Harvesting Intellectual Property

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Creative Culture, Innovating Ways, and Intellectual Property Law

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I. Introduction

Conventionally, intellectual property law is said to strike an optimal balance between incentivizing creation and maintaining access to those creations by users (Landes and Posner 2003). In terms of the United States Constitution, intellectual property law promotes the progress of science and the useful arts by facilitating innovation and encouraging creative endeavors, all for the public good. By requiring payment for the use of the good by others for limited periods of time, intellectual property law both compensates the innovator and serves a public purpose.

But does intellectual property work as it should? Or, might we observe in intellectual property law what has been observed elsewhere: a gap between the law on the books, its aspirations and purposes, and the law in action as it is practiced and functioning? The dominant justification for intellectual property protection is to incentivize the creation of art and science. This is the story that lawyers and policy makers repeat over and over to support and advocate for robust monopoly rights in intellectual property. But does this story resonate with creators and innovators? Is the incentive to own the intellectual property a reason artists and scientists pursue their work? How do creators and innovators describe what they do? And what are the relationships among these descriptions (what they say), their everyday work and its eventual output (what they do), and the means by which these inventors and artists make a living (legal entitlements to recoup their investment)?

It has become commonplace among intellectual property scholars and policy makers concerned with promoting innovation to dispute the reasonableness of laws that protect intellectual property. By and large, legal scholars explore the question of whether the grant of intellectual property rights adequately (or at all) encourages innovators by looking mostly at output: the intellectual property granted and cases litigated concerning that intellectual property. Scholars ask, for example, are the grants of rights too broad or too frequently granted? With patents, they ask whether patent thickets exist and, if so, do they hamper innovation rather than encourage it (Lerner and Jaffe 2004; Bessen and Meurer 2009)? With copyright and trademarks, they ask whether the digital medium alters how copyright and trademarks should be protected given the relative freedom with which digital data flows and free-riding and user-generated creation is more likely (Litman 2001)? By analyzing particular statutory provisions or cases for their reasonable implications on the issue, legal scholars mobilize economic theories of rational actors or moral theories about owning the fruits of labor to identify the problematic or acceptable bases for the legal rules.

But rarely do we ask the people who are innovating – inventing, writing, developing, commercializing and possibly getting paid for their work (whether or not through intellectual property royalties) – whether the ability to protect their innovations through intellectual property law played any part in their endeavor, and if so, what part law played in promoting innovation. We rarely ask whether intellectual property law works in practice as we imagine it does in theory. The work proposed here, begun already in a pilot study but seeking to expand and elaborate on a larger scale, explores the germination, harvesting and commercializing of art and science by and between creators and innovators, on the one hand, and their managers or lawyers, on the other. These processes will be explored in contexts in which intellectual property, were it sought, would play a role in the individual’s welfare or organization’s vitality. This study will hopefully lead to an understanding of whether and how the public discourse on intellectual property law (the central incentive story) connects with intellectual property creation and distribution.
Too few studies of intellectual property look at the actual practices of invention (creation and discovery) and its commercialization to understand the relationships among daily work practices, organizational structure, perceptions of and the formal application (or not) of intellectual property law. Most legal scholarship, if it is empirical, takes filed and litigated cases as data to analyze the scope and success of intellectual property claims, focusing attention on the very tip of a pyramid of legal matters, (perhaps less than 10% of the relationships and disputes that are shaped into law (Felstiner et al. 1980-81)). This project, by contrast, investigates creative culture and innovation outside the limited arena where formal doctrinal intellectual property law is applied or contested. Through face-to-face interviews and document collection, this project seeks a better means to understand the various ways intellectual property law is manifest (or not) in creative and innovation culture. A central premise of this study is that intellectual property law’s dominant incentive story is less dominant – and potentially absent – when we look more closely at the ways in which individuals and organizations engage in and make sense of their creative and inventive practices.

The primary data from this project will come from semi-structured interviews with artists, scientists and intellectual property professionals, each ranging from one to two hours in length. The artists and scientists include: engineers, laboratory and theoretical scientists, writers involved in print or on-line media, web-designers, filmmakers and videographers, musicians, sculptors, painters, jewelry designers, craftspeople and architects. Some have sought intellectual property protections, others have not. The lawyers are both in-house and firm lawyers whose expertise is intellectual property. The other intellectual property professionals are predominantly licensing professionals or managers who assist in the maintenance of a client’s work or business, including (if relevant) their intellectual property portfolio. As will be discussed more fully below, a semi-structured protocol has been developed for the interviews that covers central issues but leaves room for individual variation: a series of open ended questions that are designed to elicit descriptions, explanations and stories from the interviewees on the relationship between the art and innovations in which they are involved and intellectual property law. Workplace documents are also being collected from the interviewees that are used in the development and harvesting of intellectual property, as well as contracts or agreements where IP had not been otherwise secured.

The design of this study is intended to (1) access perceptions and commonly circulating explanations of intellectual property law, and (2) track the behaviors of and processes that produced and commercialized the art or science for those who are in the business of making or harnessing creativity and invention, whether or not through legal means. Close analysis of the interviews will illuminate common perceptions and explanations of intellectual property based on the language used and the stories told that describe reasons for resorting (or not) to intellectual property law when engaging in creative or innovative work. Analysis of the interviews and documents will also help compare what the interviewees say about creative and innovative processes and what they actually do (their behavior, process, their output, and their means of making a living). This project will therefore begin to map more systematically the relationship between the incentive story of intellectual property law and the innovation process. This work will contribute directly to the accumulated literature on the law in practice as opposed to the law on the books. More specifically, it will contribute data to the emerging literature seeking empirical evidence concerning the role of social and organizational constraints in facilitating production of art and science (Sprigman 2008; Rothman 2007). It will also contribute to the literature on legal consciousness and cultural practice as factors that structure individual agency, social organization and legal authority (Greenhouse 1986; Conley and O’Barr 1990; Sarat and Kearns 1993). Finally, it will produce a fuller understanding of intellectual property law practice based on empirical evidence from practitioners and creators that can inform the current debates and policy proposals focused on the efficacy of intellectual property law as motivation for innovation.
This project has a particularly synergistic home at Suffolk University in Boston. The Suffolk University Law School is well-known for its Intellectual Property Concentration. Its comprehensive curriculum for the study of intellectual property law has attracted exceptional students and created long-lasting professional connections, especially with those interested in patent law and the biotechnology and computer science communities that dominate the New England economy. Indeed, Suffolk University has demonstrated an institutional commitment to innovation and entrepreneurial studies across its diverse schools. In addition to the Intellectual Property Concentration at the Law School, the Center for Entrepreneurial Studies at the Sawyer Business School has been commended for its devotion to training students in the practices of entrepreneurship both in business and in public service. The Center for Innovation and Change Through Leadership, also at the Sawyer Business School, was founded to study innovation and change through collaborations with local and national businesses, governmental departments, non-profit organizations and academia. Suffolk University is also home to the New England School of Art and Design, a community of students and scholars devoted to innovation and creativity in the visual arts. Devoted to a mission of access to education for opportunities beyond academia, Suffolk University, with its growing national and international profile, is well-suited as the home for this project on the legal incentives for innovation.

II. Theoretical Resources and the Research Background

Studies of intellectual property efficacy have followed two primary tracts, one empirical and the other theoretical. Most empirical studies measure success or failure of intellectual property law by assessing productivity through output. These studies ask: how much and under what conditions does innovation occur? What are the snags on the way toward innovation? These questions invoke a very old, but nonetheless important distinction in socio-legal scholarship – law on the books and the law in action. As important as this juxtaposition remains for legal scholars and practitioners, however, cultural analyses of law push us to understand that implemented or not, the law on the books help shape public aspirations, expectations and interpretations of law. This project will place the study of intellectual property centrally within this literature on public interpretations of law and legal processes.

Intellectual Property and Innovation: Empirical Model One. Among empirical studies, one can identify two sub-genres. One line of research focuses on whether protecting intellectual property actually promotes science and the useful arts by focusing on legal hurdles to output. Many of these scholars look at scientific, technologic or manufacturing communities to ask whether the existence of formal intellectual property protection impedes further innovation for the public good. These investigations debate the existence and effect of the by-now fabled “anti-commons” (Heller and Eisenberg 1998) measuring its effect in patent law generally through filed cases (Bessen and Meurer 2009; Jaffe and Lerner 2004), citation indexes in biomedical fields specifically (Murray & Stern 2007; Walsh et al. 2005) and in the manner of follow-on user innovation in manufacturing arenas (Von Hippel 2009). These debates take place both nationally and internationally, the international arena focusing on access to medicine impeded by drug costs controlled by patent holders (Kapczynski 2008; Bernstein 2008; Eisenfeld and Ferres 2001). These studies tend to be case-law driven. Some research has been done in the university setting only, studying the relationship between patent law and research scientists, asking about the scientists’ perceived value of patenting and whether patent law provides an adequate incentive to disclose inventions (Owen-Smith & Powell 2001). This research helps schematize relationships among technology transfer offices, research scientists and patent law in the non-profit setting, an important space for innovation policy. Important as this work is, the research is geared to understanding the relationship of organizational structure to innovation, not the relation between the process of invention and the perception of legal rules governing intellectual property. Scholars also ask about the effect of an anti-commons in artistic communities, focusing for example on the music and film industries in the digital era (Fisher 2004; Litman 2001).
For the most part, these studies explain that intellectual property law is not working as expected: the promise of intellectual property protection does not necessarily lead to more or efficient investment in innovation. The present study builds on the existing research to investigate this finding about the limits of intellectual property law. It does so, however, more directly from the perspective of those professionals working in creative fields and, if available, towards intellectual property protection. Notably, this research looks at the role of intellectual property law before it manifests as litigated cases that challenge the application of the law. Learning how the intellectual property law is perceived and applied before conflict arises may provide a new insight into the causes of the law’s reported successes and failures.

Some of the research, particularly in the communities where copyright protection dominates, tends to be less empirical and more anecdotal, grounded in policy or philosophy debates rather than systematic qualitative or quantitative analysis of innovative practices (Fisher 2004; Lessig 2002; Litman 2001). Many of the prominent legal scholars in this area debate fundamental questions about the importance of the public domain for self-expression and continued innovation (Zittrain 2008; Samuleson 2006; Balkin 2004; Benkler 2006; Lessig 2002; Litman 2001; Boyle 1996) and focus less on demonstrating with empirical methods the efficacy of the social welfare function of intellectual property systems. These policy debates have been influential in structuring legal proposals (Samuelson 2007), but more empirical work is needed to explain the asserted common sense behind these proposals. Especially in the copyright realm where the legislation has been notoriously piece-meal and special-interest driven (Litman 2001), data on the manner in which copyright law is imagined and harnessed (or not) to spur creativity and recoup its costs seems of paramount importance to furthering the policy debate (Tushnet 2007). This study will begin to fill this empirical gap.

Intellectual Property and Private Ordering: Empirical Model Two. Another substantial subset of empirical intellectual property studies also focuses on the efficacy of intellectual property but investigates how individuals, organizations and communities protect value through private, informal, ordering (norms) rather than through formal or public law. These scholars explore the function and effect of private, informal norms-based intellectual property systems as compared to public and formal law-based intellectual property. Some of these scholars focus on specific community norms that establish non-pecuniary incentives to innovate, for example in scientific communities’ aspirations to advance knowledge generally (Kelty 2008; Merges 1996; Rai 1999) or satisfy curiosity (Strandburg 2005). Kelty, an anthropologist, has explored the development of open-source software and the culture in which it resides, studying the ways in which knowledge creation (its motivations and mechanisms) have changed in the software community in the Internet age. Other legal scholars have studied these private, informal norms as they support or diverge from public law-based intellectual property systems, asking how norms supplement intellectual property law or serve as a reason that intellectual property law should be less robust (Rothman 2007; Tehranian 2007; Tushnet 2005). Some scholars have delved deeply into specific communities – haute cuisine chefs (Von Hippel 2008), comedians (Sprigman and Dotar 2008), fashion industry (Sprigman and Rustiala 2006; Scafidi 2005), magicians (Loshin 2008) – to ask whether community norms are an effective substitute for intellectual property where intellectual property protection is unavailable. In these case studies, scholars do not ask whether private ordering or formal law provide the incentive to create. They ask a different question: whether members of the community experience its informal norms or formal laws as providing adequate protection for the value of their creations. The current project supplements these studies by asking a prior question. Rather than offering post-hoc valuations of intellectual property protection in light of the application of formal or informal rules, this study focuses on early-stages in the creative process to investigate the impulse to innovate in the first place, seeking to uncover its relationship, if any, to the creators’ understanding of the laws governing intellectual property.
The Theoretical Literature. Importantly, this project will also begin to fill a gap in the theoretical literature that has opened a space for questioning the common asserted motivations to create and innovate. The theoretical literature asks abstract questions and poses equally abstract answers about the relationship between intellectual output and the goals of intellectual property law. What does it mean for the legitimacy and cogency of intellectual property law that there are plenty of robust commercial and non-commercial enterprises that generate creative content and innovation without intellectual property protection, in what has been called “IP’s negative space” (Sprigman 2006)? What are the intended or unintended consequences of pushing for more or stronger intellectual property laws for creative communities currently under protected? Cohen (2007) for example, implores intellectual property scholars to “do the science” behind intellectual property policy. She says we must produce detailed descriptions of the cultural environment that the movement towards open access seeks to obtain in order to “generate a normative theory … about what makes th[e] [cultural environment that this movement seeks] good.”

In earlier work, I investigated the impulse to protect creative or novel work (the impulse behind intellectual property law) as a product of a more general cultural preoccupation with origins (Silbey 2008). In that work, I showed that much of intellectual property law (statutes and cases) could be explained as valorizing or glorifying beginnings (conception of an idea in patents, originality of expression with copyrights and source designation in the case of trademarks). Far from incentivizing creativity or innovation per se, I suggested that intellectual property law was one manifestation of the centrality of origin myths as causal models and explanatory devices in our culture more broadly (Eliade 1963; Engel 1993; Wright 2004).

Other scholars have argued that property (both real and intangible) is intimately connected with liberalism’s notion of personhood: individualism, self-expression and freedom (Radin 1993; Gordon 1993; Katyal 2006a). Some of these legal scholars focus on a specific kind of innovator: non-commercial user-communities such as fans of fictional works. To facilitate the high volume of cultural contributions by these communities, they argue that copyright law must disaggregate its user/innovator binary that effectively controls access to creative works (Katyal 2006a; Tushnet 2007, 1997). Both Katyal and Tushnet delve into the richness of the fan communities’ work; Tushnet especially questions the conventional models of for-profit production of creative works. Neither writer, however, explains whether intellectual property law is necessary or even a factor in the production of fan works. Instead, they suggest that creation and innovation is desired as a function of the good society and, contrary to the dominant justification for intellectual property law as incentivizing the production of arts and sciences, intellectual property rights should be understood (and implemented) to facilitate self-expression and high-functioning citizenship.

Each of these projects (e.g. Katyal 2006a, 2006b, Tushnet 2007, Silbey 2008, Gordon 1993, Radin 1993) attempts to shift the intellectual property debate from the law’s economic justification to its humanistic role as a protection for self-expression, self-fulfillment and culture. In so doing, these scholars are also calling for careful systematic analyses of creative communities and organizations, of the resources and tools required for their activities, and of the variety of methods used to sustain them. This research project aims to be one such empirically grounded analysis.

A Cultural Analysis of Intellectual Property: A New Third Model. These three existing styles of sophisticated work in intellectual property invite more systematic empirical analyses of innovators and organizational behavior to understand the very basic questions underwriting the entire field: whether, why and how innovators seek to protect value they create. My project is informed by these literatures that ask about the efficacy of intellectual property rules (formal law and informal norms) to protect value created in the arts and sciences. Nonetheless, the present project will ask perhaps more fundamental or prior questions. The present study will assess the success or failure of intellectual
property regulation in terms of the expressed basis for creating or innovating in the first place. If intellectual property rules are incentivizing creation or invention and their diffusion to the public, this aspect of intellectual property policy and its dominant justification in culture has been realized. Demonstrating that law achieves its purpose would be a major contribution in itself. However, we cannot know whether this is how intellectual property law works (that it actually incentivizes creativity and innovation) unless we ask those doing the creating and innovating their perception of the relationship between their processes of creation or invention and intellectual property rules. Thus, this project investigates antecedent issues that these literatures leave underdeveloped: (1) what are the expressed relationships between creativity or invention and enforceable entitlements; (2) whether or why individuals and organizations protect through intellectual property law the value created in the first place; and (3) what is the actual or enacted relationship between creativity or invention and legal entitlements to intellectual property.

The current project builds on the above-described literatures, but does so from the perspective of a cultural analysis of law (Sarat and Simon 2003). Cultural approaches understand law not as a set of directives or commands but as a system of signs and practices (cf. Sewell 2005) through which everyday actions are mediated and collected to shape subjectivity as well as institutions. In terms of the current project, I am exploring whether and how the purposes and ideals of intellectual property law (the dominant incentive story) form part of our understanding and pursuit of creative and innovative processes. Intellectual property law as pronounced and practiced is a function of cultural practices and values, culture and law being inseparable (Sarat and Kearns 1993, 1998). Importantly, then, as a cultural analysis of law, this project does not regard law or its application as a result of the aggregation of individual will and self-determination. The individual desire and action described by the respondents is mediated through legal and non-legal social structure. The law that is produced (intellectual property law), the culture of which it is a part (artistic or scientific culture) and the members of that culture (innovators, artists and lawyers) are mutually constituted and entwined (Kahn 1999).

Summary. This project aims to engage the innovation culture through in-depth interviews and document collection to closely examine the constitution of intellectual property law in terms of its self-declared role of promoting science and the arts. The existing literature cited above has approached this inquiry empirically through statutory and case law and inventive outputs, and theoretically through cultural analysis. This project combines these approaches with an empirical analysis of cultural practices. In doing so, it questions the dominant justification for intellectual property law, namely that intellectual property protection is central to incentivizing creation and invention because the property right averts free riding and allows people to recoup their investments. As will be discussed more fully below, interviewees who are artists or scientists discuss their creative or inventive processes and the circumstances under which they (or their company) do or do not protect through intellectual property law the value they are creating. The legal professionals describe their process of harvesting intellectual property from the artists and scientists, the reasons and mechanisms for doing or not doing so and the consequences of each course. These interviewees express and enact relationships among creativity, innovation and enforceable entitlements that may or may not resemble the legal trends noted in the cases filed or in the theoretical discussions on which the statutes and their interpretations are based. Analysis of the interviews will seek to explain the various ways the relevant actors’ interpretations and actions coalesce around creative or innovative practices and formal legal or informal structures. Rather than describe how intellectual property law captures and/or protects a preceding artistic or scientific invention, this project may lead to account for the way law, on the one hand, and invention or creativity, on the other hand, mutually constitute or engage each other. It may also succeed at reevaluating the classic explanation for intellectual property as the predominant and external incentive for innovation in the first instance.
III. Pilot Study and Research Questions

The project will proceed in two stages: data collection (interviews and document collection) and analysis (qualitative coding, case comparison and grounded theory). It is based on an existing pilot study.

Over the past eighteen months, an interview protocol was developed, 40 introductory letters were sent to area intellectual property professionals, writers, artists, musicians, scientists and engineers, and 15 interviews of approximately 60 to 90 minutes in length were conducted. The interviews were formal scheduled sessions, the open-ended questions of the interview protocol allowing the interviewee to describe in his or her own words the processes of creation and innovation and the reasons for and manners in which intellectual property protection is or is not sought. The interviews were taped and transcribed. In relevant circumstances, documents were collected from the interviewees related to their creative processes and intellectual property portfolios. Human Subjects approval was secured from Suffolk University for this study.

Preliminary Findings: Reading through the early interviews so far, without formal extensive coding and analysis, some (tentative) patterns seem, nonetheless, to be emerging. With additional interviews, particular codes will be determined and conceptual categories developed. More is said about this in subsequent sections. Nonetheless, these early interviews have generated questions that can be more fully explored through more extended research and analysis.

First, and perhaps most surprising from the perspective of intellectual property law, respondents describe creation and invention in the form of novel or original creation unrelated to the legal entitlement that may eventually ensue. Scientists, engineers, writers and musicians already interviewed describe their process of invention without recourse to language of ownership or exclusivity. To the contrary, these inventors appear motivated despite (and sometimes in direct opposition to) the formal legal constraints they perceive as possibly hindering the sharing of their work with other innovators or end-users. Even the lawyers and intellectual property professionals who are tasked with harvesting the inventions as intellectual property for their respective organizations describe, in these early interviews, the originators of the novel creations as not thinking in property terms (exclusive right to exclude or use). Further data collection and analysis will help to identify variations, if any, in this emerging pattern.

- Do more experienced practitioners or inventors or writers speak differently about the role of legal protection for invention and original expression?
- Is there a generational difference in the way legal professionals or inventors conceive of the role of legal protection for incentivizing creativity and invention?
- How might the size and nature of the organization (small or large business, start-up or established) and proximity of professional management (independent artist, professionally managed artist or in-house artist) vary these results?

Second, language more akin to legal entitlement (rights to exclude and to use, to be compensated) seems to arise not at the invention stage (the origination) but at the development and commercialization stages, when distribution and feasibility of on-going operations is at issue. When discussing the public benefits of invention (be it a medicine, a computer program or a textbook), innovators and intellectual property professionals describe intellectual property law as sometimes inhibiting invention. Nonetheless, intellectual property law is perceived as important for the development or maintenance of certain industries, including the pharmaceutical industry and the print-
media industry. In these specific contexts of pharmaceuticals, bioengineering and the print-industry (and notably not in others, including the software or e-commerce industry), innovators, writers and intellectual property professionals describe the transformation of invention or expression into intellectual property in real-property terms: as chits to be traded, buildings to be fortified, personal belongings to be guarded. Interestingly, the resort to real-property analogies seems to be expressed, if at all, in moral claims rather than economic ones.

- At what point in the creative or inventive process did artists and scientists begin to think in ownership terms that resemble intellectual property entitlements? At what point did artists and scientists involve a legal professional in their work and what is their explanation for doing so?

- How often and under what conditions are legal entitlements justified as means of funding on-going operations in order to distribute the good? And how does this compare to the justification (or not) of the legal entitlement to incentivize the production of the good?

- What might account for the slippage from intangible property to real property metaphors when distribution is the goal?

- What further patterns of action or figures of speech emerge around the distinction between economic and moral justifications for intellectual property protection?
  - Do certain actors or organizations rely more heavily on moral justifications whereas others stick to economic justifications?
  - Does the moral justification emerge only as regards distribution of the good rather than on preserving exclusive possession of the good?
  - Aside from a real-property metaphor, what other metaphors are used to explain the transition from the creative or inventive process to its commercialization?

- Is there a difference in the way monopoly rights are conceived as an economic or moral matter as between inventors (potential patent holders) and artists (potential copyright owners)?

Third, invention is often described as simply happening and, but for the intervention of a legal actor (or legal rule), public disclosure of the creativity would follow. The story of intellectual property’s origination (as opposed to the origins of invention), as reported in the interviews thus far, begins with a conflict between the innovator on the one hand and the lawyer or businessperson who is tasked with assuring the viability of on-going operations on the other. Here, intellectual property law is described as an artificial layer placed over organic creative processes for the purposes of commercial gain (as opposed to other benefits that might flow from creation and invention). When innovators withhold creations or discoveries, they describe doing so not for pecuniary gain but for reputational interests – to preserve the possibility of being first to originate the discovery or creation. And when innovators rush to disclose, which might serve some of the interests of intellectual property policy but might also dissolve the possibility of exclusivity, they do so for the same reasons – to preserve authenticity and reputation and sometimes also to bring an important idea to the public quickly. The assumption commonly held in intellectual property law and policy that inventors won’t disclose if competitors can immediately copy their discoveries has not yet arisen in interviews with innovators and creators. Future interviews will try to differentiate these interpretations concerning competition and misappropriation in the process of invention, creativity and their distribution.
Are competition and misappropriation concerns primarily described as concerns about proper attribution? The integrity of knowledge? The quality of innovation?

How might the above concerns vary among diverging fields of arts and science?

- Do we see, for example, less concern over competition and misappropriation in the arts and more in the sciences?
- Do managers and lawyers for both arts and sciences express different reasons for concern over competition and misappropriation or do they mirror their clients’ concerns?

- Do the lawyers, legal professionals or business managers (as opposed to artists and scientists) value attribution for economic purposes or other reasons?

Fourth, in the preliminary interviews, the innovators and intellectual property professionals describe intellectual property law as something that requires translating within the innovation culture. Intellectual property and intellectual property law is described as a site of struggle, something that artists, scientists, and engineers need to become comfortable with and trained to think about. Interestingly, however, many lawyers also say that they consider intellectual property law as less sophisticated than the innovation it protects and not fully adapted to the subject matter it is meant to regulate. These lawyers perceive themselves as playing catch up in the field, figuring out ways to craft the law to accommodate the innovation culture within which they are working.

- How widespread is this view? Does it vary generationally? Among industries or organizational structures? As between different forms of intellectual property?

- Do lawyers describe alternative ways than intellectual property law to achieve the goals of their clients?

Interviews and document collection will track these and additional emergent questions and will identify patterns of variance, if any, among the different populations interviewed and their subject areas. The aim is to create a model of different accounts of creativity and invention to explore alignments and differences in the ways intellectual property law (its rules and its policies) are evoked across the arts and sciences. The project will compare what people say about creative and inventive processes with what is actually accomplished by those processes. Orienting variables for interview purposes and qualitative analysis (the coding of interviews) will be discussed below.

IV. Research Design and Work Plan

Respondent Sample. We will continue to identify and contact additional respondents and to conduct interviews. The goal is to conduct at least 144 to 150 interviews in the New England area, at least 72 with creators/innovators and 72 with intellectual property professionals (lawyers, businesses managers and licensing professionals). Already, several dozen more interviewees have been identified. Not all interviewees will own or have legally created intellectual property. All will have engaged in creative or inventive processes (or have worked with people who do). Inventors will vary across the range of creative processes from basic science to digital and print media, music, and other arts including sculpture, cuisine, and crafts.

Interviewees are located through a snowball sampling method as well as letter campaigns. We will follow Trost’s (1986) method of non-representative stratified sampling. Utilizing three significant
variables – respondent occupation (intellectual property professional or creator/innovator), whether they work independently (as a business owner, whether or not alone) or an employee of a company in which they have no ownership stake, and field of law (copyright/trademark or patent) – 16 possible variations are generated. We will interview nine respondents in each category of creator/innovator and nine in each category of legal professional (See Figure 1). Among the creator/innovator respondents, these are people who may or may not hold intellectual property rights, thus guarding against selection on the dependent variable. However, they are all people who engage in creative or innovative endeavors. Among the legal professionals, all of these people have experience working in the intellectual property field (as lawyers, licensing professionals, business managers), but they may have different views on when seeking intellectual property protection is appropriate in light of their specific clients and their businesses. Documents will also be collected from the interviewees to include in the qualitative analysis, such as invention disclosure sheets, corporate policies regarding intellectual property, sample licenses and contracts.

Figure 1: Case Variations

<table>
<thead>
<tr>
<th>Creator/Innovator: No IP</th>
<th>Creator/Innovator: IP</th>
<th>Legal Professional: Lawyer</th>
<th>Legal Professional: Non-Lawyer</th>
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Data management. All transcripts and notes from the interviews are typed using Microsoft Word and kept in files organized by a coded label for name of respondent in order to maintain anonymity. The master list of interviewees, their job titles, organizational description and date of interview is kept in a separate location. The working interview list (the “Interview List”) contains all the people contacted for interviews, when the contacts were made and the result of the contacts. When respondents provide new names, those names are added to the Interview List. The Interview List can be sorted by name, organization, job title, date of contact, or subject area of organizational expertise. The Interview List is also kept in a confidential file.

All interviews are digitally recorded. The digital files of interviews are backed up and stored on Suffolk University’s server. All recorded interviews are transcribed by a person hired for this purpose. As interviews continue and documents are collected, the project will require on-going assistance to manage the data, including keeping the contacts up to date. Transcripts of the interviews will be uploaded to a software program that facilitates analysis of narrative data, such as Atlas.ti.

Interview Protocol. The interview protocol is designed to be both an in-depth and open-ended conversation after Mishler (1985), who describes it as a special kind of conversation in which the interviewer guides the interaction with scripted topics and questions but is also always responsive (with appropriate queries and comments) to the interviewees’ interventions, topics, and tangents. Although unstructured interviewing has been a staple of ethnographic research from its earliest years, contemporary scholars have worked to systematize the ethnographic interview (Spradley 1979; Lofland and Lofland 1995). Thus, the semi-structured research interview is not a free flowing, momentarily-invented conversation; but neither is it a fully structured, completely unvaryingly choreographed exchange.

How does the interview produce the data this project seeks to analyze? First, the interview transcripts will become a substantial database of language used to describe creative and innovative processes. Among the many questions posed, interviewees are asked about how and why they became an artist, a scientist or an
intellectual property professional. They are asked to describe their daily work in detail, where, how and with whom they work. They are asked to describe the challenges they face in their work and the reasons they continue pursuing it. They are asked to describe the different stages of their career development in terms of aspirational goals and how or whether the goals have been met. Interviewees are asked to give examples of work of which they are most proud and why, and of work that has disappointed them and why. Interviewees are asked to describe how they perceive themselves as the same or different from those who work in a similar field. Importantly, the questions ask about both normative aspirations and routine practices, offering information about what respondents think ought to be done by themselves and/or others, and what they actually do. The comparisons are elicited through direct questioning but also by posing alternatives, asking for comments and comparisons on different motivations and approaches.

**Second, the interview transcripts will become a substantial database of language used to describe intellectual property on the ground.** Among the questions, interviewees will be asked whether and how the fruits of their creative or inventive efforts (or their clients’) become intellectual property. Interviewees are asked about how and why (or why not) they came to intellectual property law as part of their career as an intellectual property professional or as an artist or inventor. They are asked to compare the reasons for initially engaging in intellectual property law with reasons for on-going engagement or disengagement with intellectual property law. If an artist or scientist, they are asked to describe the benefits of and difficulties with their experiences with intellectual property law and their relationships with intellectual property professionals (whether lawyers or not). If an intellectual property professional, they are asked about the benefits of and difficulties with client relationships and their work in intellectual property law. Interviewees are asked to draw comparisons, if any, between their career successes or failures and intellectual property, making comparisons when possible to others in the field who have been more or less successful than they are.

In all instances, answers to questions are followed by more probing questions, seeking further detail and explanation as well as interpretations by the interviewee of their own responses. Attention is made to induce self-reflective responses that proceed at a level of detail that will be amenable to in-depth analysis. Interview questions will avoid legal terms of art whenever possible, except when used to ask a follow up question in which the interviewee used the term in their response.

The goal of the interviews is to generate a database of language that describes (1) what people think about creative and inventive processes and intellectual property, and (2) how they engage in creative and inventive processes and intellectual property law (their behavior and actions). While we are seeking to capture and distinguish both what people do from what they say, a study of this sort will be limited, as are all studies that rely on respondents’ self-reports, by the interviewees’ responsiveness, self-interestedness and possible lack of candor. Survey research attempts to control for the variations in reliability of self-reports with large sample sizes. In-depth, face-to-face interviewing relies on both the interviewer’s skill (demeanor, technique for establishing comfort and rapport, and question design) and theoretical framing to address issues of reliability and validity (Maxwell 1992; Flick 1998). Despite this self-reporting question, and more so because the semi-structured interview produces only the respondents’ story of how they work and why, this study seeks to explore popular consciousness about the role of intellectual property law in creative and inventive processes. As a database of language about intellectual property and invention, the interviews are evidence of the culturally circulating schema, memes, interpretations and understandings of law. Inasmuch as the analysis of the transcripts together with the documentation collected also reveals preferences acted upon by the interviewees through their descriptions of their work and its concrete output, the project will also be able to explore possible connections or disconnects between popular consciousness and self-reported behavior. Finally, the stories people tell and the language they use to describe their work involving art and science are of import in and of themselves (Polletta 2006). Stories are political insofar as they are justificatory units for status quo or change. And language is constitutive insofar as the repeated use of words and phrases reify concepts, categories and expectations that structure relationships in our communities. For example, were this project to unearth a variety of explanations for resorting to intellectual property in the fields of arts and
sciences, the dominant story justifying intellectual property protection in formal legal discourse (the incentive story) might be proven less dominant in informal settings. Further analysis could then attempt to draw connections between the variety of justifications for intellectual property protection (or a lack thereof) in specific arts and science contexts and the efficacy of proposed reforms for intellectual property law to help it achieve its stated goals.

Data analysis. Analysis of the transcripts will proceed at the level of language (word choice, narrative structure and content) and conceptual themes (drawn from reading across the transcripts and from the literature on innovation and intellectual property). Language is easier to quantify insofar as one is looking at discrete words, whether unusual or often repeated. Narrative structure and content will also be observed and modeled as many stories have identifiable markers and take recognizable forms (Polletta 2006; Cohan and Shires 1993; Flick 1998). Drawing on my experience and training as a literary scholar (my doctoral focus was on contemporary narrative theory), analysis of the interviews will isolate and analyze the various narrative components of selection, time and relationality that coalesce to form a particular moral ordering (Ricoeur 1984-1988) or “point” (White 1987), and also that reflect or maintain a particular institutional or social structure (Austin 1962; Silbey 1999, 2008). The analysis of conceptual themes in the interviews will develop from the socio-legal literature on innovation and legal policy. As interviews are read, reread and coded with help of the analytic software, our searches will be revised based on reformulated questions and categories that emerge from this on-going study of the interviews and the scholarly literature.

To analyze the transcripts, codes will be developed deductively from preliminary findings and inductively from the emergent language, repetitions, narrative structure and conceptual themes contained in the interviews. Each transcript will be read and summarized in a four to five page synopsis. These condensations will include any notes made during the interview, a description of particularly interesting stories related by or quotations from the interviewee, and a list of overarching themes from the interview (Miles and Huberman 1994). Treating the interview as a text will expose its structural features as a story of law-in-action and of innovation culture. In conducting an inductive, qualitative analysis of these data, one goal will be to arrive at a systematic understanding of popular legal consciousness regarding intellectual property. Another goal is to arrive at a “thick description” (Geertz 1973) of the origins and output of creative and inventive processes and their relationships to the legal entitlements that may (or may not) flow there from (Dreyfuss 1990).

From the transcripts, we will extract at least two units of analysis, the interviewee and the creation/invention. This will enable us to track and model variations in descriptions of inventive processes and their maturation (or not) into intellectual property. A comparative case-oriented analysis takes the themes identified among the cases and seeks to identify person-specific patterns (Ragin 1987; Miles and Huberman 1994). This is accomplished through systematic construction of various matrices, some ordered and reorganized by theme and sequence as the analysis proceeds (Miles and Huberman 1994, Chapters 7-9). Although there are several effective methods for cross-case comparisons – constant comparative method (Glaser 1969), stacking comparable cases (Miles and Huberman 1994), Boolean analysis using truth tables (Ragin 1987) – the project will start by following Abbott’s (1992, 1992a) advice on how to do cross-case analysis. He advocates a strategy of iterative development and testing of generic narrative models, preserving the narrative sequence while producing “a social science expressed in terms of typical stories” (Abbott 1992 p. 76). Abbott recommends its use for studying events such as birth and death, merger and division. As such, this project will apply his comparative case-analysis to the birth or origins of intellectual property. By also tracking particular inventions and their development (or not) into intellectual property, we will be able to abstract from the interviews information about a larger sample of events (creations and inventions) that can be analyzed with simple quantitative methods.

Intercoder reliability. Borrowing from quantitative research traditions, procedures will be developed to insure inter-coder reliability. To assure that all assistants understand the codes in the same way (Miles and
Huberman 1994), the research team will meet regularly to review the coding of a single transcript, which we have each coded. We will compare the coding and where there are differences, discuss and resolve them. We will then review transcripts already coded to assure that agreements forged on the common transcript are transferred to interviews coded independently. In addition, at the completion of coding each interview, a memo describing salient themes that emerged will be generated. Memos will be shared on a regular basis again to produce a common framework for preparing these critical documents. By its very nature, working with qualitative data is an interpretive process (Emerson 1994). Nonetheless, strong consensus can be achieved by regularly sharing coding on a common text and thus collectively developing common parameters for interpretation. Finally, this same method of group coding and checking will be used to develop the data set of events/inventions.

IV. Feasibility, time allocation and work products

Limitations. As designed, the current project will be feasible within the three year period for the 16 case variations designated. Snowball sampling and locating respondents that fit each case variation are time consuming. Although a larger sample size could track variations across subject areas of intellectual property, the current project will produce a typology of interpretations concerning intellectual property and invention. Follow-on surveys or more interviews can test for the applicability of these models across types of invention. There are, however, sufficient cases in this study to identify variations by organizational setting. Although a sample concentrated in one geographic area may be considered a limitation, not a random or national sample, the geographic concentration increases the probability of being able to conduct and reduces the cost of face-to-face interviews.

As indicated above, a study based on interviews (although supplemented by document analysis) is going to be limited to interviewee self-reporting. This is a study of cultural scripts and beliefs, not revealed preferences. Inasmuch as it seeks to produce an account of legal consciousness (what people say as well as what they do), studying these narrative structures is important. Inasmuch as the project seeks to explore a relationship between beliefs about and the actual transformation of creative and inventive processes into intellectual property or similar public goods, the validity of this study will depend on how much of the interview responses describe behavior, whether the descriptions are sufficiently thick to be credible, and whether the theoretical interpretations are sufficiently grounded in this and comparative data (Maxwell 1992; Miles and Huberman 1994, ch.10). I will be working with law students who will have to be trained in interview techniques and coding. I will endeavor to hire students early in their law school career to ensure longevity, whenever desired. And wherever possible, I will hire students with a background in qualitative or quantitative analytic training.

Work Products. This research will produce a series of articles and a book. Over the course of the three-year of NSF funding, I will spend two-thirds of my non-teaching time and two months of each summer working with the research assistants to conduct interviews, code and analyze them. Two research assistants will work half-time during the year coding and analyzing interviews and managing the data files. They will work full-time during the summers doing the same. We will complete the interviews within the first thirty months and during that time (and continuing in the third year) engage in on-going interpretation and analysis of the transcripts and documents. The articles based on this research will be prepared for presentation at professional conferences and symposia beginning in late 2010 (Annual Association of Law Schools, Intellectual Property Scholars Conference, Works-in-Progress in Intellectual Property Conference, Law and Society Association). Articles will be submitted for publication in both law reviews and socio-legal journals.

The dynamic synergy that has developed between cultural analysis and socio-legal studies depends on both interpretive techniques developed in the humanities and systematic techniques of qualitative data collection and analysis developed in sociology. To the established methods of sampling
techniques, data collection and coding strategies developed by social scientists, I will be adding my expertise in literary theory, textual analysis and the law (a Ph.D. in comparative literature and a law degree). There are well-regarded models of social science research that rely on narrative theory to analyze legal consciousness (Ewick and Silbey 1995, 1998, 2003); disability rights (Engel and Munger 2003); police, teachers and counselors (Shearing and Erickson 1991; Maynard-Moody and Musheno 2003); as well as social movements and civil rights (Polletta 2006). This project will add to this growing body of well-regarded scholarship emphasizing the role of storytelling and narrative as a mechanism by which social ordering, including legal ordering, happens.

V. Previous NSF funded research. None.

VI. Significance

Relations to other fields. Intellectual property law has long been dominated by economic models of incentives and rational behavior. Behavioral economists have recently begun questioning the rational assumptions of these models by looking at brain function (through brain imaging (Nusbaum and Cacioppo 2009)) as well as routine behavior (Kahneman and Tversky 1982). This project studies an aspect of sociality the economists have not addressed: popular legal consciousness. As such, it will show how cultural tropes, schemas and accounts of law become part of the normal behavior and interpretive apparatus mobilized in the creation of innovations and intellectual property. In addition, the study will contribute to the sociology of professions, by describing the practice of intellectual property law as one field of legal specialization (Heinz et al.).

Relation to public policy. Intellectual property law is on the minds of policymakers in Washington. Just this summer (on June 18, 2009), Senator Orrin Hatch sent a letter to President Obama urging him to enhance intellectual property rights. He and his co-signatories said: “The United States government cannot afford to sit idle while others seek to weaken IP protections. America must continue to set the standard for IP protection, and be willing to confront those countries and organizations that attempt to weaken IP rights. IP rights have not caused any of the world’s problems, and compulsory licensing is not the key to solving them. Maintaining strong IP rights is essential to economic growth and continued innovation, and protecting IP rights will not only improve the world’s development but America’s as well.”

Here, Hatch is speaking about patent protection for pharmaceutical companies, but whether the issue is about high technology innovation and the costs of medical care, Internet privacy and defamation, or the authors’ guild and the Google settlement, intellectual property law – its precise balance and structure – is at the center. Fundamental questions about how people originate intellectual property – why and what the relationship is between innovation and legal entitlements – must be answered for policy choices concerning intellectual property to be informed and effective. This project will address these fundamental questions through structured interviews of a population of legal professionals and creators/innovators. We can begin to understand better the relationships between incentives and invention by analyzing the stories creators tell about their work (or their clients’ work) and intellectual property law.