

Submission to ISHTIP 2017

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Empirical Study of Photographic Copyright and
Changing Aesthetic and Business Practices in the Digital Age

Through various empirical methods (both qualitative and quantitative), we are investigating the business and art of photography as it has evolved with digital technology. The goals of the project are to learn how earning a living as a photographer (or through photography) and the practice of photography have changed in the age of internet distribution and e-commerce, fast evolving digital photographic equipment, and the accompanying changes to culture, aesthetics and the market. In particular, we are interested in the roles intellectual property law plays in the changing (or enduring) aspects of photography as a professional and artistic endeavor.

We received a seed grant from the Spangenberg Center for Law, Technology & the Arts at Case Western Reserve University School of Law to fund the preliminary collection of data via long-form interviews with photographers and their business partners. So far, we have conducted twelve (14) interviews each approximately 90 minutes long, and we have done some preliminary coding and analysis of those interviews. We anticipate conducting at least twenty-five (25) interviews before beginning the quantitative work. We plan to eventually run a survey based on the qualitative analysis of the interviews to test some of the relevant variables and distinctions that emerge from the interviews. At ISHTIP 2017, we hope to present the structure of this project and its theoretical and empirical framework as well as a preliminary analysis of the interview data to date.

Several theoretical frames inform our questions and methods. Most relevant for the themes of this conference are the following. (1) We understand that the copy, distribution and display functions have merged in our digital age (and have become cheaper and easier to accomplish) despite IP statutes that distinguish them in critical ways (e.g., via the first sale doctrine). This presents particularized problems and solutions in certain fields (photography, music, software) but not in others (sculpture, applied and industrial art, biotechnology). (2) Business models for creative and innovative endeavors (be they start-ups or large firms) are rapidly evolving with platform technology and information distribution networks. These changing business models are worth close study for the ways they may be altering the creative environment for photographers specifically (and as models for creative actors more generally), which in turn may affect how the copyright system is perceived, employed and enforced.

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Employment

Professor of Law, Northeastern University School of Law (2015 –present)
Professor of Law, Suffolk University Law School (2011 – 2015)
Associate Professor of Law, Suffolk University Law School (2007 – 2011)
Assistant Professor of Law, Suffolk University Law School (2004 –2007)

Pre-Academic Employment

Litigation Associate, Foley Hoag LLP, Boston, 2001 – 2004
Law Clerk, Judge Levin H. Campbell, United States Court of Appeals for the 1st Cir., 2000 – 2001
Law Clerk, Judge Robert E. Keeton, United States District Court, MA, 1999 - 2000

Awards and Grants

- ∞ Innovation Grant, 2016-2017 (\$10,000 from the Spangenberg Center for Law, Technology & the Arts at Case Western Reserve University School of Law for empirical project on digital photography and intellectual property, with collaborators Peter DiCola and Eva Subotnik)
- ∞ Boston College Institute for Liberal Arts (\$35,000 grant to sponsor conference and research on IP + Race, 2016-2017, with collaborators Anjali Vats, Deirdre Keller, Amit Basole)
- ∞ Dean’s Faculty Fellow Award for “extraordinary scholarly production” (Fall 2012)
- ∞ Alexander Cella Memorial Award for faculty dedication to Suffolk Law Review (2011, 2013)
- ∞ Teaching Enrichment Grant for innovating intellectual property courses (2011-2012)

Education & Honors

- ∞ Harvard Berkman Center for Internet & Society, Faculty Associate 2016-2017
- ∞ Yale Information Society Project (ISP), Affiliate Fellow, Yale University, Law School
- ∞ University of Michigan, Ph.D. (comparative literature) 1999
- ∞ University of Michigan, J.D. *cum laude*, 1998
- ∞ Stanford University, A.B. *with honors* in comparative literature, 1992

Publications: Books

- ∞ The Eureka Myth: Creators, Innovators and Everyday Intellectual Property (Stanford University Press 2015)
- ∞ Law and Justice on the Small Screen (Robson and Silbey eds., Hart 2012)

Publications: Law Review Articles

- ∞ Fairer Uses, 96 B.U. L. Rev. 857 (2016)
- ∞ Picturing Moral Arguments in a Fraught Legal Arena: Fetuses, Phantoms and Ultrasounds, 16 Geo. J. Gender & Law 593 (2016)
- ∞ Patent Variation: Discerning Diversity Among Patent Functions, 45 Loy. Chi. Rev. 441 (2013)
- ∞ Images In/Of Law, 57 N.Y.L.S. L. R. 171 (2012/2013)

- ∞ Harvesting Intellectual Property, 'Inspired Beginnings and 'Work Makes Work': Two Stages in the Creative Process of Artists and Innovators, 86 Notre Dame L. R. 2091 (2011)
- ∞ Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change, 61 Case Wes. Res. L. R. 195 (2011)
- ∞ Reasoning from Literature, 22 Yale J. L. Hum. 339 (2010)
- ∞ Evidence Verité and the Law of Film, 31 Cardozo L. R. 1257 (2010)
- ∞ Cross-Examining Film, 8 U. Md. J. Race, Religion & Gender & L. 101 (2009)
- ∞ Mythical Beginnings of Intellectual Property, 15 Geo. Mason L. R. 319 (2008)
- ∞ Truth Tales and Trial Films, 40 Loyola L. R. 551 (2007)
- ∞ Criminal Performances: Film, Autobiography and Confession, 37 New Mex. L. R. 189 (2007)
- ∞ Videotaped Confessions and the Genre of Documentary, 16 Ford. Intell. Prop. Media & Ent. L. J. 789 (2006) (reprinted in REDEFINING DOCUMENTARY FILMS (ICFAI University Press, India 2009) and MEDIA AND LAW (AMICUS Books, India 2009))
- ∞ Filmmaking in the Precinct House and the Genre of Documentary Film, 29 Colum. J. L. & Arts. 107 (2005)
- ∞ Judges as Film Critics: New Approaches to Filmic Evidence, 39 Mich. J. L. Reform 493 (2004)
- ∞ What We Do When We Do Law and Popular Culture, 27 Law & Soc. Inquiry 139 (2002)

Publications: Book Chapters, Book Reviews & Other

- ∞ Speaking from the Grave: Should Copyright Listen? Reviewing Eva Subotnik's *Artistic Control After Death*, 92 Wash. L. Rev. (2017) in JOTWELL, September 2016 (<http://ip.jotwell.com/>)
- ∞ American Trial Films and Popular Culture, in OXFORD RESEARCH ENCYCLOPEDIA OF OXFORD ENCYCLOPEDIA OF CRIME, MEDIA, AND POPULAR CULTURE. (Oxford University Press, forthcoming).
- ∞ Parrots, Foxes and Copy Rights: A Book Review of WHAT'S WRONG WITH COPYING by Abraham Drassinower (Harvard University Press, 2015) in the THE IP LAW BOOK REVIEW Vol. 6. (2016) (forthcoming)
- ∞ Reputation and the Role of Trademarks in Businesses Infused with IP, in *Law & Society Perspectives in Intellectual Property* (Halbert & Gallagher eds., Cambridge 2016 forthcoming)
- ∞ Parody and Fair Markets, reviewing Kris Erickson, Martin Kretschmer, and Dinusha Mendis *Copyright and Economic Effects of Parody*, JOTWELL, October 2015 (<http://jotwell.com/>)
- ∞ The Eureka Myth: How Misunderstandings about Creativity Sustain a Flawed Copyright System, SLATE.COM, January 23, 2015
- ∞ Understanding Intellectual Property and The Value of Interdisciplinary Case Studies: A Review of *Putting Copyright in Its Place: Rights Discourses, Creative Labour and the Everyday* by Laura Murray, Tina Piper, and Kirsty Robertson (Oxford University Press, 2014), INTELLECTUAL PROPERTY JOURNAL OF CANADA, Vol. 27, pp. 91-103 (2015)
- ∞ Reading Intellectual Property Law Reform through the Lens of Constitutional Equality (reviewing Robert Spoo's *Without Piracy*, Aram Sinnreich's *The Piracy Crusade*, and Bill Herman's *The Fight for Digital Rights*), 50 TULSA L.R. 101-122 (2015) (Annual Bk Rev Vol.)

- ∞ The Past and Future of Copyright Politics, Bill Herman, *The Fight Over Digital Rights: The Politics of Copyright and Technology*, JOTWELL, December 2014 (<http://jotwell.com/>)
- ∞ Afterword: Conferring about the Conference, 52 HOUSTON L. R. 679 (2014) (with Aaron Perzanowski and Marketa Trimble)
- ∞ Progress Evaluated: A Qualitative Analysis of “Promoting Progress” through IP, in IP HANDBOOK (Halbert and David eds., Sage 2014)
- ∞ Persuasive Visions: Film and Memory, 10 LAW, CULTURE & THE HUMANITIES 24 (2014)

BIO

Jessica Silbey is a Professor of Law at Northeastern University School of Law in Boston. She teaches in the areas of intellectual property and constitutional law. Professor Silbey’s intellectual property research focuses on the empirical and humanistic dimensions of the legal regulation of creative and innovative work. Her most recent book is *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford University Press 2015), a qualitative empirical investigation of diverse mechanisms and motives for engaging in creative and innovative work challenging the economic analysis of intellectual property law. Other recent publications include *Progress Evaluated: A Qualitative Analysis of “Promoting Progress” through IP*, in IP HANDBOOK (Halbert and David eds., Sage 2014); *Patent Variation: Discerning Diversity Among Patent Functions*, 45 Loy. U. Chi. L. Rev. 441 (2013); *Comparative Tales of Origins and Access: The Future of Intellectual Property Law*, 61 Case Wes. Res. L. R. 195 (2011), and *Mythical Beginnings of Intellectual Property*, 15 Geo. Mason L. R. 319 (2008).

Professor Silbey also writes and researches in the field of law and film, exploring how film is used as a legal tool and how it becomes an object of legal analysis. Representative publications include *Law and Justice on the Small Screen* (Hart 2012) (with Peter Robson); *Picturing Moral Arguments in a Fraught Legal Arena: Fetuses, Phantoms and Ultrasounds*, 16 Geo. J. Gender & Law (2016); *Images In/Of Law*, 57 N.Y.L.S. L. R. 171 (2012/2013); *Evidence Verité and the Law of Film*, 31 Cardozo L. R. 1257 (2010); *Cross-Examining Film*, 8 U. Md. J. Race, Religion & Gender & L. 101 (2009); *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 Colum. J. L. & Arts. 107 (2005); and *Judges as Film Critics: New Approaches to Filmic Evidence*, 39 Mich. J. L. Reform 493 (2004).

Jessica earned her BA from Stanford University and her JD and PhD (in comparative literature) from the University of Michigan. She is also Faculty Affiliate at the Klein Berkman Center at Harvard and an affiliate fellow at Yale’s Information Society Project. Prior to teaching, she clerked in the federal courts and worked in private practice focusing on intellectual property and reproductive rights.