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INTRODUCTION

TWO ESSAYS ON INTELLECTUAL PROPERTY AND SOCIAL JUSTICE

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The two faculty-written articles in this issue were presented at St. Thomas in a pair of programs on “Intellectual Property and Social Justice” in Spring 2021. Intellectual property (IP) laws—copyright, patent, trademark, and similar laws—can have significant effects on social equity for people and groups that are vulnerable or historically disadvantaged. For example, much debate has arisen on whether the exclusivity that drug companies enjoy over patented drugs or undisclosed testing and production data helps incentivize development of new, essential medicines or, instead, unacceptably restricts access to such medicines—most recently, COVID-19 vaccines—in the least developed nations.¹ Copyright laws may analogously place price or transaction-cost barriers to the distribution of works to vulnerable people.² One response to this problem, the multilateral Marrakesh Treaty, sets forth exceptions to copyright law designed to facilitate versions of works for visually impaired people.³ Other efforts in scholarship, advocacy, and policy change aim to protect indigenous peoples’ interest in their traditional knowledge, genetic resources, and traditional cultural expressions;⁴ or to describe how creators from marginalized communities have

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1. The literature is extensive; recent book-length examples include, e.g., *ACCESS TO MEDICINES AND VACCINES: IMPLEMENTING FLEXIBILITIES UNDER INTELLECTUAL PROPERTY LAW* (Carlos M. Correa & Reto M. Hilty eds., 2021); *INTELLECTUAL PROPERTY LAW AND ACCESS TO MEDICINES: TRIPS AGREEMENT, HEALTH, AND PHARMACEUTICALS* (Srividhya Ragavan & Amaka Vanni eds., Routledge 2021); *PATENTS ON LIFE: RELIGIOUS, MORAL, AND SOCIAL ASPECTS OF BIOTECHNOLOGY AND INTELLECTUAL PROPERTY* (Thomas C. Berg, Roman Cholij & Simon Ravenscroft eds., 2019).

2. See, e.g., several chapters in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY* (Gaëlle Krikorian & Amy Kapczynski, eds., 2010).

3. *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, WORLD INTEL. PROP. ORG. (June 27, 2013), <https://www.wipo.int/treaties/en/ip/marrakesh/>.

4. See, e.g., *PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* (Daniel F. Robinson, Ahmed Abdel-Latif & Pedro Roffe eds., Routledge 2017);

participated in IP systems but also faced barriers in, and harms from, those systems.⁵

Professor Kali Murray’s 2021 Law Journal Editor’s Lecture, entitled “Intellectual Property Liberation: An Essay,”⁶ presents a frame for the relationship between IP and social equity. She specifically discusses the difference between “despotic information,” which “create[s] and reinforces unequal legal statuses based on social identity,” and “liberatory information,” which “seeks to use information to achieve a complete re-ordering of previous social status and relationships.”⁷

In the tradition of critical legal theory, Murray observes how facially neutral or “color-blind” IP laws—designed in theory to allow all creators equal expression in a society defined by “democratic consumership”—can support despotic information as much as liberatory information.⁸ Trademarks like Aunt Jemima or Uncle Ben reinforced denigrating racial stereotypes; copyright doctrines dispossessed black musical creators.⁹ Murray begins the project of mapping IP’s support for despotic and liberatory information. The map is complex, she remarks, noting for example how the Supreme Court’s First Amendment decisions protecting “disparaging” and “offensive” trademarks¹⁰ can empower racially derogatory terms but also empower creators like Simon Tam’s band, who challenged anti-Asian prejudice by reclaiming the term “Slants.”¹¹

In their article, Enrico Bonadio and Siri-Helen Egeland discuss copyright protection for street art and graffiti, forms of expression particularly used by creators in vulnerable communities.¹² In particular, they discuss the interaction of these works with augmented reality (AR) and artificial intelligence (AI). “[A]rtists themselves can use these technologies to enhance or modify their works, but more often the interaction happens because others find street art and graffiti to be interesting forms of input data or backdrops

WORLD INTELL. PROP. ORG., INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS (2015).

5. See, e.g., ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS (2020); Shontavia Jackson Johnson, *The Colorblind Patent System and Black Inventors*, LANDSLIDE (Mar.–Apr. 2019), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/colorblind-patent-system-black-inventors/; K.J. Greene, *Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM’NS & ENT. L.J. 339 (1998).

6. Kali Murray, *Intellectual Property and Liberation: An Essay*, 18 U. ST. THOMAS L.J. 546 (2022). Professors Cathay Y.N. Smith (University of Montana) and Aman Gebru (Duquesne University) provided excellent comments on Professor Murray’s lecture at the event.

7. *Id.* at 552.

8. *Id.* at 554–55.

9. *Id.* at 550–51.

10. *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

11. Murray, *supra* note 6, at 556–57.

12. Enrico Bonadio & Siri-Helen Egeland, *Street and Graffiti Art Between Augmented Reality and Artificial Intelligence: A Copyright Perspective*, 18 U. ST. THOMAS L.J. 528 (2022).

for digital creations.”¹³ A prominent example of the latter is Pokémon GO’s display of street art in the street-scene backdrops where players find characters.¹⁴

Concentrating on these digital uses of copyrighted art, Bonadio and Egeland explore a variety of new challenges: how to detect infringement when it occurs in the confines of (say) smartglasses; whether the AR and AI platform providers can be held liable as secondary infringers; whether and when accused infringers can claim fair use; and so forth.¹⁵

Finally, this issue includes a student note, by Mackenzie Sedlack, advocating changes to the provisions in Minnesota statutes that require juveniles to register as sex offenders, just as adults must register.¹⁶ The assimilation of juveniles to adults, she argues, overlooks both the developmental differences between the two groups and the disproportionate ways in which the collateral consequences of registration affect juveniles.¹⁷

The editors are proud to present these varied articles addressing important issues of current and future importance.

13. *Id.* at 528.

14. *Id.* at 533–34.

15. *Id.* at 535–40.

16. Mackenzie Sedlack, *Are Child Sex Offenders Truly Predators? Proposed Change to the Minnesota Legislature Requiring Mandatory Sex Offender Registration for Juveniles*, 18 U. ST. THOMAS L.J. 586 (2022).

17. *Id.* at 590–94.