University of St. Thomas Law Journal

Volume 18
Issue 3 *Intellectual Property and Social Justice*

Article 3

October 2022

Intellectual Property Liberation: An Essay

Kali Murray

ARTICLE

INTELLECTUAL PROPERTY LIBERATION: AN ESSAY (REVISED)

KALI MURRAY*

[LIBERATION, N.][1]

On May 9, 1771, Samuel Sherwin placed an advertisement in the Virginia Gazette.[2] The advertisement sought help in returning:

> . . . a mulatto fellow named PETER: he is about 5 feet 6 inches high, well set, and about 25 years old. The said slave run away once before, and was out [about one year], he was brought home the 14th, on which day I branded him S on the cheek, and R on the other, though very probably he will endeavour to take them out, or deface them. I likewise had his hair cut off, which is long, when grown out, and very black. His greatest resort [hiding area], during the time he was out before, was Petersburg, Chesterfield, Prince George, and as far as Roanoke, near Mush Island, and James river, passing as a free man, and working on board of ves- sels: . . . He has a brother belonging to Mr. Dunlop, near Cabin Point, who I suspect harbor him; he has also several brothers and sisters in North Carolina. . . .
>
> Samuel Sherwin, *Virginia Gazette*, 9 May 1771.

This fugitive advertisement tells a rich story despite its brief nature. Details fill in the story: the height of Peter, the age of Peter, the length of Peter's hair. The fugitive advertisement has a plot. Peter had escaped at least one time before, Samuel had punished Peter by branding him on the

* Kali Nicole Murray, Professor of Law, Marquette University Law School. I would like to thank Professor Thomas Berg for his kind invitation to speak, Editor in Chief (2021) Mary Sue Gerber for her thorough organization of this event, and Aman Gebru and Cathay Smith for their astute commentary. This Essay is dedicated to the first generation of a free people, Abraham Lincoln Gaines, Minnie Plant Gaines, Alex Weems and Carrie Cloud Weems, and Mark and Rosa Taylor. This Essay is revised from an introduction to a larger book project considering the rela- tionship of intellectual property and liberation, entitled *Intellectual Property and Liberation*.

1. *See Liberation*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

2. NAT'L HUMANS. CTR., *Run away from the Subscriber: Runaway Slave Advertisements*, THE MAKING OF AFRICAN AM. IDENTITY: VOL. I, 1500-1865, 3 (2007) http://nationalhumanitiescenter.org/pds/maai/enslavement/text8/virginiarunawayads.pdf.

face and cutting his hair, and Peter had escaped again. The fugitive advertisement had characters—not only Peter and Samuel—but Peter's family scattered throughout Virginia and North Carolina. As Hannah Walser notes, we can treat the fugitive advertisement—like the novel—as a genre.

A Fugitive Slave Advertisement ("FSA") was not meant to be read as an argument or intellectual exercise: it was an address from a white slaveholder to a (usually) white audience aimed at the practical goal of identifying and apprehending an enslaved individual. Analyzing such texts successfully means attending to the unspoken, shared assumptions of writer and reader, which may be embedded in syntax.

> To read an FSA, or even a thousand, is to sample an ongoing conversations that took place in the both newspaper pages and in the daily life of white Southerners—a conversation that had as its purpose the control and coercion of enslaved people, as well as the intimidation and suppression of free African-Americans.[3]

[THE ACTION OF LIBERATING (ESP. FROM CONFINEMENT OR SERVITUDE); THE CONDITION OF BEING LIBERATED; RELEASE.][4]

The advertisement, then, should be understood as a creation of the human mind. Creations of the mind, of course, are protected under the law as intellectual property.

We can speculate that the advertisement itself could be protected under the modern copyright regime.[5] The advertisement is a literary work under Section 102; indeed, the Copyright Compendium of the United States Copyright Office acknowledges that "advertising copy" is protected under Section 102.[6] The advertisement was fixed in a tangible medium of expression.[7] The advertisement had an author, Samuel Sherwin, and it was his independent creation.[8]

The advertisement also refers to another intellectual property: the marks placed on Peter's face after he sought to escape from Samuel. Sa- muel notes "*he was brought home the 14th, on which day I branded him S*

3. Hannah Walzer, *Under Description: The Fugitive Slave Advertisement as Genre*, 92 AM. LITERATURE 61, 63 (2020).

4. OXFORD ENGLISH DICTIONARY, *supra* note 1.

5. *See* 17 U.S.C. § 101.

6. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFF. PRACS., CH. 703 (3d ed. 2014).

7. *See* 17 U.S.C. § 102(a)(1) (a work is protected if one of eight enumerated categories applies, including a "literary work"); *see also* 17 U.S.C. § 101 ("Literary works" are "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.").

8. *See* 17 U.S.C. § 102(a) (a work is protected if it is "fixed in any tangible medium of expression."); *see also* 17 U.S.C. § 101 ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.").

on the cheek, and R on the other."[9] In modern trademark law, the mark placed on Peter, the S/R mark, is considered a word mark.[10] The S/R was affixed on a good that is placed within interstate commerce.[11] The S/R mark was distinctive; that is, the mark distinguished Peter, the good, from another enslaved person.[12]

The advertisement placed by Samuel Sherwin complicates a story that we like to tell ourselves about intellectual property law. Specifically, we like to tell a story that protecting intellectual property produces a net social good, whether it is economic, social, or political in nature. Traditional intel- lectual property scholarship has maintained the net good of intellectual property protection arises because it provides economic, political, and so- cial incentives ("the incentive function") for authors, inventors, and creators to produce creative works protected by intellectual property.[13] Scholarship, produced over the last twenty-five years, however, has challenged the relatively straightforward account of the incentive function of intellectual property law. Three, sometimes competing, sometimes complimentary, models have emerged: the competitive function of intellectual property goods, the contest function of intellectual property goods, and the control function of intellectual property goods.

The competitive function of intellectual property goods looks to the ways in which intellectual property goods manage competition. This management of competition can vary, as intellectual property law can manage competition between different services and goods.[14] Intellectual property law can manage competition between businesses in other ways as intellec- tual property law can police the boundaries more informal innovative ef- forts that are not protected by intellectual property and more formal innovative activities that are protected by intellectual property goods,[15] and by setting ownership rules between who owns intellectual property goods

9. NAT'L HUMANS. CTR., *supra* note 2, at 3 (emphasis added); *see* 15 U.S.C. § 1127 ("The term 'trademark' includes any word, name, symbol, or device, or any combination thereof ").

10. *See* 15 U.S.C. § 1127 (a trademark must be "used by a person, or which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter.").

11. *Id.*

12. *See* 15 U.S.C. § 1052 ("No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature ").

13. *See* Mark Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 130 (2004) (discussing ex ante incentive strategy in intellectual property goods).

14. *See* Roger Feldman & Felix Lobo, *Competition in Prescription Drug Markets: The Roles of Trademarks, Advertising, and Generic Names*, 14 EUR. J. OF HEALTH ECON. 667, 668 (2013) (examining the relationship between trademarks and product differentiation in driving product recognition in the prescriptive drug market).

15. *See* David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1108–29 (2012) (discussing the intersection of innovative naming practices and formal intellectual property rights in the provision of roller derby names).

within an employment context.[16] Finally, intellectual property can directly intersect with broader competition regimes including antitrust and unfair competition law.[17]

The contest function of intellectual property goods posits the intellectual property is the discursive subject and the discursive site of political contest over, for instance, the construction of citizenship,[18] innovation and trade,[19] indigeneity,[20] and the labor dynamics between creators and disseminators.[21] The contest function, thus, has situated intellectual property against other areas including constitutional, human rights, civil rights, and administrative law.

The control function of intellectual property goods explores the ways intellectual property goods serve as mechanisms for the presentation of an individual[22] and collective self through traditional print, social, and digital mediums.[23] While these new ways of understanding the function of intellectual property law may complicate our understanding of the primary normative function of intellectual property goods, they remain confident in the idea that intellectual property goods are, for the most part, a net positive good.

Samuel's fugitive slave advertisement further complicates this story. The advertisement suggests we need to understand that intellectual property law may function in a way that is harmful, or indeed, even more than that, a

16. *See* On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 856–61 (2013) (examining the relationship of non-compete agreements on employment relationships from a behavioral economics perspective).

17. *See* Mark P. McKenna, *Property and Equity in Trademark Law*, 23 MARQ. INTEL. PROP. L. REV. 117, 123 (2019) (discussing the competitive function of trademark and unfair competition law).

18. *See* KALI MURRAY, A POLITICS OF PATENT LAW: CRAFTING THE PARTICIPATORY PATENT BARGAIN 28 (2013) (the patent as a marker for citizenship discourse); *see also* Kara Swanson, *Race and Selective Memory: Reflections in Inventions of Slave*, 120 COLUM. L. REV. 1077, 1082 (2020) (the use of patent disputes to project a politics of belonging for African-Americans making citizenship claims).

19. *See* Shobita Parthasarathy, *Innovation Policy, Structural Inequality, and COVID-19*, 7 DEMOCRATIC THEORY 104 (2020) (assessing how innovation policy is the subject of political contests that fails to attend the needs of a vulnerable population).

20. *See* Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1088 (2009) (assessing indigenous cultural property as a counterpoint to traditional property rights).

21. *See* Catherine Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920*, 52 HASTINGS L.J. 441, 446 (2001) (assessing the emerging use of trade secrets in disputes over employee ownership within a moral economy framework).

22. *See* William McGeveran, *Selfmarks*, 56 HOUS. L. REV. 333, 339–47 (2018) (examining the three primary scenarios for the application of a "self mark" that protects the crafting of a professional persona).

23. *See* Stephanie L. Mahin & Victoria S. Ekstrand, *Old Law, New Tech, and Citizen-Cre- ated Hashtags: #BlackLivesMatter and the Case for Provisional Hashtag Marks*, 98 JOURNALISM & MASS COMMC'N Q. 13 (2021) (assessing the use of the #BlackLivesMatter within traditional, social, and digital media).

horror. To describe the horror in this advertisement seems almost redun- dant. An obvious horror exists in the brutal defilement of Peter's body. Samuel himself recognizes the horror of his brutality, stating that Peter "very probably. . . will endeavour to take [the S/R mark] out, or deface them."[24] But other horrors are present as well. Peter, a *human,* was a *good*; he, a *human*, was used *in commerce*, that is, a nationwide marketplace that was organized around the sale of human bodies. In fact, we only can under- stand the fugitive advertisement as a genre—this story was replicated over and over again because these advertisements were a considerable source of revenue for newspapers during the antebellum period.[25]

Sometimes, then, intellectual property law can be a net bad. An intellectual property good, like a copyright or trademark, can be implicated in systems of inequality, which can reinforce specific social identities, and promote discrimination and violence based on that social identity. A trademark can be registered for a stereotyped image; Aunt Jemima stands as a famous example of this reality.[26] The Ku Klux Klan copyrighted its Constitution and Laws in 1921,[27] and in Article V, Section 3 of the Constitution, granted the Emperor of the Invisible Empire the ability to "create and cause to be promulgated all countersigns, passwords, ritualistic or kloranic work and secret signs, symbols and work of this Order."[28]

Indeed, as intellectual property goods are often conceived, the moral aims of the intellectual property good may not be part of the assessment. For instance, in *Juicy Whip, Inc. v. Orange Bang, Inc.*,[29] a case which ex- amined a potentially deceptive patented slushie machine, Judge William Curtis Bryson of the United States Court of Appeals for the Federal Circuit wrote:

> Of course, Congress is free to declare particular types of inventions unpatentable for a variety of reasons, including deceptiveness. *Cf.* 42 U.S.C. § 2181(a) (exempting from patent protection inventions useful solely in connection with special nuclear material or atomic weapons). Until such time as Congress does so, however, we find no basis in section 101 to hold that inventions

24. NAT'L HUMANS. CTR., *supra* note 2, at 3.

25. *See* Jordan E. Taylor, *Enquire of the Printer: Newspaper Advertising and the Moral Economy of the North American Slave Trade, 1704–1807*, 18 EARLY AM. STUD.: AN INTERDISC. J. 287, 292 (2020) ("[a]lthough slave notices comprised just a portion of a printer's income, eight- eenth-century newspapers operated at such fine margins that some might have needed this adver- tising revenue to survive.").

26. *See* Deborah R. Gerhardt, *The Last Breakfast with Aunt Jemima and Its Impact on Trademark Theory*, 45 COLUM. J.L. & ARTS 231, 239 (2022).

27. THE CONSTITUTION AND LAWS OF THE KNIGHTS OF THE KU KLUX KLAN 1921, https://archive.lib.msu.edu/DMC/AmRad/constitutionlawsknights.pdf.

28. *Id.* at art. V, § 3.

29. Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1368 (Fed. Cir. 1999).

> can be ruled unpatentable for lack of utility simply because they have the capacity to fool some members of the public.[30]

Beyond the fact that intellectual property protection can be offered when its goals are immoral, even intellectual property "done right" can still be a "net bad." Anjali Vats asserts trademark and copyright law relies on resonant racialized scripts to draw lines between creators and infringers within each field.[31] Kevin Greene and Tuneen Chisholm have identified the ways doctrinal components of copyright law have fostered systematic dispossession of African-Americans within the musical industry.[32]

I add to this scholarship that emphasizes the potential net bad of intellectual property by advancing two claims. First, our understanding of intellectual property law, in both its historical development and its current forms, should be situated against other potential legally protected forms of information. I have contended in other work, that intellectual property law both absorbs and reacts to other areas of information law, including: property, free speech, classification regimes, and right to information law. Second, understanding this process of absorption and reaction can be deepened not only through juxtaposition of intellectual property to other doctrinal areas, but also thinking about intellectual property law as a doctrinal space where we can examine other issues fundamental to understanding political and constitutional theory, such as the provision of social goods or in contests over the equality within in a political order. I am not alone in this project; the work of Madhavi Sunder[33] and Janewa Osei-Tutu[34] examines how intellectual property goods serve to achieve the goal of human dignity and development, and Jessica Silbey explores the ways in which intellectual property law is in dialogue with fundamental constitutional values such as equality, privacy, and community welfare.[35]

---

30. *Id.*

31. ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE AND THE MAKING OF THE AMERICAS (2020) (assessing the construction of racialized scripts in intellectual property law).

32. Kevin Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMMC'N & ENT. L.J. 339 (1998) (assessing the treatment of African-American musical performers within copyright law); Tuneen Chisholm, *In Lieu of Moral Rights for IP-Wronged Music Vocalists: Personhood Theory, Moral Rights, and the WPPT Revisited*, 92 ST. JOHN'S L. REV. 453 (2018) (assessing the treatment of African-American musicians and the lack of perform- ance right in copyright law).

33. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE (2012) (assessing the need for intellec- tual property goods tied "to the value of human flourishing").

34. J. Janewa Osei-Tutu, *Human Development as a Core Objective of Global Intellectual Property*, 105 KY. L.J. 1 (2016) (human development is a core value of the international intellectual property regime).

35. Jessica Silbey, *Against Progress: Interventions About Equality in Supreme Court Cases About Copyright Law*, 19 CHI. KENT J. INTELL. PROP. 280 (2020) (analyzing how the Supreme Court has utilized an equality framework in intellectual property law).

[THE ACTION OF FREEING A REGION OR ITS PEOPLE FROM AN OPPRESSOR OR ENEMY FORCE; THE RESULT OF THIS. IN LATER USE FREQUENTLY *IRONIC*.][36]

The doctrinal formation of intellectual property must be situated against two different forms of information: the form of despotic information and the form of liberatory information.

What is despotic information? I define despotic forms of information as those legally protected forms of information that create and reinforce unequal legal statuses based on social identity, whether race, gender, or other social identities. The problem conflating legal status with social iden- tity and social status occurs because "[o]fficial legal status" as Davina Bhandar[37] notes, "has been used to define and legislate the very nature of personhood in society. Status determines membership, belonging and may also define the rights and entitlements that a political subject or actor can demand of the state."[38]

We can trace this function of despotic information to the systematic enslavement of Africans in the United States. Status and hierarchy were central to the enslavement of Africans in the United States. Brenna Bhandar describes a central component of enslavement in the United States as "the transmissibility of status through biological inheritance through the racial and gendered schemas."[39] Whether we describe it as a category of "social death," or the permanent, violent domination of natally alienated and gener- ally dishonored persons,[40] or as a type of "naked life," where the individual is left to fend for themselves without protection by a sovereign power,[41] the enslavement of Africans in a New World Diaspora was tied to a matrix of laws, including information law, that sought to impose a social order that depended on the ongoing domination of enslaved persons.

The function of despotic information, then, in the law is to enforce a hierarchy: by defining a status, by reinforcing a status, and by drawing boundaries between different statuses. We can trace how despotic information operated within the economy of enslavement. I start by unpacking a term that became a common way to discuss the different harms of slavery, "the badges and incidents of slavery."[42] The term "badge" itself is a word

36. OXFORD ENGLISH DICTIONARY, *supra* note 1.

37. Davina Bhandar, *Decolonizing the Politics of Status: When the Border Crosses Us*, 1 DARKMATTER J. 14 (2016).

38. *Id.*

39. BRENNA BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND AND RACIAL REGIMES OF OWNERSHIP 157 (2018).

40. ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 13 (1982).

41. *See* GIORGIO AMGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 81–85 (1998).

42. For instance, in a dissent to *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 449 (1968), Justice William Douglas recited harms that outlined the "badges" of slavery, finally noting that "[t]his recital is enough to show how prejudices, once part and parcel of slavery, still persist. The

that has always been used to discuss a hierarchical social status; in its original meaning it was a symbolic sign of the relationship of a knight to its retainers.[43] The term "incidents" typically referred to a privilege, burden, or custom that attached to an office or estate.[44] In relationship to slavery, it appears to be related to an idea that the enslaved person inherited the "office" of enslavement, a status reinforced by the "badge" of enslavement, and thus, the master could exercise some customs in relationship to that "office."

The ability to brand an enslaved person, thus, could be described as a "badge and incident" of slavery, and therefore, serve as a way to define the relationship between the enslaved person and the owner. Hannah Farber, in her study of early American commercial property marks, examining the methods used to brand individuals, demonstrates that enslaved people were branded with alphanumeric marks, tobacco origin marks, and other unique marks that were "unique visual expression, and someone who 'read' the mark off the bill of lading was not reading it in the same way that he read the shipper's name or the date of shipment."[45]

The legal literature that directly links the branding marks appears sparse. Charles Pugh Walcott, the then Attorney General of Ohio, however, arguing before the Supreme Court of Ohio in *Ex parte Bushnell*,[46] (a case that addressed whether the state of Ohio could issue a *writ of habeas corpus* to intervene in the prosecution of an anti-slavery activist that helped an enslaved person evade capture under the Fugitive Slave Act), did refer to the act of branding as an "incident" of enslavement. He noted that a key incident of slavery was "to brand the slave or slit his ears to mark him as his property!"[47] The term "badges and incidents" as it applies to the branding of a slave appears to resemble something like a trademark. A "badge of slavery," like a brand, used a visualized image to convey an owned thing to others.

What does understanding the different functions of the "badge" of slavery tell us about the development of intellectual property law in the Atlantic world? Initially, it shows us a new way of conceiving the historical development of trademark law in the United States. Until recently, our account of trademark law in the United States was remarkably sparse; the law

men who sat in Congress in 1866 were trying to remove some of the badges or 'customs' of slavery when they enacted § 1982."

43. *Badge*, Oxford English Dictionary (3d ed. 2010).

44. *Incident*, Oxford English Dictionary (3d ed. 2010).

45. Hannah Farber, *Early American Commercial Property Marks: Reading According to Code, and Beyond*, 57 Early Am. Literature 43, 58 (2022).

46. *Ex parte* Bushnell, 9 Ohio St. 77 (1859).

47. *Id.* at 149.

of "badges" within the economy of enslavement may prove to be a crucial missing link.[48]

Equally important, however, it provides a contrast to modern intellectual property law. Intellectual property law—copyrights, trademarks, and patents—should be framed as an ideological project that sought to change social hierarches by reforming how information was conveyed and protected. As to trademark law, the key ideological project is democratic consumership.[49] The principle of democratic consumership is based on the normative ideal that every person should have access to many types of products, whether they be books, clothing, or even skin. For example, Shontavia Johnson,[50] in her examination of trademarked tattoos, contrasts trademark tattoos sharply to the practice of branding slaves, noting "[in] contrast, to the pre-American Civil War Period, parties who permanently place trademarks on their bodies now generally do so based on their own free will and not because a slave owner has forced them to."[51] Modern forms of intellectual property law should be juxtaposed against despotic information to operate as a category of "light" information form.

In that respect, modern intellectual property is a form of information that seeks to produce equality in the social production of information. Based on this mirror of despotic information, we could cast intellectual property as a triumphal outcome in the law. Doing so, however, would fail if we do not contrast intellectual property in light of another mirror, *liber- atory information*, which seeks to create new forms of information by "working" through inequity in the social production of information.[52]

Liberatory information seeks not only to preserve current social statuses in a state of equality; rather, it seeks to use information to achieve a complete re-ordering of previous social status and relationships.[53] When we contrast intellectual property law to liberatory forms of information, liberatory information challenges the basic presumptions underlying modern "light" form of information. For instance, the ideological commitments of

48. *See* Farber, *supra* note 45, at 57–59 (discussing branding practices within the enslave- ment economy); *see also* Katrina H.B. Keefer, *Marked by Fire: Brands, Slavery and Identity*, 40 SLAVERY & ABOLITION: A J. OF SLAVE & POST SLAVE STUD. 659 (2019).

49. As I will examine in my larger project, there is a corollary ideological project that has more of an impact on understanding patent and copyright law. This ideological project can be described as a democratic creation, that is, a claim that any person can produce socially relevant information.

50. Shontavia Johnson, *BRANDED: Trademark Tattoos, Slave Owner Brands, and the Right to Have "Free" Skin*, 22 MICH. TELECOMM. & TECH. L. REV. 225 (2016).

51. *Id.* at 240.

52. The normative project of understanding liberty as an autonomous method of describing the political relationship is extensive. *See, e.g.*, Grant Silva, *"The Americas Seek Not Enlighten- ment but Liberation": On the Philosophical Significance of Liberation for Philosophy in the Americas*, 13 THE PLURALIST 1 (2018) (assessing the framework of liberation philosophy). Again, examining liberatory information as a category will be a significant element of my larger project.

53. *Id.* at 9.

democratic consumership—providing everyone access to a range of consumer goods—does not solve the issue that the marketplace itself may be defined by pervasive social hierarchies. A common example of the failures of democratic consumership is internet dating services, where nominally, everyone has access to the same service of dating on the internet, but in- stead has been demonstrated to be rife with pervasive social hierarchies premised on the supposed attractiveness of different racial categories.[54] In- deed, I often point out the pervasive use of the term "brand" to describe a range of services offered by a singular market actor—despite its problem- atic origins in the market of enslavement—speaks to the problems of a democratic consumership, insofar as *access* to the marketplaces does not mean we are operating the same in the marketplace.

I admit, here, that the project of understanding and conceiving of liberatory information, is, still for me, a project very much in progress. Mapping out the project of liberatory information will have to grapple with two fundamental questions.

First, the project of liberatory information is fundamentally interested in how "outsiders" perceive the formation of the law. It will entail looking at the formation of intellectual property law in light of other frameworks of cultural production that are not typically considered in intellectual property law. A simple way to achieve this goal might be to simply include more types of primary sources in intellectual property law. For instance, I often discuss Article 70 of the Haitian Constitution of 1801 as an alternative framework to the IP Clause in the Constitution of the United States. Article 70, notably, protects two types of inventions: "an award to the inventors of rural machines" or a patent to inventors for "the preservation of the exclu- sive ownership of their discoveries."[55] The Haitian Constitution of 1801 serves as an important counterpoint to our own constitutional framework insofar as like the United States, the Haitian drafters of the Haitian Consti- tution of 1801 conceived of a patent law that rewarded the democratic crea- tion of an individual inventor, but differed in the provision of awards— whether for novelty or on another basis—to rural invention. Thus, the Hai- tian Constitution reflects the concern that economic development of an under-resourced nation could serve as a fundamental focus of intellectual property law.

The project of liberatory information is not only a project of inclusion. It also offers a more complex way to take seriously outsider *thinking* on culture production and its impact on doctrinal formation of intellectual

54. *See, e.g.*, Belinda Robnett & Cynthia Feliciano, *Patterns of Racial-Ethnic Exclusion by Internet Dates*, 89 Soc. Forces 807 (2011) (examining patterns of racial-ethnic exclusion by race and gender and concluding that persistent patterns of in-group dating tend to harm Asian males and African-American women).

55. The Saint-Domingue Constitution Jul. 8, 1801, art. 70 (Haiti).

property law. Here, I draw on Brandon Byrd's recent reflection on Black intellectual history.[56] Byrd states that:

> At its core, African American intellectual history is the study of the *thinking of* (not about) enslaved Africans and their descend- ants—of humans who were defined as chattel, not thinkers, and denied full inclusion in Eurocentric conceptualizations of human- ity. It is a field very much concerned with how ideas move in the world and, in the spirit of the Black intellectual tradition, troubles post-Enlightenment ideas of progress and linearity by asking how ideas of the ostensible past might pertain to possible, liberated futures.[57]

Byrd's claim as to the autonomy of Black Intellectual Tradition helps us to discover new analytical and design approaches within intellectual property law. I, as a patent law scholar, for instance, have been intrigued about the potential relationship between Afrofuturism, a field of study de- fined as, "speculative fiction that treats African-American themes and ad- dresses African-American concerns in the context of twentieth-century technoculture—and, more generally, African-American signification that appropriates images of technology and a prosthetically enhanced future."[58] Engaging with Afrofuturism as a normative approach has led me to read patent specifications as a type of science future, projecting forward a vision of new technology in the future. The disclosed patent, in this reading, becomes a fundamental projection of the future, and maybe, just maybe, it challenges us to rethink the role of patent law itself.

Second, how does law respond to liberation as a framework? I admit this question poses a more difficult question than my first one. Why? De- signing legal systems around the project of liberation means that we accept the link between information and the preservation of social hierarchies. Additionally, liberatory projects in the law are often contingent, fraught processes. Here, I keep in mind the challenges of a liberation framework posed by the recent decision of the United States Supreme Court in *Matal v. Tam* ("*Tam*").[59] In *Tam,* an applicant named Simon Tam sought review of the decision of the Trademark Trial and Appeal Board[60] to uphold an exam- ining attorney's refusal to register the trademark "THE SLANTS" for a musical band under Section 2(a) of the Lanham Act because the "slants"

56. Brandon Byrd, *The Rise of African American Intellectual History*, 18 MOD. INTELL. HIST. 833 (2020).

57. *Id.* at 863 (emphasis added).

58. Mark Dery, *Black to the Future: Interview with Samuel R. Delany, Greg Tate, and Tricia Rose*, *in* FLAME WARS: THE DISCOURSE OF CYBERCULTURE 180 (1994); Tiffany E. Barber, Reynaldo Anderson, Mark Dery & Sheree Rene`e Thomas, *25 Years of AfroFuturism and Black Speculative Thought: Roundtable with Tiffany E. Barber, Reynaldo Anderson, Mark Dery, and Sheree Rene`e Thompson*, 39 TOPIA: CAN. J. OF CULTURAL STUD. 136 (2018) (assessing the development of Afro-Futurism as a doctrine).

59. Matal v. Tam, 137 S. Ct. 1744 (2017).

60. *In re* Tam, 108 U.S.P.Q.2d 1305 (Trademark Tr. & App. Bd. 2013).

was a disparaging mark. Simon Tam has written of the act of using what had traditionally been a slur as a liberatory act, noting that he "named the band the Slants because it represented our perspective—or slant—on life as people of color. It was a deliberate act of claiming an identity as well as a nod to Asian-American activists who had been using the term for de- cades."[61] In the opinion authored by Justice Samuel Alito, the Supreme Court in *Tam* upheld Mr. Tam's claim that the disparagement clause of Section 2(a) of the Lanham Act was overbroad, and thus, not narrowly drawn under the First Amendment "to drive out trademarks that support invidious discrimination."[62]

Tam is a case that poses a normative dilemma as to liberatory information. Mr. Tam's reclaiming of an offensive term is an inherently liberatory act, but the Supreme Court's recognition of Mr. Tam's liberatory act also means that it is much easier to register offensive trademarks that reproduce social hierarchies. Considering the appropriate outcome in *Tam* suggests why legal complexities will accompany the liberatory project in intellectual property law. Can (should?) intellectual property law bear this weight?

[*COLLOQUIAL*. STEALING, MISAPPROPRIATION; AN INSTANCE OF THIS. CF. LIBERATE V. 2B.RECORDED EARLIEST IN *ATTRIBUTIVE* USE.]

In the end, as I anticipate the challenges of the project, I return to the story of Samuel and Peter. And since I started this Essay with Samuel's words, I want to end with the story of Peter. I admit, while I agree with Hannah Farber's general assumption that the fugitive advertisement was written with a white reader in mind, with the grace of history, we can read it with our eyes. And there is always, for me, one hopeful thought in reading these advertisements: maybe, just maybe, Peter (like all of us, it must be said) found his way towards freedom.

61. Simon Tam, *At the Supreme Court, the Slants Are Fighting for More Than a Band Name*, NBC NEWS (Jan. 17, 2017), https://www.nbcnews.com/news/asian-america/opinion-supreme-court-case-slants-are-fighting-more-band-name-n707831.

62. *Matal*, 137 S. Ct. at 1765.