are part of the public domain.²⁰⁷ And so, here too, copyright returns to the hierarchical distinctions that value art more highly if it "results from the true imagination rather than mere application, particularly if its creator draws inspiration directly from nature," a hallmark of English Romanticism.²⁰⁸

What category of thought or expression outranks the precious gold-standard of "original works of authorship"? Only facts and ideas are so valuable that no one can own them;²⁰⁹ and so they are left in the commons. From the perspective of a market-driven society in which private ownership maximizes productivity, innovation, and personal wealth, leaving the most valuable commodities free for everyone is puzzling, unless they are truly non-rivalrous, non-excludable public goods. Of course, this is the debate around facts and ideas: although they are non-rivalrous and non-excludable, how exactly do we separate a fact or an idea from copyrightable expression so that we protect the latter from intrusion but leave the former free?²¹⁰

Again, attention to the mythical origin helps here. Searching for a human source can distinguish facts and ideas from copyrightable expression. "No one may claim originality as to facts,"²¹¹ because facts are not original to anyone, but are discovered. They existed previously and were merely found.²¹² For example, the facts of a United States' President's life (e.g.,

²⁰⁵ *Bleistein*, 188 U.S. at 251.

²⁰⁶ For example, derivative works are based on preexisting works of authorship, 17 U.S.C. § 101 (2000), and are only copyrightable to the extent that the new work is a distinguishable variation that is more than trivially different from the preexisting work. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490-91 (2d. Cir. 1976). Even then, the copyright in the derivative work extends only to the new material. 17 U.S.C. § 103(b) (2000).

²⁰⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 349 (1991).

²⁰⁸ *Jaszi*, *supra* note 161, at 462-63; *see id.* at 495 ("In effect, artists who work directly from personal experience, in proximity to the natural raw materials of the creative process, are given a legal preference over those who merely rework prior art—no matter how ably.")

²⁰⁹ 17 U.S.C. § 102(b) (2000); *see also* GOLDSTEIN, *supra* note 179, § 2.3 (2005).

²¹⁰ *See infra* Part III.B.

²¹¹ *Feist*, 499 U.S. at 347.

²¹² *Id.* ("The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."). Recalling the comparison of the public domain to an "orphan" is irresistible here, *see* JESSICA LITMAN, *DIGITAL COPYRIGHT 77* (2001) (quoting Jack Valenti describing the public domain as an "orphan"), as both the public domain and orphans are no longer lucky enough to have parents (caretakers) of their own—people or a person to whom one can point as their originator (author).

when and where he was born) are free for all to use, but the sentences and expressions that incorporate those facts (e.g., a presidential autobiography) are subject to copyright and only the author can permit their reproduction.²¹³ Facts pre-exist expression. Their tangible manifestation in written language is merely a recordation.²¹⁴ But the autobiography, in contrast, is original human expression, *par excellence*.²¹⁵ “The discoverer merely finds and records,”²¹⁶ whereas expression results from human creativity, a product of the mind. Of course, this distinction between expression and facts—“between creation and discovery” as the Supreme Court has said²¹⁷—is not stable.²¹⁸ Only faith in a discernible origin, reputable or customary, maintains it.

B. *Copyright Stories*

Copyright disputes rehearsing the copyright’s origin myth are plentiful. The following example is one whose outcome remains very much contested.²¹⁹

The case involved the action of Peter Veeck, who operates a non-commercial website, “RegionalWeb,” that displays information about northern Texas.²²⁰ Veeck purchased a copyright-protected 900-page model code from Southern Building Code Congress International, Inc. (“SBCCI”) for \$72, contained on computer disks that bore prominent copyright warnings and that bound the user to a licensing agreement upon opening and installation.²²¹ Veeck installed the model code onto his computer and cut

²¹³ Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

²¹⁴ This is like the product of nature doctrine in patent law. See *supra* note 109 and accompanying text.

²¹⁵ As I have discussed elsewhere, the genre of autobiography creates a life, rather than records one. Jessica Silbey, *Criminal Performances: Film, Autobiography, and Confession*, 37 NEW MEX. L. REV. 189, 207-211 (2007).

²¹⁶ *Feist*, 499 U.S. at 347.

²¹⁷ *Id.*

²¹⁸ See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 190-91 (1995) (distinguishing between social reality, which is maintained by custom, and brute reality, which is independent of human agreement, and defining certain things—like money, property, and government—as existing in our social reality only because we believe them to exist); see also PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 116 (1966) (examining how social order is a human product and therefore relative and contingent).

²¹⁹ Compare *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 520 (9th Cir. 1997) (holding that medical standards were protected by copyright even after being adopted by reference into federal law), and *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) (same), with *Veeck v. S. Bldg. Code Cong. Int’l*, 293 F.3d 791, 801 (5th Cir. 2002) (en banc) (contra).

²²⁰ *Veeck*, 293 F.3d at 793.

²²¹ *Id.*

and pasted all of the text onto his website for public users to view.²²² Veeck did not credit SBCCI with authorship of the 900-page code or recognize SBCCI's copyright.²²³ Veeck identified the model code as the building codes of the towns of Anna and Savoy, Texas.²²⁴

Both Anna and Savoy, Texas, had adopted by reference SBCCI's model building code as a municipal ordinance.²²⁵ SBCCI is a non-profit organization "whose primary purpose, since 1940, has been to create uniform model codes to guide the safe design, construction, and operation of commercial and residential buildings."²²⁶ Organizations like SBCCI are wide-spread in the United States and are growing.²²⁷ They provide an invaluable service, especially to small towns, which do not have the resources or expertise to develop safety standards of their own.²²⁸ Indeed, the benefit of these private standard developers also runs to the federal government. The Office of Management and Budget ("OMB") of the United States directs all federal agencies to incorporate privately developed standards "whenever practicable and appropriate," thereby eliminating "the cost to the Government of developing its own standards."²²⁹ Recognizing that the standards systems depend on maintenance of copyright, the OMB requires agencies to "observe and protect the rights of the copyright holder"²³⁰ SBCCI and its competitors develop model codes and encourage local government to enact them.²³¹ The local government pays nothing to do so.²³² SBCCI supports its mission by selling its model codes to individuals or private organizations.²³³

²²² *Id.*

²²³ *Id.*

²²⁴ As it turns out, the version of the model code that Veeck posted on his website was not an accurate version of the law that Anna and Savoy had enacted. The text of the law included provisions that resolved conflicts between the model code and previous city laws, and certain clarifications. *Id.* at 809 n.4.

²²⁵ *Id.* at 802.

²²⁶ Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, *S. Bldg. Code Cong. Int'l, Inc. v. Veeck*, 539 U.S. 969 (2003) (No. 02-355), 2002 WL 32151704.

²²⁷ *Id.* As early as 1981, 97% of U.S. cities has adopted model building codes from one developer of standards or another. This is up from 47% in 1964. BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION, LOCAL BUILDING CODES AND THE USE OF COST SAVING METHODS 11-12 (1988); *see also* NATIONAL CONFERENCE OF STATES ON BUILDING CODES AND STANDARDS, INC., DIRECTORY OF BUILDING CODES & REGULATIONS (1996 ed.) (listing adoptions of building-related model codes and standards).

²²⁸ *Veeck*, 293 F.3d at 817 (Wiener, J., dissenting).

²²⁹ Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546, 8554-55 (Feb. 19, 1998) (revising the 1983 OMB Circular A-119).

²³⁰ *Id.* at 8555.

²³¹ *Veeck*, 293 F.3d at 794.

²³² *Id.*

²³³ *Id.*

SBCCI sent Veeck a cease-and-desist letter when it learned that Veeck had posted its entire 900-page model code on RegionalWeb.²³⁴ Believing that he was not infringing any copyright, Veeck filed a declaratory judgment action against SBCCI seeking a ruling to that effect.²³⁵ Veeck did not dispute that SBCCI had had a valid copyright in the model code when it was originally drafted.²³⁶ Veeck insisted, however, that upon adoption into law by Anna and Savoy, Texas, the copyright expired.²³⁷ SBCCI, or any other standard developer, could no longer hold a copyright in its original expression because, through enactment into law, it had become part of the public domain.²³⁸ If Veeck was correct, SBCCI would lose approximately one-third of the revenue that it generates by sales of model codes to contractors, potentially harming SBCCI's business and thwarting the public service it provides.²³⁹

SBCCI made several arguments to support its counterclaim of copyright infringement that resonate with some of the doctrinal foundations of copyright law and attempt to justify its authorship status. For example, the constitutional purpose of copyright law is “[t]o Promote the Progress of Science and useful Arts”²⁴⁰ by “secur[ing] a fair return for an ‘author’s’ creative labor . . . to stimulate artistic creativity for the general public good.”²⁴¹ This is precisely what SBCCI and other model code drafters were doing—promoting the public good by creating standards that protect health and safety. Without its copyright revenue, this public service would be lost. SBCCI further explained that without the rights that pertain to authorship, it would have little incentive to disseminate its model codes, which it creates less expensively and more efficiently than the municipalities that had enacted them.²⁴² This, too, is a central tenet of copyright law: protecting authored works.²⁴³ Finally, SBCCI explained that when Anna and Savoy adopted SBCCI's model code by reference into its law, instead of drafting their own code at their own expense, these municipalities acknowledged

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 241 F.3d 398, 403 (5th Cir. 2001).

²³⁷ *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 49 F. Supp. 2d 885, 888 (E.D. Tex. 1999).

²³⁸ *Id.*

²³⁹ *Veeck*, 293 F.3d at 816 n.24.

²⁴⁰ U.S. CONST. art. 1, § 8, cl. 8.

²⁴¹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (internal quotation marks omitted).

²⁴² See Brief for Curiae Texas Municipal League et al. as Amici Curiae Supporting Petitioner, Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, 539 U.S. 969 (2003) (No. 02-355) (approximating the cost of the model code at eight cents per page when purchased through SBCCI, which is less than the cost of photocopying in public libraries or municipal offices).

²⁴³ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

SBCCI's authorship status by entering into a licensing agreement that retains for SBCCI the exclusive right to publish these codes or license their reproduction and publication.²⁴⁴ SBCCI also, however,

ensures free access [to the code] by specifying [in the license] that once a governmental unit enacts such a model code into law, copies must be made available for inspection by the public in the enacting government's office. As a general proposition, members of the public may make or obtain copies of portions of the adopted versions of SBCCI codes from city officers or local libraries or may purchase copies of the codes directly from SBCCI.²⁴⁵

Veeck did not pursue copies of codes at Anna's and Savoy's municipal offices, finding the services there "inconvenient."²⁴⁶

In response to what appears to be a clear case of willful infringement, Veeck made several arguments. In particular, he claimed that the author cannot copyright "the law" (i.e., the enacted model code) for two reasons: (1) due process and right of access prohibits private control of public law to which citizens are accountable; and (2) once the model code becomes "the law," its expressive quality has merged with the fact of the law such that the fact/idea doctrine of merger precludes copyright protection.²⁴⁷ The Second and Ninth Circuits had previously addressed both issues and had ruled in favor of model code developers that were in positions similar to SBCCI.²⁴⁸ The United States Court of Appeals for the Fifth Circuit, in a divided en banc opinion (with two dissents), created a Circuit split on the issue when it ruled in Veeck's favor.²⁴⁹ The majority drew primarily on a nineteenth cen-

²⁴⁴ *Veeck*, 293 F.3d at 808-09 (Wiener, J., dissenting).

²⁴⁵ *Id.* at 808-09. Further:

SBCCI does not permit governmental entities to publish its model codes when they are enacted. Instead, it permits their adoption by reference and furnishes a copy of the adopted code to the entity. SBCCI also generously allows that if a governmental entity were to publish the building code on an Internet site to meet its due process obligation, that would be a fair use.

Id. at 800 n.12.

²⁴⁶ Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, *S. Bldg. Code Cong. Int'l, Inc. v. Veeck*, 539 U.S. 969 (2003) (No. 02-355), 2002 WL 32151704; *see also Veeck*, 293 F.3d at 793 ("Veeck made a few attempts to inspect several towns' copies of the Building Code, but he was not able to locate them easily.").

²⁴⁷ *See Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 49 F. Supp. 2d 885, 888 (E.D. Tex. 1999). Veeck made other arguments that are not relevant to the foregoing discussion, including a claim of copyright misuse and waiver. *Id.*

²⁴⁸ *See Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 518-19 (9th Cir. 1997) (holding that where Federal Health Care Financing Administration adopted regulations requiring physicians to use a version of a copyrighted standard owned by the American Medical Association, copyright should be enforced); *CCC Info. Servs., Inc., v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 68-74 (2d Cir. 1994) (holding that where a New York statute required insurance companies to use copyright-protected *Red Book* as one of several standards in calculating payments upon total loss of vehicle, *Red Book's* copyright should be enforced).

²⁴⁹ *Veeck v. S. Bldg. Code Cong. Int'l Inc.*, 293 F.3d 791 (5th Cir. 2002).

tury Supreme Court case and a single decision from the Court of Appeals for the First Circuit that discussed the issue but did not decide it.²⁵⁰ The reasoning of the majority opinion counters SBCCI's doctrinal arguments about the purpose and scope of copyright protection with a story about mythical origins of "the law" itself.

In holding that the law cannot be copyright protected, whether a judicial opinion, a statute, or a local ordinance that adopts by reference a privately-owned model code, the Court of Appeals for the Fifth Circuit relied on *Banks v. Manchester*,²⁵¹ a Supreme Court case from 1888.²⁵² In that case about a court reporter seeking copyright in his publication of judicial opinions, the Court wrote:

there has always been a judicial consensus . . . that no copyright could . . . be secured in the products of the labor done by judicial officers in their discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute.²⁵³

A principle of access prompts this anti-property stance: "[I]t needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this"²⁵⁴ But another reason for this ruling, at least as the Fifth Circuit understood it, resulted from a particular understanding of who exactly "authors" the law.²⁵⁵ SBCCI contends that *Banks* does not deny copyrightability to all legal enactments, "only that judges have no need of the Copyright Act's economic incentives in order to author judicial opinions."²⁵⁶ The law, be it a judicial opinion or a statute, is a "work-for-hire," whereas the model codes, drafted by private companies on their own dime, are not.²⁵⁷

The Fifth Circuit opinion refuted the application of the work-for-hire doctrine and the incentive rationale for copyright, and instead reached for a higher level of abstraction. "*Banks* refers to the source of the judges' salary in order to explain that it is the *public at large*, not the judges, who have the pecuniary interest or proprietorship in the fruits of their judicial labors."²⁵⁸

²⁵⁰ *Id.* at 795 (discussing *Banks v. Manchester*, 128 U.S. 244 (1888)); *id.* at 798-800, 803-04 (discussing *Bldg. Officials & Code Adm'rs v. Code Tech.*, 628 F.2d 730 (1st Cir. 1980)).

²⁵¹ *Banks*, 128 U.S. 244 (1888).

²⁵² *Veeck*, 293 F.3d at 800.

²⁵³ *Id.* at 795 (citing *Banks*, 128 U.S. at 253).

²⁵⁴ *Id.* at 795-96 (citing *Nash v. Lathrop*, 142 Mass. 29 (1886)).

²⁵⁵ *Veeck*, 293 F.3d at 798-99.

²⁵⁶ *Id.* at 796.

²⁵⁷ *Id.* at 797 ("Judges . . . receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors." (quoting *Banks*, 128 U.S. at 253)).

²⁵⁸ *Veeck*, 293 F.3d at 797 (emphasis added) (internal quotation marks omitted).

The notion of the “public” as distinct from the judge as the origin of the law’s authority, grows even more fabled when the Fifth Circuit relied on a phrase from an earlier First Circuit case that identified the “real premise[] of *Banks*” as that of the “‘metaphorical concept of citizen authorship’ of the law”²⁵⁹ When the local government, representing the citizens of the town, enacted SBCCI’s model code into law, SBCCI’s model code was no longer an original work of authorship by the private standard developer but an assertion by the people of Anna and Savoy, Texas, of their sovereignty and self-determination.²⁶⁰ The statement of law needn’t be inventive or unusual. It must only originate (have its source of authority derive) from the particular community or person who *intends* their expression to be inseparable or interdependent parts of the whole.²⁶¹ In addition to describing how joint-authors create original works of expression, this describes the ideal by which each citizen “authors” their own government.

Veeck’s win seems an unfair result. The Fifth Circuit opinion relied on the panacea of consent, attempting to legitimate the apparent unequal distribution of power and property.

Not only is the question of authorship of ‘the law’ exceedingly complicated by SBCCI [and its position on] . . . the ‘authorship’ question, [but it] ignores the democratic process. Law-making bodies in this country enact rules and regulations only with the consent of the governed. . . . The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.²⁶²

This political origin story justifies the redistribution of property from private sweat and equity to “the people” who are thereby enriched (albeit via an enrichment of the public domain) with the casting of a ballot. The authenticity and authority of the expression—the model code cum law—derives not from the labor that made it, but the power and force (and myth) of the people speaking their desire as one. The origin here is not the source of the model code but the source of the law, the people who invent themselves through consensual self-government.

This is a compelling story, a story that a nation devoted to the philosophy of self-government and the creed of independence likes to believe about itself. To this, SBCCI might only say that the Court’s origin myth

²⁵⁹ *Id.* at 798.

²⁶⁰ *See Veeck*, 293 F.3d at 799 (stating that the “‘authorship’ question ignores the democratic process.”).

²⁶¹ *See* 17 U.S.C. § 101 (2000) (defining joint works). Working with this “metaphorical concept of citizen-authorship,” rather than against it, SBCCI could have asserted that the laws of Anna and Savoy, Texas, were “collective works,” under 17 U.S.C. § 101, in which the “public” could own rights to the whole, and SBCCI could retain rights in its separable contribution (if there was any). But this arrangement would diminish the authority of the “public,” reducing it to editor-like status, rather than author.

²⁶² *Veeck*, 293 F.3d at 799 (citations and internal quotation marks omitted).

based on the “citizen-author” is actually a story of paternalism, saving the citizens of Anna and Savoy from their own preferences by denying to them the sovereign choice to enter into the agreement in which they in fact did: a license for SBCCI’s finished and copyrighted work that permits them to use it as the standard to measure building safety in both Anna and Savoy.²⁶³ As one dissent in the case wrote:

The cities could have hired counsel and engineers to draft a code, recouping its expense either from all taxpayers or by charging a fee to users for a copy of its ordinance. . . . [T]he refrain passes by the fact that it was legislators who chose what they thought was the most practical path, to adopt a technical code developed at the expense of others under a licensing agreement.²⁶⁴

Lest this be a tale of the government taking property from its citizens without compensating them,²⁶⁵ the Fifth Circuit played a trump card. It held that whether or not the author of the codes is the citizenry of Anna and Savoy, Texas or SBCCI, once adopted into law, the model code becomes a “fact” or an “idea” which the Copyright Act does not protect.²⁶⁶ The codes “are the unique, unalterable expression of the ‘idea’ that constitutes local law.”²⁶⁷ Applying the merger doctrine to the adoption of the model code as law, the Court explained that once an expression is law, it cannot be expressed in any other way (or at least in only a limited number of ways).²⁶⁸ “The law is the law,” the majority seemed to say. And in one way, they are right. “Courts routinely emphasize the significance of the precise wording of laws presented for interpretation.”²⁶⁹ But are laws, facts, or ideas discovered without human origin rather than an expression created by a deliberate

²⁶³ *Id.* at 800 n.12 (noting that SBCCI expressly reserved its rights when it allowed the North Carolina Building Offices to publish SBCCI’s model code).

²⁶⁴ *Id.* at 806 (Higginbotham, J., dissenting).

²⁶⁵ The risk is real that the government will be seen this way, given the explicit language of the Copyright Act:

When an individual author’s ownership of a copyright . . . has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, . . . shall be given effect under this title, except as provided under title 11 [regarding bankruptcy].

17 U.S.C. § 201(e) (Involuntary Transfer). The purpose of this section “is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer.” H.R. Rep. No. 1476, 94th Cong., 2d Sess. 173 (1976); *see also* Trotter Hardy, *The Copyrightability of New Works of Authorship: “XML Schemas” as an Example*, 38 HOUS. L. REV. 855, 878 (2001) (protecting under this section of the Copyright Act those model building codes authored by private entities and adopted by a legislative body).

²⁶⁶ *Veck*, 293 F.3d at 800, 802.

²⁶⁷ *Id.* at 801.

²⁶⁸ *Id.* at 802; *see, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985); *Baker v. Selden*, 101 U.S. 99 (1879).

²⁶⁹ *Veck*, 293 F.3d at 801.

or fortuitous act? Certainly SBCCI's model code is an original expression that is but one possible manifestation of the many expressive possibilities for the "idea" or the "fact" of a building code. SBCCI's competitors in the model code industry that produce diverse versions of model codes, among those Anna and Savoy were free to choose, prove this point. For the Court's logic to be anything but circular,²⁷⁰ the law's existence or expression must be destined, beyond human intervention.

This narrative runs counter to that of the deliberative citizen-author, hence its presentation by the Court as an argument in the alternative.²⁷¹ But it is an origin myth nonetheless. It is the story of how "the law," devoid of interpretive or expressive content that is uniquely human, exacts deference and submission. This is a divine creation story that hides the messiness of our law—inevitably messy because it is a living, evolving language that nonetheless must function as a set of commands. The Court says that "the U[nited] S[tates] Constitution is a fact; the Federal Tax Code and its regulations are facts What SBCCI and the dissent ignore . . . is the graphic merger of its model building codes with 'the law' as enacted by Anna and Savoy, Texas."²⁷² But "the law," whether the United States Constitution or the municipal codes of Texas, is no more a fact than is a poem.²⁷³ The Court's assertion of it as a pure "idea" or "fact" rests on the desire for law to be holy and sublime, the font from which all else flows. This application of the merger doctrine, however flawed,²⁷⁴ serves the "deeper meaning" of

²⁷⁰ The en banc court's error appears to be conflating the fact of the adoption of the model code as law with the model code itself. In effect, the court says that because it is a fact that Anna and Savoy have adopted SBCCI's model code as law, that model code loses its copyright and may be copied in its entirety. See *Veeck*, 293 F.3d at 800-03. This is a mistake. It is akin to saying, as SBCCI pointed out:

Irvine Welsh's final draft of *Trainspotting* merged with the fact of being the novel *Trainspotting* upon publication. True, that is the unique expression of the book *Trainspotting*. No responsible observer, however, would think that the impossibility of conveying this novel in any way other than through the exact text of the novel nullified Welsh's copyright.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, S. Bldg. Code Cong. Int'l, Inc. v. *Veeck*, 539 U.S. 969 (2003) (No. 02-355), 2002 WL 32151704.

²⁷¹ *Veeck*, 293 F.3d at 800.

²⁷² *Id.* at 801-02.

²⁷³ See *supra* note 270 and accompanying text.

²⁷⁴ Whether or not a "fact" or "idea" is inseparable from its expression is a context-driven determination, not something that is simply declared as a matter of law and without analysis. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.) (describing the analysis involved in what has become known as the "abstractions" test). The Fifth Circuit en banc majority opinion fails to engage in this sort of examination. See generally *Veeck*, 293 F.3d at 791. It does not examine any of the other current model building codes, which exemplify the variety of expressive possibilities for the "idea" or "fact" of a building code. *Id.* Nor does it even assert that the only way to express the underlying "facts" or "ideas" of SBCCI's model code is as SBCCI actually expressed them in the 900 pages of its model code. *Id.* These missing analyses are necessary prerequisites to a finding of merger. See, e.g., 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1][a]-[d] (1978).

the role of law in our society.²⁷⁵ Like fact and ideas, the law (whether or not all three share essential qualities) is so precious, so fundamental to liberty, equality, and the pursuit of knowledge, that no one person can stake a claim to it. This proposition ignores that which makes the common law system so effective at keeping the peace: its unavoidable malleability due to its intimate involvement with law's diverse subjects. The people, including SBCCI and the legislators who chose SBCCI's model code, make law work, not the other way around. But suppressing this commonplace in favor of the mythic in order to reify the status of "the law" as authoritative in our society (an "author" of our society) is what origin stories are all about.²⁷⁶

IV. TRADEMARK LAW

A. *Trademark Origins*

Federal trademark protection also glorifies or valorizes a certain kind of origin. At first blush, the basis of trademark protection might seem less lofty or fabled than the origin myth that structures patent and copyright protection. The Constitution does not protect trademarks, for example. But an examination of the statute, foundational cases, and treatises reveals a well-rooted origin myth as the basis for trademark protection.

1. As a Heuristic of an Individual and Society

The touchstone of trademark protection is the mark's source-identifying function. Frank Schechter opens his canonical essay *The Rational Basis of Trademark Protection* with the "orthodox definition of 'the primary and proper function of a trademark . . . to identify the origin or ownership of the goods to which it is affixed.'"²⁷⁷ He goes on to discuss the historical roots of trademark in the marketplace as primarily proprietary (to identify the good's owner) or regulatory (to inform consumers about the source of defective or counterfeit goods).²⁷⁸ He further explains that the "mark was a true mark of origin, designating as it did the actual producer of the goods."²⁷⁹

²⁷⁵ Engel, *supra* note 9, at 791.

²⁷⁶ See *supra* notes 31-54.

²⁷⁷ Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 813-14 (1927) (citing *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916)).

²⁷⁸ *Id.* at 814.

²⁷⁹ *Id.*

As Schecter noted, the literal origin-designating function of the trademark has evolved from its historical roots.²⁸⁰ Even by 1927, when Schecter was writing, consumers looked to trademarks as reputational designations, indicating the purity or unadulterated quality of the good. Purchasers of goods might not know that Walter Baker and Company, Limited makes Baker's Cocoa.²⁸¹ Instead, the Baker's Cocoa mark informs the consumer that the product will be the same as it was last time because it originates from the same place.

[The mark] indicates, not that the article in question comes from a definite or particular source, the characteristics of which or the personalities connected with which are specifically known to the consumer, but merely that the goods in connection with which [the mark] is used emanate from the same—possibly anonymous—source or have reached the consumer through the same channels as certain other goods that have already given the consumer satisfaction, and that bore the same trademark.²⁸²

The modern formulation of this trademark function is this: distinctive of a consistent, if anonymous source, and distinct from other marks in the marketplace, trademarks reduce consumer search costs by making goods easier to identify and purchase and therefore encourage consistent quality among goods for consumer satisfaction.²⁸³ Protecting the producer's investment in good will and the consumer's expectations of quality and consistency, the mark (as a sign of a particular product of consistent quality) facilitates the sale of the good.²⁸⁴

This branding system works because trademark law prohibits confusion among marks on similar goods.²⁸⁵ "If a competitor were able to market its goods under a confusingly similar symbol, consumers may mistakenly purchase the wrong goods, and the producer's investment in the goodwill of

²⁸⁰ *Id.*

²⁸¹ *Id.* at 815 (citing *Walter Baker & Co., Ltd. v. Slack*, 130 F. 514, 518 (7th Cir. 1904)).

²⁸² *Id.* at 816.

²⁸³ Stacey L. Dogan & Mark A. Lemley, 41 *HOUS. L. REV.* 777, 786-87 (2004). For the "anonymous source doctrine," see 2 J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 15:8 (4th ed. 1996) (stating that to establish secondary meaning, a plaintiff needs to show "that the ordinary buyer associates the mark with a single, albeit anonymous source") and 15 U.S.C. § 1127 (2000) (defining "trademark").

²⁸⁴ Schecter, *supra* note 277, at 815 (citing *Powell v. Birmingham Vinegar Brewery Co.*, 13 Rep. Pat. Cas. 235, 250 (1896) ("His mark, as used by him, has given a reputation to his goods. His trade depends greatly on such reputation. His mark sells his goods.")). Of course, Schecter's theory is not purely an economic theory of goodwill and market dominance. He understands the psychological and cultural aspect of trademarks. "[T]oday, the trademark is not merely the symbol of good will but often the most effective agent for the creation of good will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions. The mark actually sells the goods." *Id.* at 819.

²⁸⁵ 15 U.S.C. §§ 1114, 1125(a) (2000).

the product would be appropriated.”²⁸⁶ The benefits of trademark protection thus inure to the consumer, who can shop more efficiently and presumably with more choice, and to the producer, who reaps the reputation-related rewards of its investment in its product through branding.²⁸⁷ In this description are echoes of an origin story that concerns the mythic relationship between the consumer and product manufacturer. Unlike the patent, which is born of inventors, or copyrightable expression, which is born of authors, trademarks are born not in the enchanted solitude of creation or discovery but of the social relations between marketplace actors. Trademarks are born of the identity-relation between consumer and manufacturer, the venerated origin of which is a frictionless and unambiguous market economy where free actors reign.²⁸⁸

Who is this consumer who makes her home in the marketplace and who values the efficiency of branding symbols?

Just as copyright doctrine has based itself upon a largely mythical ‘author construct,’ so trademark doctrine has based itself upon a largely mythical ‘consumer construct.’ Where the former describes an impossibly romantic producer, however, the latter describes an impossibly utilitarian consumer. Both figures are conceived as sovereigns, that is to say, as egoists, but where the ‘sovereign author’ is inspired, even capricious in her egoism, the ‘sovereign consumer’ is a utility-maximizing agent of unbounded rational choice.²⁸⁹

This rational consumer is a comparison shopper, an individual who thrives in as much as she motivates the quality and choice of goods in the market around her. This is a story of a consumer and marketplace that the United States prides itself on having originated, both as a basis of our post-industrial economic success and our democratic government.

²⁸⁶ Graeme B. Dinwoodie, *The Rational Limits of Trademark Law*, in U.S. INTELLECTUAL PROPERTY 59, 62 (Hugh Hansen ed., 2006); see also Dogan & Lemley, *supra* note 283, at 788-89 (“Trademark law thus historically limited itself to preventing uses of marks that ‘defraud[ed] the public’ by confusing people into believing that an infringer’s goods were produced or sponsored by the trademark holder” (alteration in original) (footnote omitted) (quoting *Taylor v. Carpenter*, 23 F. Cas. 742, 744 (C.C.D. Mass. 1844)).

²⁸⁷ Dinwoodie, *supra* note 286, at 63 (“Trademark protection against confusing simulation thus advances the interests of producers and consumers by protecting the integrity of consumer understanding and the producer’s investment in creating goodwill.”).

²⁸⁸ Cf. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 2-15 (1960); Jonathan Macey, *The Nature of Conflicts of Interest Within the Firm*, 31 J. CORP. L. 613, 615 (2006) (“The Coase Theorem posits that under conditions of zero transaction costs and well-specified property rights, market participants will organize their activities in ways that inevitably will achieve efficient outcomes.”).

²⁸⁹ Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2022-23 (2005); see also Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. R. 721, 723-24 (2004) (asking, “Why, in trademark litigation decisions, do judges so often write about representative members of the public as if we are astoundingly naïve, stunningly gullible, and frankly stupid?” and arguing that likelihood-of-confusion determinations underestimate the consumer, leading to broader trademark protection at the expense of the public).

2. As a Measure of Authenticity (to Legitimate Hierarchies Based on Quality and Distinction)

This origin story of trademark's protection—the rational consumer and the Pareto-optimal market²⁹⁰—assumes (or at least, it instantiates) a culture that is premised on the value of authenticity and difference. Trademarks stand for the integrity of the good, its authenticity, or its unadulterated quality as if to say, “this is the real thing” or “straight from the source.”²⁹¹ Trademarks are also only valued inasmuch as they distinguish the good of one from the good of another. In this, uniqueness of a good and difference between goods are two sides of one coin, describing the winning branding strategy.

Moreover, one only acquires rights in a trademark when the trademark successfully differentiates products in a consumer-populated marketplace.²⁹² When, for example, similar marks that brand like products collide, trademark law determines property interests based on the relative success of each mark in communicating identity and authenticity to the consumer first. The canonical case of *Blue Bell Inc. v. Farah Manufacturing Co.*²⁹³ or the more recent case of *Thrifty Rent-a-Car System, Inc. v. Thrift Cars, Inc.*²⁹⁴ teaches that a mark's first “use in commerce”²⁹⁵ (or first use in trade) which determines the scope of the trademark right at issue, depends on the assessment of the ability of the mark to communicate its branding identity to the relevant community of consumers.²⁹⁶ In the case of *Thrifty Rent-a-Car System*, for example, Thrifty Rent-a-Car moved its business (with its federally registered trademark) into Massachusetts and collided with Thrift Cars' related business and confusingly similar common law trademark, which had been first to operate in southeastern Massachusetts.²⁹⁷ The court applied the limited use exception of Section 33(b) of the Lanham Act to preclude Thrift

²⁹⁰ “A Pareto-optimal equilibrium is one in which no one can be made better off without making someone worse off. It reflects the most efficient distribution of societal resources, distributive justice aside.” Henry H. Perritt Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L.J. 259, 267 n.21 (2007).

²⁹¹ Consider how mayonnaise is marketed, for example, often with the qualifier “real mayonnaise,” as in the cases of Kraft Mayo Real Mayonnaise® and Hellmann's Real Mayonnaise®. Or consider Coors beer's slogan, “Brewed with Pure Rocky Mountain Spring Water,”® which dates from the 1950s.

²⁹² 15 U.S.C. § 1127 (2000) (defining trademark as “any word, name, symbol, or device . . . which [is used] . . . to identify and distinguish . . . goods, including a unique product, from those manufactured or sold by others . . .”).

²⁹³ 508 F.2d 1260 (5th Cir. 1975).

²⁹⁴ 639 F. Supp 750 (D. Mass. 1986).

²⁹⁵ 15 U.S.C. § 1127 (2000).

²⁹⁶ See *Thrifty Rent-a-Car*, 639 F. Supp. at 752-55; cf. *Blue Bell*, 508 F. 2d at 1265-67 (concluding that first “use in trade” is first sale of properly branded goods to purchasing public, not sale of goods to company sales representatives or sale of different goods branded with new mark to public).

²⁹⁷ *Thrifty Rent-a-Car*, 639 F. Supp. at 751-52.

Cars from expanding its business appurtenant to its mark beyond its original area in southeastern Massachusetts because, the court found, Thrift Cars had not established sufficient consumer recognition beyond that limited area.²⁹⁸ Thrift Cars lost, despite being “first” in Massachusetts, because it had yet to successfully communicate its brand beyond a limited area.²⁹⁹ Beyond a certain area of southeastern Massachusetts consumers, it had little distinct identity as a business with a brand and thus Thrifty Rent-a-Car could freely establish a market relationship with consumers in the rest of the state.³⁰⁰

Branding, the art of trademarks, is as much about market share and consumer identification as it is about personal identity politics in today’s twenty-first century. We buy goods for what they are *and* for what they say about each of us: our hipness, athleticism, politics, or sexual preference.³⁰¹ Insofar as trademark law revolves around the consumer construct,³⁰² the trademark origin myth tells the story of how to be unique and different in today’s visually crowded and stimulated society.

The promise of branding is so intrinsic to our market culture that some marks are inherently distinctive without proof of their capacity to designate a source. Whereas “descriptive” marks (e.g., Softsoap) require proof of secondary meaning (that the good originates from a consistent, if anonymous, source), trademarks that are “suggestive,” “fanciful,” or “arbitrary” are registrable as trademarks without such proof.³⁰³ Although the rationale for this rule is that inherently distinctive marks do not deplete the pool of useful words to facilitate the activity and growth of the marketplace,³⁰⁴ the other basis resonates with the central premise of trademark’s political origin myth: being inherently distinctive facilitates choice and expression, both of which are operative currencies in a democratic republic whose mantra is diversity.³⁰⁵

²⁹⁸ *Id.* at 756-57.

²⁹⁹ *Id.* at 751, 756.

³⁰⁰ *See id.* at 756-57.

³⁰¹ *Cf.* Barton Beebe, *Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 658-59 (2004) (describing *Boston Prof'l Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, where the mark (a professional hockey team’s logo) referred not to the professional hockey team but to “the consumer himself. He is the commodity-form about which the trademark is designed to convey information.”).

³⁰² *See* Beebe, *supra* note 289, at 2021 (“The consumer, we are led to believe, is the measure of all things in trademark law. Trademarks exist only to the extent that consumers perceive them as designations of source.”).

³⁰³ *See* *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9-11 (2d Cir. 1976); 15 U.S.C. § 1052 (2000) (prescribing that no trademark may be denied registration “on account of its nature” unless it shows too great a similarity to certain types of existing signifiers); *cf.* 15 U.S.C. § 1053 (2000) (applying rules for trademark registration to service marks).

³⁰⁴ *See* *Abercrombie & Fitch*, 537 F.2d at 11 (reasoning that “suggestive” terms can be easily invented and therefore present a stronger case for registrability than “descriptive” terms do).

³⁰⁵ *See* Beebe, *supra* note 301, at 681 (describing the “arresting uniqueness,” “singularity,” and “identity” of marks, per Schechter’s analysis). Elsewhere, Beebe writes:

The functionality doctrine shows the ongoing vitality of trademark's origin myth. If a mark serves an aesthetic or useful purpose and does not indicate origin, the mark is not protectable.³⁰⁶ The Supreme Court in *Qualitex Co. v. Jacobson Products Co.*³⁰⁷ "elevated the importance of the functionality doctrine by casting it—and not the ontological status of the mark-subject matter—as the sentinel of competition."³⁰⁸ The past decade has seen a strengthening of the functionality doctrine through the restriction of trade dress protection³⁰⁹ and by imposing the burden of proving non-functionality on the plaintiff seeking protection of an unregistered trademark.³¹⁰ Designating origin must be the *only* thing the mark does.³¹¹ The singular identity relation between consumer and product (i.e., the authenticity of the source) is paramount. Other worldly features cannot clutter the mark, however useful or pretty. As the Protestant church reformed man's relationship with God by making it a one-to-one relationship (singular, sacred, and personal) rather than one in need of an intermediary, the evolved functionality doctrine streamlines the relationship between the consumer and her choice of good, a relationship that branding both cultivates and cements. We are not only what we eat, we are what we wear, buy, and promote.³¹² Trademarks "R" us.

One's theory of trademark law . . . is a species of one's theory of politics. And as a theory of politics, the apologists and restrictionist schools offer us in the schizoid consumer the worst of each of their worlds. The political-economic subject is either confused or deluded; he either chooses on instinct but mistakenly chooses other than what his instinct instructed him to choose, or he chooses what he intended but chooses it according to external command. In either case, the subject may be said to have lost control over the ends of his actions, i.e., to have lost his sovereignty. This is of, course, [sic] an outcome that both the Right and the Left are otherwise committed to avoiding, each in their own way, in the name of 'liberty' and 'authenticity.'

Beebe, *supra* note 289, at 2062-63 (footnote omitted).

³⁰⁶ *Qualitex Co. v. Jacobson Prods.*, 514 U.S. 159, 162 (1995); *see also* 15 U.S.C. § 1052(e)(5) (excluding from registration any mark that, "as a whole, is function").

³⁰⁷ 514 U.S. 159 (1995).

³⁰⁸ Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*, 84 IOWA L. REV. 611, 655 (1999).

³⁰⁹ *See Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 214 (2000) (restricting inherently distinctive trade dress to product packaging out of concern that product design serves purposes other than source identification and therefore protecting it without proof of secondary meaning would have anticompetitive effects).

³¹⁰ 15 U.S.C. § 1125(a)(3) (2000).

³¹¹ ROBERT SCHECHTER, *INTELLECTUAL PROPERTY* 112 (2006) ("Not all product or package designs will be afforded trademark protection even if the merchant using them can prove they are distinctive.").

³¹² This is sometimes described as the expressive value of trademarks, where one wears a t-shirt with a Nike logo for what it says about the wearer, not for its source-signaling function. *See* Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 402-03 (1990). As a property right, this expressive value is called the "merchandising right," which has been much criticized. *See, e.g.*, Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 465 (2005) (arguing that the

3. Consensual Market Relations

The power and control that branding culture exudes might overwhelm the tourist in Times Square. And yet the origin myth of trademarks features empowered individuals who choose the products that can best represent them and satisfy their desires. In our choices (consensual exchanges and purchases), we actively shape our identities and forge our paths in society.³¹³ Here, the dimension of the origin myth that rehearses a narrative of consent surfaces yet again to rationalize and legitimate the force that markets have over our daily lives. A peaceable consumer culture depends in part on the belief that we have some control over the advertisements that bombard us; we can deflect the ones we disdain and grab for those (or the products to which they refer) that please us.³¹⁴ Historian Jackson Lears sees twentieth century advertising in this light as peculiar to “Anglo-American Protestant culture: extraordinary natural abundance, combined with a proliferation of charlatans and confidence men in a society committed to sincerity and self-command.”³¹⁵ Lears explains that that early branding practices fostered “personal efficiency” and “discipline[.]” to control a “hedonistic culture of consumption.”³¹⁶ In other words, the will and efficiency of the American citizen validates her purchasing choices. And with every purchase she consents further to the branding practices in place around her.

And yet, as early as 1948, trademarks were perceived as teasers, “induc[ing] a purchaser to select what he wants, or what he has been led to believe he wants.”³¹⁷ We are not necessarily sovereign consumers, the counter-narrative goes, we are also fools.³¹⁸ Ralph Brown’s seminal article on trademarks followed a consumer movement of the 1920s and 1930s in which organized groups lobbied against the growing advertising industry.³¹⁹

merchandizing right as protected in the case law “relegates competition and consumer search costs to secondary status”).

³¹³ This is the “sovereign consumer,” as Barton Beebe describes her. Beebe, *supra* note 289, at 2023. The other side is the fool. *Id.* at 2024. For a discussion of the “fool” in trademark law, *see infra* note 318.

³¹⁴ *Cf.* Beebe, *supra* note 289 at 2041-42 & nn.87-90 (collecting authorities that rails against the image of the “befuddled” consumer and supports that of the sophisticated consumer).

³¹⁵ JACKSON LEARS, *FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA* 10 (1994).

³¹⁶ *Id.*

³¹⁷ Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165, 1165 (1948) (quoting *Mishawakaw Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942)); *see also* Beebe, *supra* note 289, at 2057 (describing the debate in trademark law about authentic and inauthentic desires of consumers).

³¹⁸ Beebe, *supra* note 289, at 2023 (characterizing the position of Brown and others).

³¹⁹ *See generally* INGER L. STOLE, *ADVERTISING ON TRIAL: CONSUMER ACTIVISM AND CORPORATE PUBLIC RELATIONS IN THE 1930S* (2006).

The movement objected to the industry's view of consumers as "helpless and irrational" and to its reliance on image and emotional appeal, often playing to people's fears and insecurities.

Instead, the consumer advocates wanted advertising that provided only legitimate product information, such as that required by any business or government purchaser Because it failed to provide that, they believed that advertising "was not just flawed . . . it was anti-democratic"³²⁰

As Professor Inger Stole has written, the consumers lost this battle.³²¹ Presumably, then, the proliferation of advertising and its lowest common denominator—the trademark—has rendered consumers at least partially "irrational and emotionally driven,"³²² even while our national narrative is one based in part on an "individualistic model of controlled, unified self-hood."³²³ This tension is by no means unexamined in trademark law,³²⁴ but its analysis in terms of the origin myth of trademarks is new to the story. The narrative of consent conceals the counter-narrative of control. Whereas law might protect trademarks to facilitate choice and enhance quality with the concomitant benefit of promoting self-expression, the political origin myth of trademarks, once exposed as myth, reveals the power of branding to shape consumers' desires and identity and to mask the commonality between goods beneath a façade of difference.³²⁵ This is deeply "antidemocratic."³²⁶ Indeed, at one extreme, the origin story of trademarks could do exactly what political origin myths are said to do: hide the violence (or

³²⁰ Craig Chamberlain, *Advertising and Its Methods Put "on Trial" in the 1930s, Author Says*, NEWS BUREAU, UNIVERSITY OF ILLINOIS, URBANA-CHAMPAGNE, June 26, 2006 (second alteration in original) (quoting STOLE, *supra* note 319, at 48), available at <http://www.news.uiuc.edu/news/06/0626/advertising.html>.

³²¹ STOLE, *supra* note 319, at viii.

³²² *Id.* at 48.

³²³ LEARS, *supra* note 315, at 2.

³²⁴ See Beebe, *supra* note 289, at 2025 ("expos[ing] and analyz[ing] the inconsistent uses that have been made of the sovereign and the fool in trademark advocacy"); see also LEARS, *supra* note 315, at 9 (examining "recurring tensions in commercial culture: between the deceptions of the confidence man and the plain speech of the self-made man, between the spontaneous force of consumer desire and the managerial drive for predictability and control").

³²⁵ See Gregory S. Carpenter et al., *Meaningful Brands from Meaningless Differentiation: The Dependence on Irrelevant Attributes*, 31 J. MARKETING RES. 339 (1994). The authors explain:

Our results show that meaningless differentiation [i.e., differentiation on an irrelevant attribute] is valued by consumers in a surprising number of situations. For example, meaningless differentiation is valued even if the differentiated brand is priced above all others and, more surprisingly, in some cases increasing price actually can increase preference for the differentiated brand. Furthermore, the competitive advantage created by adding an irrelevant attribute can be sustained even if consumers acknowledge that the differentiating attribute is irrelevant.

Id. at 340.

The authors note that "[their] results are somewhat disquieting for the model of rational choice." *Id.* at 348.

³²⁶ STOLE, *supra* note 319, at 48.

forestall its eventuality) that twenty-first century capitalism proliferates in the form of environmental dangers and intensified class distinctions.³²⁷

This origin story of how protecting source-designators facilitates a healthy market of goods naturalizes what is otherwise a contingent system of power relations among market actors. As criticism of anti-dilution law and the merchandizing right explains,³²⁸ the rational faculty of the consumer is a helpful fiction, potentially frustrating a healthy market of goods and instead enabling the “commodification of . . . sign[s]” themselves.³²⁹ Here, trademarks circulate not for their source-designating function (i.e., not because we want to buy the same product for its quality and experience) but for their own sake, as status symbols or expressive gestures. Indeed, the source-designating function of trademarks has shrunk substantially as the actual source of products either proliferates or is unidentifiable in the globalized economy. What Barton Beebe has called the “rise of the sovereign trademark” is one culmination of this origin story, where people are consumers for the sake of consuming, but nonetheless consider themselves freer than ever from the constraints of the marketplace—to shape and mold themselves around it.³³⁰ The origin story of trademarks makes us think we are co-equal actors with the producers and manufacturers in a marketplace of choice. It perpetuates the notion of the consumer both freely engaged in and gratefully protected by transparent commercial relations.³³¹

³²⁷ Cf. Nicholas Bayard, *Valuing Nature in Environmental Education*, GREEN TEACHER, July 1, 2006, at 27, available at 2006 WLNR 15517646. Bayard states:

The goal of the activity is to demonstrate the catastrophes (both environmental and economic) that can arise when individuals pursue their own economic self-interest without regard for natural cycles and limits and without controls to mitigate their impact on the environment. Ironically, this is the very system on which capitalism is predicated: free markets and competition in the pursuit of individual self-interest.

Id.

³²⁸ For criticism of the merchandizing right, see, for example, Dogan & Lemley, *supra* note 312. For criticism of the expansion of dilution law, see, for example, Christine Haight Farley, *Why We Are Confused About Trademark Dilution Law?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1175 (2006). The merchandizing right and dilution law are not clearly premised on the protection of trademarks as source designators but rather on expressions of affiliation and rights in gross (as compared to rights appurtenant to the businesses' good will). See generally Lisa H. Johnston, *Drifting Toward Trademark Rights in Gross*, 85 TRADEMARK REP. 19, 19-21 (1995).

³²⁹ Beebe, *supra* note 301, at 656.

³³⁰ Beebe, *supra* note 289, at 2026, 2069.

³³¹ Indeed, Douglas Kysar has argued that producers, manufacturers and legislators may underestimate the important intersection between consumer preferences for certain products and the ways in which consumer-citizens shape civil society through their purchasing choices:

[T]he already heroic conceptual role of the consumer within market liberalism seems poised to become even more heroic. Long expected to help raise collective welfare through constant material accumulation, consumers also now are being charged with determining the outcome of important policy disputes by revealing—again through private market behavior—their true level of support for human safety, the environment, and a host of other public goods. Although proponents of this valuation methodology expect market choices to reveal purely private preferences, individuals acting on process preferences instead seem to regard consumption at least partially as an act of public significance.

B. *Trademark Stories*

By now, the case of *Dastar Corp. v. Twentieth Century Fox Film Corp.*³³² is well known. Scholars have hailed it both as a triumph for the public domain and criticized it as withholding necessary trademark protection.³³³ The case's mobilization of the trademark origin story, which exposes discordant notions of the consumer and the market, explains the inconsistent responses to the case.

Fox produced a television series, entitled *Crusade in Europe*, based on the popular book of the same name by General Dwight D. Eisenhower describing his experience in World War II.³³⁴ Fox had exclusive television rights to the book and owned the copyright to the television series.³³⁵ Fox failed to renew the copyright in the original television series that it broadcasted in 1949 and, in 1977, the television series passed into the public domain.³³⁶ In 1995, in celebration of the 50th anniversary of the end of World War II, Dastar Corporation released a video set called *World War II Campaigns in Europe*, which the court below characterized as a "bodily appropriation" of *Crusade in Europe*.³³⁷ Dastar purchased a copy of the original version of the Fox television series, edited it, and reproduced it under the Dastar name.³³⁸ Dastar's version makes no mention of Fox's original television series.³³⁹ Fox sued Dastar for "false designation of origin" under Section 43(a) of the Lanham Act,³⁴⁰ among other claims.³⁴¹

The *Dastar* case concerns the Supreme Court's evisceration of the "right of attribution," and moral rights generally, which, until *Dastar*, had a somewhat vulnerable but long-standing existence in trademark law under Section 43(a)(1)(A) of the Lanham Act.³⁴² Section 43(a)(1)(A) protects both

Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 533 (2004).

³³² 539 U.S. 23 (2003).

³³³ Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1205-06 (2005) (collecting articles and commentary).

³³⁴ *Dastar*, 539 U.S. at 23, 25-26.

³³⁵ *Id.*

³³⁶ *Id.* at 26. The copyright in the book was renewed by Doubleday in 1975. *Id.*

³³⁷ *Id.* at 26-28.

³³⁸ *Id.* at 26-27.

³³⁹ *Id.* at 27.

³⁴⁰ 15 U.S.C. § 1125(a) (2000).

³⁴¹ *Dastar*, 539 U.S. at 27.

³⁴² For a discussion of the right of attribution, see Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L. J. 49 (2006). Lawyers and scholars have relied on several cases, one dating from the mid-1970s, for the possibility of a the right of integrity and the right of attribution under the Lanham Act. *See, e.g.*, *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 18 (2d Cir. 1976) (right of attribution and integrity); *King v. Innovation Books*, 976 F.2d 824 (2d Cir. 1992) (right of removal of attribution).

consumers and producers from false attribution, a broader cause of action than an infringement suit brought under Section 32.³⁴³ In relevant part, Section 43(a)(1)(A) prohibits a person:

in connection with any goods or services, . . . [from] us[ing] in commerce any word, term, name or symbol . . . or any false designation of origin, false or misleading description of fact . . . which is likely to cause confusion, . . . or to deceive as to affiliation, connection, or association . . . as to the origin, sponsorship, or approval of his or her goods, services or commercial activities³⁴⁴

Plaintiffs have successfully applied this Section against defendants who appropriate the likeness of a person (e.g., a celebrity) or expression (e.g., a film or novel) and repackage and redistribute it under conditions that the person or originator of the expression considers to create a false impression of their “origin, sponsorship, or approval.”³⁴⁵ For example, the novelist Ken Follett successfully sued a publisher under Section 43(a)(1)(A) for publishing a book indicating that Follett was its author when Follett contended he had no authorship stake in the book.³⁴⁶ In a case of “reverse passing off,”³⁴⁷ an actor sued a film company for failing to credit him with a film role and crediting another actor instead.³⁴⁸ These are trademark cases under the theory that the author and the actor have developed a brand in their name or image, such that branding the book with Ken Follett when he was not the source of the book, or passing off the film role as originating with some actor other than the correct one, misleads the consumer. These trademark violations also harm the plaintiff by misappropriating his brand (“reap[ing] where [the defendant] has not sown”³⁴⁹) and potentially damaging the reputation of the brand in which the plaintiff (here, the author or actor) has made considerable investment and over which he should have exclusive control.

The scope of Section 43(a)(1)(A) as defined by the above-mentioned cases is vulnerable, in part, because the so-called “right of attribution” does

³⁴³ Compare 15 U.S.C. § 1114 (2000) (prohibiting misleading or confusion as to trademark use), with 15 U.S.C. § 1125(a)(1)(A) (2000) (prohibiting false designation of origin or sponsorship).

³⁴⁴ 15 U.S.C. § 1125(a)(1)(A).

³⁴⁵ *Id.*

³⁴⁶ *Follett v. Arbor House Publ'g Co.*, 497 F. Supp. 304, 305-06 (S.D.N.Y. 1980).

³⁴⁷ “Reverse passing off” occurs when a party sells someone else’s wares without proper attribution—if, for example, Tiffany lamps were on sale at the local lamp shop labeled “made here, our own creations.” See 4 MCCARTHY, *supra* note 283, § 25:6 (4th ed. 1996 & Supp. 2007). Passing off, the more common trademark violation, involves an entity selling its own wares as someone else’s—if, for example, the local lamp shop sold its own lamps and labeled them “Tiffany lamps.” 2 MCCARTHY, *supra* note 283, § 5:2.

³⁴⁸ *Smith v. Montoro*, 648 F.2d 602, 603 (9th Cir. 1981).

³⁴⁹ *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918).

not exist at all.³⁵⁰ It doesn't exist under copyright law,³⁵¹ and under trademark law the intellectual property right protects against false attribution but does not create the right to attribution per se.³⁵² In *Dastar*, the Supreme Court affirmed this parsimonious reading of Section 43(a)(1)(A).³⁵³ It decided the case by interpreting the word "origin" and "origin of goods" to mean the manufacturer and producer rather than the creator of the underlying expression.³⁵⁴ Here begins the thread of our origin myth. Whereas Fox claimed that *Dastar* violated Section 43(a) by failing to credit Fox as the originator of the television series now marketed as the video *Campaigns in Europe*, the Court held that "origin of goods" means the "producer of the tangible product sold in the marketplace," which is *Dastar*.³⁵⁵ *Dastar* produced, marketed, and sold the repackaged series on video.³⁵⁶ In other words, the meaning of "origin" in trademark law lay at the heart of the matter in that case.

According to the false designation of origin cases that had come before, Fox has a straight-faced argument for misappropriation. *Dastar*, a small Oregon company, took a well-known television series based on a popular book, edited and repackaged it, and sold it as *Dastar's* own for substantially less than Fox charged for essentially the same product.³⁵⁷ A trademark violation requires, however, that Fox have a trademark-like property interest in the title or embodiment of the television series (i.e., that *Crusade in Europe* or some part of it served as a source-designator for Fox or its affiliates). To be sure, for *Dastar* to reap the value of the investment and reputation that Fox developed over time in the well-received program *Crusade in Europe* seems grossly unfair. If consumers saw what looked like *Crusade in Europe* but were disappointed, or misled, by *Dastar's* version thinking it originated from Fox, Fox might have a trademark claim. But this

³⁵⁰ It is also vulnerable because it is not clear that "Ken Follett" is a brand in the way protectable trademarks are.

³⁵¹ Jonathan Band & Matt Schruers, *Dastar, Attribution, and Plagiarism*, 33 AIPLA Q.J. 1, 4 (2005) ("[C]opyright does not concern itself with non-attribution"); see also Lastowka, *supra* note 333, at 1211 ("[T]here is actually no [copyright] law prohibiting plagiarism and misattribution generally."); cf. 17 U.S.C. § 106A(a)(1)(A) (2000) (providing that the author of only specific works of visual art in particular "shall have the right . . . to claim authorship of that work").

³⁵² See 15 U.S.C. § 1114 (2000) (prohibiting confusion and deception with regard to affirmative use of marks, as compared to the absence of a prohibition for the *lack* of attribution which could also be misleading or confusing to consumers); 15 U.S.C. § 1125(a) (2000) (same with regard to unregistered marks and source identifiers).

³⁵³ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36 (2003) (declining to "creat[e] a cause of action for, in effect, plagiarism"—the use of otherwise unprotected works and inventions without attribution).

³⁵⁴ *Id.* at 31-38.

³⁵⁵ *Id.* at 31.

³⁵⁶ *Id.* at 26-27.

³⁵⁷ *Id.* at 27; Lastowka, *supra* note 333, at 1202.

is not what the Supreme Court said. Instead, the Supreme Court conceived of the trademark dispute as follows:

[Fox's] claim would undoubtedly be sustained if Dastar had bought some of New Line's Crusade videotapes and merely repackaged them as its own. Dastar's alleged wrongdoing, however, is vastly different: it took a creative work in the public domain—the Crusade television series—copied it, made modifications (arguably minor), and produced its very own series of videotapes. If “origin” refers only to the manufacturer or producer of the physical “goods” that are made available to the public (in this case the videotapes), Dastar was the origin.³⁵⁸

In the face of an expanding trademark cause of action, where trademarks are protected for their expressive as well as source-designating function,³⁵⁹ *Dastar* emasculates the former claim and endorses trademark law's more traditional or, as the Supreme Court said, its “natural”³⁶⁰ foundations (designating the “source of wares . . . sold in the marketplace”)³⁶¹ rooted in the political origin myth that structures trademark protection. It does so by reaffirming a conventional notion of “source” or “origin” and by imagining the consumer as someone narrowly focused on that origin (and its significance for the value of their purchase), and on little else.

The most natural understanding of the ‘origin’ of ‘goods’—the source of wares—is the producer of the tangible product sold in the marketplace, in this case the physical Campaigns videotape sold by Dastar. . . . [T]he phrase ‘origin of goods’ is . . . incapable of connoting the person or entity that originated the ideas or communication that ‘goods’ embody or contain. . . . [This is because] [t]he consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product—and typically does not care whether it is. The words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers.³⁶²

The Court did not disregard the difference in consumer expectations of the branding functions between, say, bottled soda and a novel,³⁶³ but it concluded that protecting the author of a novel the same way we protect brands on soda cans impermissibly conflicts with copyright law and the bargain it crafts between the incentive to create and the delayed addition to the public domain.³⁶⁴ In any case, trademark law “has no necessary relation to inven-

³⁵⁸ *Dastar*, 539 U.S. at 31.

³⁵⁹ See *supra* note 312 and accompanying text (discussing merchandizing right as an example).

³⁶⁰ *Dastar*, 539 U.S. at 31.

³⁶¹ *Id.*

³⁶² *Id.* at 31-33.

³⁶³ *Id.* at 33 (“The purchaser of a novel is interested not merely, if at all, in the identity of the producer of the physical tome (the publisher), but also, and indeed primarily, in the identity of the creator of the story it conveys (the author).”).

³⁶⁴ *Id.* at 33-34 (noting that a copyright holder's rights are part of a “carefully crafted bargain” (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989))).

tion or discovery, but rather, by preventing competitors from copying a source-identifying mark, reduce[s] the customer's costs of shopping and making purchasing decisions and helps a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product."³⁶⁵ Theories of the market, of branding, and of the consumer who choreographs both, controlled the outcome of the *Dastar* decision.

In the Supreme Court's opinion, according to well-established trademark cases, the rational consumer of Campaigns of Europe experiences no actionable confusion or deception when it purchases *Dastar*'s version of Fox's original television series.³⁶⁶ This consumer recognizes *Dastar* as the originator of the video, not its author. Indeed, if this consumer optimizes her purchasing decisions in the way the Supreme Court imagines trademark law facilitates, this consumer would recognize that denying Fox a trademark cause of action in this case multiplies her opportunity to view some version of the World War II documentary. She could purchase *Dastar*'s version, Fox's version, the Doubleday book version, or any of the other versions that will likely become available now that the Supreme Court designated Fox's 1949 television series free for all. This choice not only facilitates diversity of goods and prices in the marketplace, the argument goes, but it enriches the consumer herself. By separating the author function from the trademark function (regimes that the Supreme Court said in *Dastar* protects different kinds of origin),³⁶⁷ *Dastar* insures that the marketplace abounds with goods that are only marginally different (trademarked products such as *Dastar*'s and Fox's videos), whose small differences are nonetheless alleged to be signs of rich and "innumerable cultural influences"³⁶⁸ that populate our diverse society.

In this vein, many have applauded *Dastar* as reinvigorating the public domain.³⁶⁹ The facts of the case certainly support that view, given the relative obscurity of *Dastar*, the dominance of Twentieth Century Fox and the triumph of *Dastar* to produce a similar product for consumers at a substantially lower price.³⁷⁰ Here, *Dastar* tells a story of interconnectedness of competition for consumers, a rich public domain, and the little guy having a chance to best the big guy. This is the stuff of classical Hollywood films, as

³⁶⁵ *Id.* at 34 (internal quotation marks omitted) (quoting *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879)); *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 163-64 (1995)).

³⁶⁶ *Dastar*, 539 U.S. at 38.

³⁶⁷ *Id.* at 37.

³⁶⁸ Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 90 NOTRE DAME L. REV. 1377, 1442 (2005) (arguing that determining the true source among the many influences of a good is not the only importance of trademark law).

³⁶⁹ Lastowka, *supra* note 333 (collecting authorities).

³⁷⁰ *Dastar*, 539 U.S. at 27.

well as trademark law.³⁷¹ The story exemplifies what we hear repeatedly about the promise and power of the American dream for all those who seek to attain it.³⁷²

But there is another aspect of the origin story in *Dastar* that explains its narrowing of trademark protection, which speaks less to the ability of each individual to shape his or her own destiny and more to the process of legitimizing unequal (and potentially unfair) power and property relationships among individuals, a central function of origin myths. It is a story of opportunity and *just deserts* that the Supreme Court leaves for the end. “The original film footage used in the Crusade television series could have been copyrighted as was copyrighted (as a compilation) the Crusade television series, even though it included material from the public domain. Had Fox renewed the copyright in the Crusade television series, it would have had an easy claim of copyright infringement.”³⁷³ Here, the Supreme Court highlights that Fox sat on its rights and therefore relinquished them. *Dastar* seized an opportunity where it arguably had a legal right to do so and ran with it. Opportunistic, go-getter *Dastar* deserves this victory. Fox does not.

Note, however, that nothing in this decision prevents flipping the identities of the parties, such that the opportunist is the multi-billion dollar company and the idle or ignorant party the small-time entrepreneur. Consider how often this is the case, in part because of the high cost of litigation, the expense of good legal advice, and the lack of understanding of intellectual property rights generally.³⁷⁴ In fact, since *Dastar*, the decisions applying the definition of origin as the “tangible goods offered for sale” rather than as the originator of the expressive or communicative product have ruled consistently against the misattributed or non-attributed author/creator and for the film company, the publishing house, or music company.³⁷⁵ In this light, *Dastar* is not necessarily a victory for the public domain, and the general public, but a victory for the property owners with sufficient capital

³⁷¹ Jessica Silbey, *Patterns of Courtroom Justice*, 28 J.L. & SOC’Y 97, 116 (2001) (mapping the genre of trial films and its central theme of the liberal legal subject, the lone individual apparently free and determined who comes before the law to exact justice based on his own will and unique capacity).

³⁷² See *supra* note 16.

³⁷³ *Dastar*, 539 U.S. at 37-38 (citations omitted).

³⁷⁴ On the problem of unequal resources and repeat players, see generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97-98 (1974). On this problem in internet law, see Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 349 (2005).

³⁷⁵ See, e.g., *Zyla v. Wadsworth, Div. of Thomson Corp.*, 360 F.3d 243, 252 (1st Cir. 2004) (following *Dastar* to reject lack of attribution claim under § 43(a) by contributing author to textbook); *Borrego v. BMG U.S. Latin*, 92 F. App’x 572, 572-73 (9th Cir. 2004) (rejecting reverse passing off claim for misattribution of songwriter’s copyrighted songs); *Smith v. New Line Cinema*, No. 03 Civ. 5274(DC), 2004 WL 2049232, at *4 (S.D.N.Y. Sept. 13, 2004) (dismissing screenplay writer’s § 43(a) action for lack of attribution against film company by following *Dastar*); *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177, 1183 (C.D. Cal. 2003) (denying author’s claim for attribution in connection with “story/screenplay”).

to protect their investment who manage to get to the desired property first. Moreover, because little in *Dastar* limits its holding to public domain works, lower courts have applied *Dastar* as a bar to a misattribution claim of copyright protected works as well.³⁷⁶ This means the first in time to capture *any* expressive work or communicative product and use it in a non-copyright-infringing way wins.³⁷⁷ The message to those who follow the *Dastar* creed: conquer and vanquish if you can.³⁷⁸

This might not seem so terrible. The first to establish secondary meaning in a word, sign, or logo and use it in commerce, to conceive or reduce to practice an invention, or to express a work in a tangible medium, is the owner of that property and can exercise all the related statutory rights of exclusion under the United States intellectual property regimes. Nevertheless, *Dastar*'s rigid reliance on the meaning of "origin" in trademark law leaves a central goal of trademark law (i.e., protecting the public from confusion) unguarded. The Court's foray into "amateur psychology" to determine what consumers do and do not care about³⁷⁹ and its deficient reliance on copyright law for authorial attribution³⁸⁰ combine to leave the consumer guessing or misguided as to who is responsible for the representation on the film and of the film itself. Misattribution or non-attribution is a valuable business. "Misattribution . . . is valuable to those who engage in it precisely

³⁷⁶ See Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273, 305-06 (2005); Ginsburg, *supra* note 19, at 269 (describing the application of *Dastar* by lower courts to copyrighted works as "unflinching," but disagreeing with this trend).

³⁷⁷ For other articles analyzing first-in-time secured property rights, see Abraham Drassinower, *Capturing Ideas: Copyright and the Law of First Possession*, 54 CLEV. ST. L. REV. 191 (2006) (comparing the theoretical basis of *Pierson v. Post*, the case that originated the doctrine of "first possession," with the reality of copyright protection) and ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 315 (1990) (describing how discourses of origin in property law parallel discourses of colonialism, and drawing examples from the "doctrine of discovery" and the Law of Nations that gave "discovering" nations exclusive right to extinguish Indian title of occupancy).

³⁷⁸ This does not mean, of course, that the first in time will necessarily have the right to exclusive use because noninfringing uses are available to all. But for all intents and purposes, the entity that gets to the desired property first, sufficiently captures consumer attention, and stakes a claim (be it merely in name rather than by law) will be the entity with maximum capital and mobility and thus will "win" from the point of view of profit and reputation. For an eloquent essay on the "first in time" principle as applied to property, see CAROL M. ROSE, *Possession as the Origin of Property*, in *PROPERTY AND PERSUASION*, *supra* note 5, at 11. Rose writes:

The common law gives preference to those who convince the world that they can catch the fish and hold it fast. This may be a reward to useful labor, but it is more precisely the articulation of a specific vocabulary within a structure of symbols understood by a commercial people. It is this commonly understood and shared set of symbols that gives significance and form to what might seem the quintessentially individualistic act: the claim that one has, by "possession," separated for one's self property from the great commons of unowned things.

Id. at 20.

³⁷⁹ Lastowka, *supra* note 333, at 1206.

³⁸⁰ *Id.* at 1213; Landau, *supra* note 376, at 298-300.

because it deceives the public.”³⁸¹ Unless the plaintiff can make out a false advertising claim under Section 43(a)(1)(B),³⁸² which may be the only door the Court left explicitly open in its *Dastar* decision,³⁸³ the confused public loses out.³⁸⁴ Trademark law is said to strike a balance between the sovereign consumer and the fool,³⁸⁵ and yet *Dastar* obliterates trademark’s weaker half—those of us who are sufficiently foolish to think (mis)attribution matters to the meaning, experience, and quality of the work, service, or good.³⁸⁶ *Dastar* instantiates the origin myth of trademark law by relying on its bygone roots in merchant guilds,³⁸⁷ assuming the consumer is that efficient and disciplined agent in a market culture driven by demand for high quality and meaningful choices.

CONCLUSION: THE MYTH OF ORIGINS

One goal of this Article was to examine how intellectual property protection in the United States is structured around political origin myths. These origin myths justify certain hierarchies and power relations that might otherwise be considered problematic with appeals to authenticity and

³⁸¹ Lastowka, *supra* note 333, at 1227 (discussing the frequent use of ghost-writing in the book publishing industry to sell many books).

³⁸² *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 38 (2003) (explaining that a consumer has a cause of action if a company selling a substantially copied product advertises the product as something different from the original).

³⁸³ See Lastowka, *supra* note 333, at 1208.

³⁸⁴ This, of course, assumes the existence of a confused or misled public in *Dastar* in the first place. For the statute governing confusion, see 15 U.S.C. § 1125(a)(1)(A) (requiring “false designation of origin, false or misleading description of fact . . . which is likely to cause confusion . . . as to the affiliation . . . or origin . . . of goods”). It is unclear from the facts of *Dastar* (or from one’s sense of ordinary consumer behavior) whether consumers were or would be confused by the *Dastar* designation on the Crusade video. The Court assumed the lack of confusion, but it is not clear on what basis that determination was made except on a presumption about consumer behavior.

³⁸⁵ Beebe, *supra* note 289, at 2023-24.

³⁸⁶ The articles written on the importance of attribution rights are too numerous to list here. For some especially illuminating articles, see Fisk, *supra* note 342; Ginsburg, *supra* note 19; Heymann, *supra* note 368, at 1377; Kwall, *supra* note 164; Landau, *supra* note 376. Suffice it to say that misattribution is important when the author is publicly known such that the work’s value and meaning correlate directly to the reputation of the author. In such a case, under *Dastar*, a claim may be brought under § 43(a)(1)(B) for false advertising which requires that the misrepresentation be material to consumers (we are buying the book because it originates from this well-known author). *Dastar*, 539 U.S. at 38. This cause of action is likely not available to authors who are less known and whose name does not serve a trademark or branding function and whose absence from the marketing of the product therefore does not matter to the purchasing public.

³⁸⁷ For general information on merchant guilds role in trademark law, see Mark McKenna, *The Normative Foundations of Trademark Law*, 80 NOTRE DAME L. REV. 1839, 1851 (2007) (characterizing the history of trademark law as based on unfair competition and its early form as possessing clearer source-designating properties than exist today).

consent. They are also persuasive and attractive narratives because they explain particular property arrangements by relying on broader, affirmative themes of the American citizen and nation.

In the end, of course, it is not enough to say that origin stories structure United States intellectual property regimes. Understanding how these narratives work might be helpful to explain why certain cases come out as they do (or to encourage a certain outcome). This understanding might also help us become more critical of our intellectual property laws, insofar as we believe that our laws and legal adjudication should be driven by more than the allure of a shared narrative (especially when the shared nature of the narrative and its historical basis may be contested).

Moreover, origin myths are unstable, as are all narratives.³⁸⁸ Indeed, the political origin myths animating our nation's intellectual property regimes appear dialectical.³⁸⁹ Origin myths tend to embrace beginnings as a legitimate status quo. But societies must inevitably change and grow. The above described origin myths are at once a manifestation of our culture's preoccupation with origins (and their beginnings as authentic and consensual), as well as examples of our ambivalence toward and struggle over these origins. Embedded in the political origin stories of innovation, creation, and identity is the diverging matter of how to advance and mature as a society. And the proliferation of intellectual property, ironically enough, is one way in which society evolves or so the story goes. Thus, the origin stories justifying intellectual property protection venerate mythic beginnings as well as defy them in the inevitable development of "new" origins or alternative sources of value. This dialectic exposes the myth of origins.³⁹⁰

By way of brief examples, consider a few recent developments in intellectual property law that appear to move away from the protection of origins as the above origin myths describe them. The pending Patent Re-

³⁸⁸ The instability of language and narrative is what Roland Barthes called "readerly" and what Jacques Derrida labeled a function of "difference" (*différance*). ROLAND BARTHES, *S/Z* 3-6 (Richard Miller trans., Hill & Wang 1974); JACQUES DERRIDA, *Structure, Sign, and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 278, 280 (Alan Bass trans., 1978). Ross Chambers expands on the theme:

Readerly texts claim the power to produce new meanings in ever new circumstances . . . , but at the same time they are concerned, if not to claim a single univocal sense as central to their meaning, then at least to define the range of possible meanings that they can admit, to the exclusion of other possible meanings and relevances.

CHAMBERS, *supra* note 54, at 26.

³⁸⁹ I mean to refer here to the structure of a dialectic—thesis, antithesis, and synthesis—which almost always leads to change, revolutionary or otherwise.

³⁹⁰ To be sure, most litigated cases expose competing origin stories, as the above stories of *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, and *Veck v. S. Bldg. Code Cong. Int'l, Inc.*, demonstrate. Litigators spar over whose story will dominate. See *supra* Parts II.B, III.C. The fact that two different origin stories can be told about the same intellectual property suggests that there is no true origin, just stories. But this should not be surprising given the socially constructed nature of legal protection in the first place.

form Act of 2007 proposes to change the “first to invent” standard into a “first to file” standard.³⁹¹ Under this new law, the inventor would not be the person who first conceived of the invention and reduced it to practice, but instead the person who first filed the patent describing the invention with the United States Patent Office. Criticism of this change abounds, from its unconstitutionality to its inefficiency.³⁹² Some say, however, that the United States should give up its ideals of individualized rewards and move toward a “centralized innovation reward system” that the first-to-file system would provide,³⁹³ thus harmonizing its patent system with Europe and Japan.

Copyright has its proposed revolutions too. The Open Access movement offers alternative structures for protecting and encouraging the creation of scholarship.³⁹⁴ Increasingly, copyright holders are participating in the Open Access movement by relinquishing some of the sticks in their bundle of copyright in exchange for other rights they would rather have. For example, through the use of a Creative Commons license, which grants a royalty-free, non-exclusive license to copy, transmit, and distribute the work in exchange for a promise of attribution to the author, copyright holders are asserting attribution rights, which the Copyright Act lacks, over the right to exclude.³⁹⁵

Trademark law is undergoing its own transformations. The Federal Trademark Dilution Act of 1995, which added Section 43(c) to the Lanham Act,³⁹⁶ has caused much skirmishing among the legislative and judicial branches, academics, and corporations. When Congress expanded the bundle of rights that trademark law protects by codifying into federal law an anti-dilution right which had previously only existed in state law, the Supreme Court responded by narrowly circumscribing that right requiring

³⁹¹ Patent Reform Act of 2007, H.R. 1908, 110th Cong. (2007).

³⁹² Brad Pederson & Vadim Braginsky, *The Rush to a First-To-File Patent System in the United States: Is a Globally Standardized Patent Reward System Really Beneficial to Patent Quality and Administrative Efficiency?*, 7 MINN. J.L. SCI & TECH. 757 (2006); David L. Simon, *The First-to-File Provisions of the Patent Reform Act of 2005 Violate the Constitution's Intellectual Property Clause* (November 2005), available at <http://ssrn.com/abstract=841404>.

³⁹³ Pederson & Braginsky, *supra* note 392, at 763.

³⁹⁴ Nicholas Bramble, *Preparing Academic Scholarship for an Open Access World*, 20 HARV. J.L. & TECH. 209, 210-11 (2006).

³⁹⁵ For an example of a typical Creative Commons license, see Creative Commons, <http://creativecommons.org/licenses/by/2.5/> (last visited Nov. 15, 2007). Other changes in copyright law, although not as recent, suggest a shift away from the mystical-author function as the originating source of the creative expression (and therefore a shift away from that function as the justification for copyright protection). For example, Joseph Liu discusses how the 1976 Copyright Act (and later amendments) incorporated highly complex industry-specific exemptions and compulsory licensing provisions in response to industry practices and heavy lobbying efforts. Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 126-32 (2004). Moving away from “the traditional property rights” model of copyright to “regulatory copyright” shifts the discourse from authors as sources to be protected and incentivized to specific industries (and complex business organizations) as sources to be both safeguarded and managed. *See id.* at 94, 101.

³⁹⁶ Federal Trademark Dilution Act of 1995, H.R. Res. 1295, 104th Cong. (1995) (enacted).

strict proof requirements to prevail.³⁹⁷ Congress responded three years later with the Trademark Dilution Revision Act of 2006 to reverse the Supreme Court's reading of the Lanham Act.³⁹⁸ This debate over dilution revolves around the scope of trademark protection: whether trademark law protects the source-designating function of the mark (the relationship between the mark and the manufacturer in the marketplace) or whether the mark itself is a "right in gross" such that a trademark owner can exclude another from using a famous mark even in the absence of consumer confusion over source.³⁹⁹

How do these changes to patent, copyright, and trademark law speak to the origin myths each intellectual property regime instantiates? Do they signal a different narrative, a movement away from the veneration of mystical beginnings? The patent reform still protects "firsts" but of a different kind, less the mad scientist and more the entity with the wherewithal to get to PTO ahead of everyone else. The Creative Commons license appears to venerate the romantic author, protecting her name and reputation rather than her pocketbook. And the amendments to the Lanham Act, that broaden the scope of trademark protection beyond that which concerns consumers in their search for goods, still signal an origin, except not one that is located among consumer relations in the marketplace but one that is the chattel that the mark has become. Do these changes reflect competing notions of "origin" worthy of protection under the law, contrasting notions of value, or more of the same? We cannot know until we investigate the values these changes protect in light of the stories they tell, the entities they benefit, and the heroes they glorify.

What we do know from the above analysis is that while political origin myths may structure and explain the current statutory intellectual property regimes in the United States, their stories of innovation, creativity, and identity (engines of change and transformation) also manifest a dialectic

³⁹⁷ *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 432-3 (2003).

³⁹⁸ Trademark Dilution Revision Act of 2006, H.R. 683, 109th Cong. (2006) (enacted). Cf. Barton Beebe, *A Defense of the New Federal Trademark Antidilution Law*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1143, 1153-55 (2006) (discussing how the Supreme Court's decision in *Moseley v. V Secret Catalogue, Inc.* made the law ripe for change).

³⁹⁹ Dinwoodie, *supra* note 286, at 72-75; Brian R. Landry, *From Book Covers to Domain Names: Searching for the True Meaning of the Cliffs Notes Temporal Test for Parody*, 7 *J. HIGH TECH. L.* 19, 21-22 (2007); Monica Hof Wallace, *Using the Past to Predict the Future: Refocusing the Analysis of a Federal Dilution Claim*, 73 *U. CIN. L. REV.* 945, 988 (2005); see also *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 875 (9th Cir. 1999) (noting that dilution actions "tread very close to granting 'rights in gross'" in trademarks).

Other skirmishes in trademark law involve the scope of trade dress protection, on which the Supreme Court has opined several times over the past decade, interpreting the Lanham Act to narrowly circumscribe the scope of trade dress protection in light of the functionality doctrine. See *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 213-15 (2000); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164-65 (1995); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992); see also Dinwoodie, *supra* note 286, at 60-68.

that exposes the inevitability of competing origin stories in law and culture.⁴⁰⁰ Assuming that one basis of intellectual property protection is to encourage innovation, creativity, and the technological and economic development of our society, the more intellectual property proliferates and affects our culture, the farther it travels from its origins, and the farther we travel from ours. In other words, the seductively powerful but unstable influence of narrative reasoning explains how current intellectual property regimes communicate their stated goals of economic and social development while simultaneously protecting and venerating origins of human endeavor (inventions, creative expression, and a market for commercial goods). In this way, the origin stories of intellectual property are the mechanisms by which one area of law works to both embrace its founding and overcome its limitations to move forward. When spun to their conclusions, the origin myths of intellectual property law expose the myth of origins.

⁴⁰⁰ See Merges, *supra* note 112, at 1269, for an example of putting competing narratives to use to justify copyright protection over original expressive content used as the basis of a remix. See also Michael J. Madison, *Comment: Where Does Creativity Come From? And Other Stories of Copyright*, 53 CASE W. RES. L. REV. 747, 769 (2003), for a rich example of how varied narratives about authorship and the incentive to create structure copyright disputes.