

Symposium on Anita Bernstein’s *The Common Law Inside the Female Body*

INTELLECTUAL PROPERTY INFRINGEMENT AND THE RIGHT TO SAY NO

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INTRODUCTION

The term infringe means “to act in a way that is against a law or *that limits someone’s rights or freedom.*”¹ Pervasive within the three major codified areas of intellectual property (IP) law—copyright, patent, and trademark—is this concept of infringement, which dovetails with Professor Anita Bernstein’s thesis that the common law can support feminist legal progress through its protection of negative liberty—the right to say no to what one does not want.² Indeed, IP law is deeply rooted in the common law

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¹ *Infringe*, CAMBRIDGE ACAD. CONTENT DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/infringe> [<https://perma.cc/D56E-M32A>] (emphasis added).

² ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 15 (2019) (“Negative liberty says that boundary-crossing into the personal identity and space of a person *qua* person is wrong. Common law doctrines enlist the state to enforce this entitlement.”); *id.* at 8 (“To hold negative liberty . . . is to enjoy . . . ‘condoned self-regard.’ We may put ourselves first, in other words. Individuals may favor themselves and what they think are their own interests over the demands that another person makes.”).

of tort as well as property.³ Both tort and property law regulate relationships among competing interests, but tort law arguably conveys more directly than does property law the sense of mutual obligations within communities through its element of duty.

Profoundly shaped by these common law kinships, the statutory grants of IP's exclusive rights encourage a person to engage in her creative and inventive pursuits (or, in the case of trademark law, to pursue legitimate competition with others). Relatedly, a negative liberty associated with a finding of infringement is a freedom by the IP holder from wrongful takings of chattels (albeit intangible ones).⁴ The view that infringers harm IP holders in their rightful enjoyment of the fruits of IP is evident, for example, in the ongoing debate over whether or not the sampling of sound recordings requires permission from a copyright owner of the music being sampled.⁵ Such alleged infringers might also commit incursions upon the dignity or tranquility of the IP holder, or impose an agenda that the IP holder does not share—two other “Do Not Wants” that Bernstein claims as protective functions of the common law.

In these scenarios, IP provides a boundary against the offensive act, which is legally represented by a finding of infringement. Consider a nude selfie posted online without authorization of the photographer. As the copyright holder of the photograph, the photographer can wield the sword of her exclusive right to reproduce, distribute, or to publicly display this work.⁶ In turn, the alleged infringer must, to use Bernstein's words, “heed[] and honor[] [the copyright holder's] objections, resistances, and protests.”⁷ Nonetheless and not surprisingly, many IP feminist scholars perceive a disparity between the gender-neutral facial equality of IP and its unequal application and impact by gender.⁸ Nude selfies, for instance, create harms that fall disproportionately upon female authors rather than male authors as

³ See, e.g., Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1544–45 (2010).

⁴ 15 U.S.C. § 1114 (1962) (creating federal civil action for trademark infringement); 17 U.S.C. § 501 (2006) (creating federal civil action for copyright infringement); 35 U.S.C. § 271 (2012) (creating federal civil action for patent infringement).

⁵ See, e.g., *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016).

⁶ 17 U.S.C. § 106 (2012).

⁷ BERNSTEIN, *supra* note 2, at 35.

⁸ See generally Kara W. Swanson, *Intellectual Property and Gender: Reflections on Accomplishments and Methodology*, 24 AM. U. J. GENDER, SOC. POL'Y & L. 175, 183–86 (2015) (surveying the gender disparities, exclusions, and biases experienced by female inventors and scholars in traditional IP law).

targets of so-called nonconsensual pornography.⁹ Moving beyond examples of misuse of specific kinds of IP-protected products to the distribution of the economic rewards of IP, recent statistics show the relative lack of female representation in the upper echelons of the copyright content industries.¹⁰

Furthermore, this issue of gender-based inequality is compounded by new harms that confront us in an era of information overload rather than information scarcity. Do consumers have the right to say no to intrusive advertising or to the lack of information about supply chain governance? Do online users have the right to say no to ubiquitous data gathering on their searches and other activity? Do targets have the right to say no to online harassment of a highly sexualized, threatening, and often anonymous nature, in response to posting of content? These informational transgressions—arguably types of infringement—threaten the dignity or tranquility of individuals. And yet these often-gendered harms remain largely unaddressed by the law, including IP law. If IP is a species of a larger genus of information law,¹¹ then ought not it recognize and respond to these informational harms? Bernstein’s argument may offer some useful tools to answer these emerging questions. In particular, the twin grounds of condoned self-regard and negative liberty may help bridge the distance between formal and substantive gender equality within IP, by affirming the importance of personal boundaries and control in achieving optimal human development.¹²

⁹ DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 100–02 (2014), *cited in* Margaret Chon, *Copyright’s Other Functions*, 15 CHL.-KENT J. INTELL. PROP. 364, 369 (2016).

¹⁰ MARTHA M. LAUZEN, CTR. FOR THE STUDY OF WOMEN IN TELEVISION & FILM, SAN DIEGO STATE UNIV., THE CELLULOID CEILING: BEHIND-THE-SCENES EMPLOYMENT OF WOMEN ON THE TOP 100, 250, AND 500 FILMS OF 2018 (2019), https://womenintvfilm.sdsu.edu/wp-content/uploads/2019/01/2018_Celluloid_Ceiling_Report.pdf [<https://perma.cc/7ELN-KKCN>] (summarizing the proportion of female directors, writers, producers, etc. in the 250 highest-grossing U.S. films in 2018); STACY L. SMITH, MARC CHOUËITI & KATHERINE PIEPER, USC ANNENBERG INCLUSION INITIATIVE, INCLUSION IN THE RECORDING STUDIO? GENDER AND RACE/ETHNICITY OF ARTISTS, SONGWRITERS & PRODUCERS ACROSS 700 POPULAR SONGS FROM 2012–2018 (2019), <http://assets.uscannenberg.org/docs/aai-inclusion-recording-studio-2019.pdf> [<https://perma.cc/B8S5-8UZJ>] (detailing the percentage of female artists and producers in the music industry compared to men from 2012–2018).

¹¹ Peter Goodrich, Sonia K. Kayal & Rebecca Tushnet, *Panel I: Critical Legal Studies in Intellectual Property and Information Law Scholarship*, 31 CARDOZO ARTS & ENT. L.J. 601, 611 (2013) (“This way of reconceiving the notion of public progress has really been influenced by the structural critiques that were offered by Lawrence Lessig, Siva Vaidhyanathan, and Jessica Litman, who gave birth to a critical information studies movement that was really focused on critiquing the structural relationship between broad flows of information and the danger of overbroad property rights.”).

¹² BERNSTEIN, *supra* note 2, at 97 (quoting Margaret Jane Radin, an early proponent of recognizing the boundary-respecting values of IP, who stated that “to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment”) (Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982)).

However, IP presents some unique challenges to Bernstein's thesis. The first challenge stems from IP's concern with the negative liberty of not only the IP holder but also the putative infringer. This is evident, for example, in copyright's fair use doctrine. A second challenge stems from IP's primary focus on commercial harm rather than individual harm. Bernstein's arguments tend to focus more on injuries to a woman's dignity or privacy interests, than to her potential markets. Thus, they may fall short of addressing the structural inequality and social justice issues located within IP, which often de-emphasizes noneconomic injuries. Nonetheless, Bernstein's arguments also suggest ways in which IP could adjust its priorities so as to treat harms to individuals (for example, dignity-based harms) with the same gravitas that it treats business torts. Each of these two challenges is explored below, with a focus on copyright law.

I. CHALLENGE ONE: WHOSE NEGATIVE LIBERTY MATTERS?

Copyright law is heavily statutory, yet simultaneously provides more than a palimpsest of common law influence and activity. For example, common law principles actively shape copyright's secondary liability doctrine: Faced with rapidly emerging challenges associated with networked digital technologies, courts have innovated within the interstices of statutory text.¹³ And the current U.S. statutory framework, the 1976 Copyright Act, codifies a key doctrine that originated as a common law rule of reason: fair use.¹⁴ Fair use defines the contours of use of copyrighted material without payment to or permission by the copyright holder.¹⁵ A judicial finding of fair use is equivalent to a finding of noninfringement, and it thus operates as a safety valve against the overextension of the rights associated with copyright. Courts constantly manage the boundary between transgressive and nontransgressive (infringing and noninfringing) creative activity through fair use and other doctrines that may excuse or otherwise limit liability—so-called exceptions and limitations. Furthermore, the statutory interpretation of the fair use doctrine itself is open-ended and constantly subject to judicial

¹³ See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 936–37 (2005) (articulating an inducement theory of secondary liability, derived from both patent law and common law).

¹⁴ See 17 U.S.C. § 107 (2012); see also R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in *INTELLECTUAL PROPERTY STORIES* 259 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

¹⁵ PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT* (2d ed. 2018).

extension and elaboration.¹⁶ Courts have not been timid to expound upon fair use and other copyright doctrines, whether substantively or procedurally.¹⁷

This means that the copyright holder's sword against any potential infringer is not absolute but rather, may be subject to an analysis that accounts for the benefits and burdens faced by both parties. For instance, let's say a mother captures a video of her toddler dancing with delight to music recorded by a famous musician. After the mother posts the video online, the recording label (which holds copyright in the sound recording) issues a take-down notice to the intermediary providing the platform for online content. The copyright holder—the record label—may be required to undergo a fair use assessment before issuing this notice, at the risk of a judicial finding of misrepresentation should it fail to do so.¹⁸

This example illustrates that courts have developed the negative liberty enjoyed by the copyright holder into perhaps something more malleable than the liberty enjoyed by the common law's quintessential chattel-holder. If “possession, understood to cover things and land together, dominates the entire human sense of what is right and wrong,”¹⁹ then who is the rightful possessor of cultural content,²⁰ critique,²¹ experience,²² and/or play?²³ Fair use encompasses the answers to these questions in IP because it accounts for possessory harms to those other than the copyright holder. Possession of chunks of shared knowledge and information will shift, depending on the position of the party as subject or object, creator or consumer, originator or follow-on innovator, or even victim or perpetrator. Fair use is one, albeit

¹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (favoring a use that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; [a court] asks, in other words, whether and to what extent the new work is ‘transformative’”).

¹⁷ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152–53 (9th Cir. 2016) (citing Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 688 (2015)).

¹⁸ 17 U.S.C. § 512(f) (2012) (“Any person who knowingly materially misrepresents . . . that material or activity is infringing . . . shall be liable for any damages . . . incurred by the alleged infringer . . .”).

¹⁹ BERNSTEIN, *supra* note 2, at 50 (citing to PHILIPPE ROCHAT, *ORIGINS OF POSSESSION: OWNING AND SHARING IN DEVELOPMENT* 4 (2014)).

²⁰ See generally Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER, SOC. POL'Y & L. 551 (2006) (critiquing copyright doctrine generally from a feminist perspective).

²¹ See generally Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273 (2007) (analyzing the fair use doctrine from a feminist perspective).

²² Madhavi Sunder, *Intellectual Property in Experience*, 117 MICH. L. REV. 197, 235 (2018) (discussing experience and experimentation in child development).

²³ See, e.g., JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (2012) (discussing the critical importance of play in human development).

incomplete, mechanism to address dignity and equality values represented by a putative infringer within IP.²⁴

Thus, IP law's protection of intangible chattels resulting from creative and inventive activity transcends the categorical duality of possession. Claims to chattel may shift from one party to the other, depending upon context and circumstance. In this way, IP law incorporates the negative liberty of the putative infringer along with that of the IP owner, and does not necessarily give absolute primacy to the latter.

II. CHALLENGE TWO: COMMERCIAL V. DIGNITARY HARM

The dominant view of IP frames its instrumental purpose of fostering innovation almost exclusively through the robustness of market-driven outcomes rather than other possible alternative metrics.²⁵ If IP rights are primarily commercial rights, then it follows that IP does not necessarily recognize harms other than market-based harms.²⁶ But even accepting the dominance of the market rationale, IP's relationship to equitable market participation is problematic. For example, it currently results in the exclusion of women from much of the economic fruits of creative and inventive activity.²⁷ In addition to this problematic distribution of IP's economic benefits, the overly-narrow view of IP as a set of commercial rights negates the intertwined history of common law privacy and statutory publication in

²⁴ See generally JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* (forthcoming 2020) (synopsis on file with author) ("Equality, privacy, and distributive justice are central to human dignity but have been largely absent from intellectual property policy. This book for the first time describes these debates about intellectual property as a bellwether of changing social justice needs in the digital age.").

²⁵ See generally Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549 (2015) (arguing that nonmarket-based harms are irrelevant to IP). But see Andrew Gilden, *Copyright's Market Gibberish*, WASH. L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3295280> [<https://perma.cc/NH99-299T>] (arguing that IP should not be constrained in expressing harms in market language).

²⁶ Cf. Lateef Mtima, *The Idea Exclusions in Intellectual Property Law*, TEX. INTELL. PROP. L.J. (forthcoming 2020) (on file with author). See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (exploring various market-related theories of intellectual property).

²⁷ See, e.g., LAUZEN, *supra* note 10, at 1–3 (reporting that in 2018, women comprised 20% of all directors, writers, producers, executive producers, editors, and cinematographers working on the top 250 domestic gross films; specifically, women comprised 8% of directors, 16% of writers, 21% of executive producers and 6% of composers working on the top 250 films in 2018, and 73% of those films had no women writers at all); SMITH, CHOUËITI & PIEPER, *supra* note 10 (documenting that in 2018, women comprised only 17.1% of 2018 Billboard Hot 100 artists; 12.2% of credited songwriters; 2.3% of music producers; and, from 2013–2018, 10.4% of Grammy nominees).

copyright law,²⁸ not to mention the various intersectional approaches of IP more broadly within torts-like human rights regimes.²⁹ By contrast, much of what is protectible by copyright is not intended to be monetized, but rather to contribute to self-actualization and/or the nurturing of sociality to the end of human flourishing.³⁰ Numerous IP scholars have critiqued the anachronistic view that all authors and inventors care about is remuneration.³¹ Even the U.S. Copyright Office recently departed from its usual focus on economic rights with a report emphasizing moral rights such as attribution.³²

IP's current orientation flies in the face of much of Bernstein's faith in the common law as an instrument for progressive social change, specifically in the direction of gender equality. True, her dazzling tour de force ends with an incantation of the wealth of nations, and thus, she clearly endorses market-based choices made by individuals (if and only if they can protect themselves through the common law's full endorsement of their negative liberties).³³ But the majority of her thesis lies outside the realm of commerce and literally inside the female body (i.e., penetration and pregnancy). This is unnecessarily limiting to her broader liberating claims for common law. Relatedly, a market rationale should not be the only framework for a legal regime designed to promote overall social welfare through creative and inventive activity. Bernstein's framework can bring into focus the full range of IP's negative liberties, which include the freedom not to experience dignitary harms, including but not limited to those associated with being excluded from its economic benefits.

²⁸ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 554–55 (1985) (“It is true that common-law copyright was often enlisted in the service of personal privacy In its commercial guise, however, an author’s right to choose when he will publish is no less deserving of protection.”).

²⁹ See, e.g., DUNCAN MATTHEWS, *INTELLECTUAL PROPERTY, HUMAN RIGHTS AND DEVELOPMENT: THE ROLE OF NGOS AND SOCIAL MOVEMENTS* (2011).

³⁰ Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2909–10 (2006).

³¹ See generally JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015); COHEN, *supra* note 23; Mtima, *supra* note 26; Sunder, *supra* note 22, at 197.

³² U.S. COPYRIGHT OFFICE, *AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES* 34 (2019); see also ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2010); Cathay Y. N. Smith, *Creative Destruction: Copyright’s Fair Use Doctrine and the Moral Right of Integrity*, 47 PEPP. L. REV. (forthcoming), <https://ssrn.com/abstract=3367075> [<https://perma.cc/UX64-8VAK>].

³³ BERNSTEIN, *supra* note 2, at 213–14 (referring to ADAM SMITH, *THE WEALTH OF NATIONS* (1776)); *id.* at 198 (discussing the law governing the sale of female body parts).

CONCLUSION

Professor Bernstein's pursuit of condoned self-regard and negative liberty provides important signposts to common law priorities as it engages with the regulation of information and knowledge. This Essay points to how her overall framework can help us to understand IP as a mechanism for addressing potential harms not just to the IP owner, but also to the putative infringer. It also highlights that Bernstein's emphasis on dignitary harms can inform IP, just as IP's emphasis on economic harms can inform her thesis.

However, as stated at the outset, the statutory scarcities created by the exclusive rights of IP are responding to a problem that is obsolescing in the face of informational nonscarcity—indeed, in conditions of informational overload.³⁴ Perhaps the common law within IP can recognize the newer challenges of information—those created by ubiquitous information and communication technologies—by applying Bernstein's principles to protect women's various interests as they engage with technologies of information and communications. Common law principles point to the recognition of emergent harms, such as cyber harassment, that now permeate our media landscapes, while at the same time pay due regard to free expression and healthy market competition.³⁵ In that regard, the common law might also help to pivot IP away from its solipsistic gaze on incentives for innovation in the pursuit of economic growth toward a more expansive frame based upon the primacy of human flourishing, including, but not limited, to female bodies.

³⁴ See generally Guy Pessach, *Beyond IP—The Cost of Free: Informational Capitalism in a Post-IP Era*, 54 OSGOODE HALL L.J. 225 (2016) (discussing proprietary IP and capitalist structures of corporate media).

³⁵ CITRON, *supra* note 9, at 190; see also THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION (Saul Levmore & Martha C. Nussbaum eds., 2010) (describing emerging legal issues relevant to the Internet age).