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Coming of Age in IP: What Goods, Infrastructures, and Property Theory Suggest about the Flourishing of Intellectual Property Scholarship

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COMING OF AGE IN IP: WHAT GOODS, INFRASTRUCTURES, AND PROPERTY THEORY SUGGEST ABOUT THE FLOURISHING OF INTELLECTUAL PROPERTY SCHOLARSHIP

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RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS (2013). Pp. 288. Hardcover $55.00.

MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012). Pp. 272. Hardcover $35.00.

BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES (2012). Pp. 436. Hardcover $85.00.

The field of intellectual property ("IP") scholarship is a comparatively young one, when juxtaposed with fields of law like contracts, property, or even torts and unfair competition. Those older areas of law, especially property, possess distinguished jurisprudential histories, with hundreds of years—millennia, in the case of property—of erudition informing them. Those older areas of law originally provided some basis for IP laws, and different areas of IP reflect these different doctrinal origins. It follows that IP law has a much shorter scholarly history than its predecessor doctrines. Despite the origins of IP legislation in the Enlightenment and in the founding of the Republic, a full body of scholarship in the area was slow to germinate, and arguably slower still to mature.[1] Full consideration of the pace, emergence, and evolution of IP scholarship is well beyond the scope of this review.[2] Yet it is clear that the rapid growth and increasing centrality of IP to the global economy has led to more law

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1. Edward C. Walterscheid, *To Promote The Progress Of Science And Useful Arts: The Background And Origin Of The Intellectual Property Clause Of The United States Constitution*, J. OF INT. PROP. L. 2, 16 (1994).

2. Partial explanation can be found in the fact that intellectual property laws did not play a central role in the economy for earlier generations. In the contemporary "knowledge economy," by contrast, intellectual property protection has a crucial place. Greater attention to its structure and purpose in our era, as well as greater awareness of its limitations, seem thus unsurprising. Combined with the emergence of a greater diversity of academic work in law, and a substantial increase in volume of scholarship and greater specificity in topic, it seems historically inevitable, perhaps, that intellectual property would emerge as a field of inquiry in its own right.

being made, more IP lawyers needed to interpret and police that law, and more scholarly interest as a function of all that legal growth.[3]

In recent decades, IP scholarship has witnessed a crescendo. One could decry the noise, conceding one's own lack of perfect pitch of course, but I prefer to celebrate the symphony, however haphazard, and take the cacophony along with it. By contrast, by the mid nineteenth-century, little scholarly sound as we conceive it would have been available to greet the ear. In the nineteenth century, the writings on IP tended to be summaries or treatises, though this was true of American law in general in this era.[4] Starting in the fin-de-siècle and early twentieth century, however, certain works of scholarship emerged that are arguably classic works of IP law and theory today.[5] Their existence indicates that there was scholarship in this field of the sort we consider scholarship today. There was, in fact, a field; and some of its scholarship was very good. It helped shape contemporary academic discourse as well as today's IP laws themselves. Scholarship in particular from around the 1930s and 1940s (especially in trademark),[6] the 1950s (especially in patent),[7] and the 1960s and 1970s (especially in copyright), produced many lasting gems.[8] Nonetheless, IP scholarship has greatly increased in volume and—happily—in diversity and sophistication, too, as a function of many factors. These factors likely include the increase in the size of the professoriate, the growth and codification of the IP laws themselves, and the emergence of IP as a central component—if not the central

3. William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001).

4. With the exception of Justice Story's treatises, which Grant Gilmore calls "works of impressive scholarship and of great originality," the writings of the early nineteenth century were largely workmanlike, but not deeply intellectual. GRANT GILMORE, THE AGES OF AMERICAN LAW 28 (1977). "The books were conceived as manuals for practitioners and were mostly uncritical collections of case digests . . . . It was a literature which, apart from such exceptional accomplishments as [Justice] Story's, had no jurisprudential pretensions whatever." *Id.* at 29. For examples of such treatises, see GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT (1847); EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (1879); ALBERT H. WALKER, TEXT-BOOK OF THE PATENT LAWS OF THE UNITED STATES OF AMERICA (1883).

5. For a wonderful resource assembling many of the field's earliest treatises and works, see Mike Madison, *Lost Classics of Intellectual Property Law: 1 of 4*, MADISONIAN.NET (Jan. 1, 2010), http://madisonian.net/2010/01/01/lost-classics-of-intellectual-property-law-1-of-4/. The first part of the nineteenth century saw a rise in the legal treatise, and many of the works Madison cites from that era are indeed more like treatises than like the scholarship model we consider to be pathclearing today.

6. *See, e.g.*, RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS (1945); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Milton Handler & Charles Pickett, *Trade-Marks and Trade Names—An Analysis and Synthesis*, 30 COLUM. L. REV. 168 (1930); Beverly W. Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 MICH. L. REV. 967 (1952); Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927).

7. *See, e.g.*, HARRY A. TOULMIN, INVENTION AND THE LAW (1936); Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1 (1950); Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1 ECONOMICA 30 (1934); Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws*, 24 J. PATENT OFF. SOC'Y 85 (1942); Fritz Machlup, *An Economic Review of the Patent System*, S. COMM. ON THE JUDICIARY, 85TH CONG., STUDY NO. 15 (Comm. Print 1958).

8. *See, e.g.*, BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967); Melville B. Nimmer, *Two Copyright Crises*, Foreword *in* NEW TECHNOLOGY AND THE LAW OF COPYRIGHT, REPROGRAPHY AND COMPUTERS, 15 UCLA L. REV. 931 (1968); L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966); Melville B. Nimmer, *Copyright vs. The First Amendment*, 17 BULL. COPYRIGHT SOC'Y U.S.A. 255 (1970); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (1934); Martin A. Roeder, *The Doctrine of Moral Rights*, 53 HARV. L. REV. 554 (1940); Leon Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203 (1954).

component—in today's "knowledge economy."[9] It is therefore heartening to see, reflected in the range and depth of the three books selected for this review, that the field of IP scholarship has, to borrow from Margaret Mead, genuinely come of age.[10] The three books selected for this review collectively put to rest any doubts about the field's intellectual and methodological maturity, if any doubts could be said still to exist. IP scholarship now flourishes in a non-uniform, rigorous, ever-evolving, methodologically rich and polyglottal way.

In their book, *Laws of Creation: Property Rights in the World of Ideas*, Ronald Cass and Keith Hylton approach IP through an economic lens, seeking to counter what they perceive to be a normative bias against property rights in IP scholarship.[11] This bias could be described as anti-expansionist since it decries the perceived expansion of IP rights. Investigating canonical texts from philosophy, economic theory, and property, Cass and Hylton offer a critique of the anti-expansionists and a justification for those willing to consider the opposing view, namely, that the expansion of IP rights, which they concede has occurred, may not be cause for concern.

In *From Goods to a Good Life: Intellectual Property and Global Justice*, Madhavi Sunder writes to provide an alternative narrative to counter some of the weight of economic theories of intellectual property's creation, consumption, and protection. Conjuring a notion of IP as participatory culture, she insists on a consequentialist vision of IP in which global justice can and should be expressly considered to be one of IP's highest ends.[12]

Brett Frischmann's book, *Infrastructure: The Social Value of Shared Resources*, represents not a middle ground so much as a third way. Using and critiquing economic theory. Frischmann innovatively connects the interdisciplinary concepts of "infrastructure" and "the commons," emphasizing demand-side microeconomics.[13] He shows how infrastructures underpin and shape many resources, including, somewhat counterintuitively, not just internet usage but also IP. His work, like Sunder's, is a critique of the economic vision, but unlike hers, which is largely an external one, Frischmann's mobilizes economics from an internal perspective, at the confluence of regulatory economics and public welfare economics. By attending to the role and importance of infrastructures, in light of theories of commons management, he arrives at a normative vision of nondiscrimination that urges scholars to "move beyond the impoverished [simplistic] view of infrastructure . . . and grapple with the functional relationships between infrastructure and interdependent systems."[14] Key to both Frischmann and Sunder, however different their books may be, is a sense of frustration with the limits of economic models, whatever their very real benefits may have been, and may continue to be. Both scholars show themselves

9. Walter W. Powell & Kaisa Snellman, *The Knowledge Economy*, 30 ANN. REV. SOC. 200-201, 203 (2004).

10. *See* MARGARET MEAD, COMING OF AGE IN SAMOA (1928).

11. *See* RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS (2013).

12. *See* MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE (2012).

13. BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 368 (2012).

14. *Id.* at 367.

willing to retain certain economic features in their theories, but both call for an expansion beyond the traditional disciplinary borders. Frischmann even concludes that the added complexity of moving to a more satisfying model of valuation is worth it, given that "the conventional models and measures obscure as much as they reveal."[15]

The three books all plainly draw, therefore, on some version of economic or utilitarian theories for allocating the rights and managing the resources associated with IP's main currencies. Yet, it is just as plain from the three different approaches exemplified by these books that no consensus exists in the scholarly community about how to conceptualize intellectual property's goals, tools, and structures. Evidence of this diversity suggests that while the fight over IP's correct normative purpose, vision and scope would—will—be protracted, there will be many interested stakeholders, employing various and different methods. The optimistic conclusion of this review is that this rich and conflicted heterogeneity should be a source not for complaint, but celebration.

I. HYLTON AND CASS: INCENTIVES TO CREATE

In certain respects, *Laws of Creation* is the most traditional of the three books selected for this review. Cass and Hylton's book is an august and accessible restatement of the philosophical underpinnings of intellectual property law, with a pointed focus on utilitarian justifications brought over from property theory and law and economics. It displays a laudable command of a classic view of intellectual property resources and regulation, and an impressive range in its familiarity with all of the major doctrinal areas of IP. Its discussions of copyright doctrine occasionally seem a bit hasty or imprecise—as when, for instance, the authors seem to be implying that the distinction between idea and expression has to do with whether the work is great or ordinary, when instead the idea expression dichotomy simply separates what is protectable from what is not protected.[16] It is worth lingering on this detail since it plays a small but important recurring role in propping up the authors' normative vision of copyright. To wit, they suggest, somewhat tautologically, that great works of art are superior for particular reasons that make the works' appeal endure, and these appealing features in the works should be considered less as conditions for copyright protection and more as "features" which are appropriately "rewarded by unfettered access to copyright."[17] In other words, the fact that works are great explains their protectability, which, in turn, supports the idea of strong protection. This view of copyright folds in many assumptions drawn from an economic understanding of IP.

In drawing on economic theories and literature, the book allies itself with one now-established approach to intellectual property. According to that view, progress can be neatly categorized in terms of utilitarian advancements, such as improve-

15. *Id.*

16. CASS & HYLTON, *supra* note 11, at 101 ("What distinguishes a Rembrandt or a Vermeer, a Sargent or a Manet, from the run-of-the-mill artist isn't the idea behind their paintings but the expression of it."). At other times the authors seem to be similarly unsteady with respect to doctrinal nuances, as when they appear to confuse the originality requirement and the independent creation defense *Id.* at 105.

17. *Id.* at 108.

ments in medical care and hygiene, or improvements in communication directly traceable to better "speed, cost, and reliability."[18] This approach to intellectual property often demonstrates a marked commitment to an incentives theory of intellectual property, which is in evidence here, and which the authors naturalize through their frequent references to the importance of property rights as motivating factors for commercial investment.[19]

Yet in its adherence to a particular party line, namely the incentives theory, the book feels in some crucial ways as though it has missed—perhaps even to some degree mischaracterized—an important recent chapter in intellectual property scholarship; one that reflects both increasing interdisciplinary methods and sources, and what we might call a turn away from utilitarianism. The turn away has not exactly been a turn to any one theory; we might call it a pluralistic turn, a turn to the possibilities of divergent and diverse views. Intellectual property scholarship can now safely be characterized in terms of a variety of sometimes-competing approaches and views, with work drawing on empiricism, natural law and other philosophical theories, and interdisciplinary methods hailing from psychology, literature, anthropology, music theory, and aesthetics. The field is as diverse as it is complex and specialized. Yet the academy, in the authors' depiction of it, seems cartoonish, peopled with zealots who are, if recognizable, not representative of the academy at large. Cass and Hylton describe scholars who, in their estimation, think of IP law as "a zero-sum conflict between rights-holders and members of the public,"[20] and they describe them as making "a broad-based assault on fundamental propositions that support intellectual property."[21]

At the very moment when scholars have begun turning away from the incentives theory in growing number, these authors seem to have doubled down on it, as though without adequately attending to the questions raised by their scholarly peers. Indeed, the book stacks the deck in numerous respects against competing views of intellectual property, as, for example, when it assumes that because copying technologies have improved, stronger protection must necessarily and logically be required.[22] The scholarship here is thoroughly researched, but dated, and some-

18. *Id.* at 1.

19. For one example, see *id.* at 3 (noting that "[c]asual observers of the human condition long have noted the difference secure property rights make in motivating individual initiative.").

20. *Id.* at 210.

21. *Id.* at 220.

22. *Id.* at 11 (noting that "[t]he expected outcome would seem to be greater need for protection of the investment in creating and managing intellectual property."). *But cf.* Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 446 (2013) (internal citations omitted):

> Courts and scholars have, generally speaking, advanced three non-utilitarian justifications for intellectual property law: (1) labor-desert theory, which originates loosely from John Locke's Two Treatises [*sic*] and posits that creators deserve to own the fruits of their intellectual labor; (2) personality theory, which extends from Hegel by way of Margaret Jane Radin and suggests that creators have a moral claim on their creations as an expression of their personalities; and (3) distributive justice, the idea that formal intellectual property rules should advance a "just and attractive culture."

Id.

what complacent.[23] A generation of scholarship is represented around the 2004 and 2005 date, but genuinely recent or contemporary work is hard to find in their bibliography Where it appears, it does not seem to merit more than passing mention: Jonathan M. Barnett's empirical work on the efficacy of the incentives thesis, for instance, receives mention in a footnote, but its "balanced review" does not lead to its discussion in the text, where I believe its more complex balancing could have added strength and legitimacy to the book's arguments, if robustly deployed.[24]

Because of the selective sources, the book's arguments, at times, appear to exist within a scholarly echo chamber of primary (if concededly classic) sources. To use Adam Smith, for instance, to state that "there cannot be a strong case *against* property rules per se" is question-begging.[25] More specifically, the authors claim that property rights have expanded over time, and take that expansion as evidence of Smith's prescience. Yet earlier they refer to the "odd sort of disconnect in the rising number of voices in opposition to intellectual property rights" and seem to ignore the point their own observations raises.[26] To say that property rights have expanded over time is not to say that such expansion was either necessary or inevitable. Indeed, the wave of criticism of intellectual property rights could surely be graphed in some meaningful way as a function of their very expansion. The voices raised in opposition are not, after all, unreasonable proponents of some quasi-Marxist view, hostile to capitalistic notions of private property; many of these scholars have worked for private employers for profit, and some continue to do so even as they teach in law schools. Undergirding their preference for a more limited scope of intellectual property rights might be historical or doctrinal grounds; cultural and artistic justifications; and, indeed, economic theories. These are not, in other words, IP Bolsheviks, crying for a radical revolution, as much as they are careful scholars attending to what has unquestionably (and descriptively) been an expanding sphere of rights, even by Cass and Hylton's admission.

Cass and Hylton's normative commitment to one vision—an economic vision propped up by cost-benefit analysis—may stand in the way of a more robustly defended book. By way of example, consider that the authors seem to trivialize all non-utilitarian forms of attention to legal problem solving thus: "Intuitively, most people thinking seriously about legal rules gravitate to some form of cost-benefit analysis."[27] This quote suggests that any sort of reasoning about legal rules from philosophical first principles, whether Kantian or, indeed, Lockean, let alone moral balancing in the natural law tradition, must necessarily constitute pursuits lacking in sufficient seriousness to satisfy Cass and Hylton, if that reasoning falls short of cost-benefit analysis.

The time-bounded nature of the book becomes all the more apparent when

23. I hesitate to brand anything as dated, especially a book of scholarship by such obviously preeminent thinkers. However, loose empirical evidence supports the assertion. Examination of the main sources underpinning the authors' key arguments reveals that a good many of their sources date to the 1970s and 1980s or earlier.

24. CASS & HYLTON, *supra* note 11, at 230 n.11.

25. *Id.* at 16.

26. *Id.* at 10.

27. *Id.* at 31.

the authors turn their focus from philosophy to intellectual property. Their view of the works of intellectual property is almost entirely consumption-oriented: "Writers, producers, singers, actors, and others devote their talents to creating books and films and music for us to enjoy."[28] Moreover, they make continuing causal claims for which they lack the sort of empirical evidence they theoretically prize. For instance, they state that, "investment in research and development has been driven in large part by the ability to secure profits through a legally protected patent, copyright, trademark, or trade secret."[29] Though they concede that commercial incentives offered by the promise of legal protection are "not the only reason for" invention and creation, they nonetheless insist—without offering evidence for the proposition—that such protection "is often a principal motivating force or a necessary condition for the activity essential to innovation and creation."[30] They offer none of the counternarratives to the necessary-as-incentive fable they offer, ultimately, in my view, weakening their argument.

Perhaps Cass and Hylton's work more accurately captures patent law's contours, and better reflects the state of contemporary scholarship on patents. My familiarity with patent law and scholarship is limited. Accordingly, I cannot fully claim to assess the extent to which the book is germane and current to the scholarly dialogue in that area. However, with respect to the other areas this book covers, I would report a regrettable gap between the book and the dynamic critical conversation as it is occurring in the field: in law reviews, books, peer-reviewed journals, symposia, and so on. We need look no further than the other two books selected for review for examples of what I mean.

II. SUNDER: IP AND GLOBAL JUSTICE

Madhavi Sunder's new book, *From Goods to a Good Life*, offers a reframing of IP law in terms of its capacity to increase "human capabilities," as that approach has been articulated by Amartya Sen and Martha Nussbaum. Sunder seeks to reframe intellectual property law in "complex consequentialist" terms as a tool for global social justice, which in turn requires redefining how the law conceptualizes culture.[31] She shows that whether law treats culture as tradition, as commodity, or as participatory sphere makes a significant difference in law's influence in human lives. Sunder's title thus reflects her mission: to move IP law from its role in regulating goods to a broader role in maximizing human flourishing. I participated in an online symposium for the blog Concurring Opinions, in which I described the work thus: We might say that rather than "efficiency, utility, and *output by the few for consumption by the many*, a word cloud for Sunder's normative vision [of IP] would instead feature justice, human flourishing, and *participation by the many for the many*."[32]

As is perhaps appropriate for a book with such ambitious scope, Sunder's pro-

28. *Id.* at 32.
29. *Id.* at 35.
30. *Id.* at 35, 36.
31. SUNDER, *supra* note 12, at 15.
32. Zahr Said, *A Response to Madhavi Sunder's From Goods to a Good Life*, CONCURRING OPINIONS (Sept. 11, 2012), http://www.concurringopinions.com/archives/2012/09/a-response-to-madhavi-sunders-from-goods-to-a-good-life.html.

ject covers a great deal of theoretical and doctrinal ground. Sunder's chapters range from discussing the broad cultural and political theories that buttress her argument to tackling the specific challenges presented by copyright law and forms of appropriation such as remix culture and cultural appropriation; trademark law and its use in developing countries as a means of equalizing trading power; and patent law and biodiversity issues. Sunder turns for her theoretical tools to cultural studies and the social sciences, finding helpful voices in anthropology, art and music history, philosophy, political science, and psychology. A signal and deliberate omission in Sunder's citation roll comes in her circumscription of the dominant economic voices in IP scholarship, whose considerable influence Sunder sees as having derailed the larger potential of IP law to do good in the world. Though naturally she gestures to law and economics—it would be almost impossible not to do so in a project of this sort—Sunder prefers to locate her authority elsewhere. Indeed, Sunder stresses the need to unsettle the hegemony of economic approaches to IP, which she feels have produced "a crabbed understanding of culture and law's role in promoting culture."[33] In consequence, IP law has been marshaled for the ultimately materialistic and superficial purpose of augmenting "the production of more cultural goods" instead of tapping the law's capacity "fundamentally [to] affect human capabilities" and provide in a more universal fashion the ability "to live *a good life*."[34] Yet far from playing a minor role in everyday life, IP's presence and power in Sunder's characterization are at an all-time high.[35] Sunder is thus adamant that a new theorization needs to be developed, and she offers a set of factors we might consider. Crucially, in her critique of the existing economic framework, she does not propose a complete rejection of economics; she seeks instead to broaden the economic framework, to allow inclusion of a greater number of values.

I should note that just as it seems to me that Cass and Hylton a bit uncharitably present the state of contemporary scholarship as a field filled with one (unreasonable) view, it seems that Sunder's view of IP's law-and-economics school is similarly, though unintentionally, uncharitable. Take, for instance, when she offers this reductionist view of the contemporary academy: "[IP] scholars today focus on a single goal: efficiency."[36] I would further venture that she overstates the centrality of economic discourse to the academy ("The dominance of this singular, narrow economic discourse has rarely been challenged"),[37] especially since she is quick to acknowledge that outside the academy, its influence has been less certain.[38] Sunder seems to me to be on strongest ground when she offers competing narratives that leave room to integrate sophisticated economic ones as well, rather than insisting

33. SUNDER, *supra* note 12, at 3.

34. *Id.* at 3.

35. *Id.* at 3.

36. *Id.* at 11. She softens this stance somewhat later, but remains fairly committed to the view that the incentive-focus to the utilitarian story is limiting, rather than clarifying: "I urge intellectual property scholars to begin to integrate [economic and cultural lenses] and come to recognize that the interrelationship between culture and economics goes well beyond incentives." *Id.* at 44.

37. *Id.* at 25.

38. *Id.* at 29 (noting that "despite its preeminent position in legal scholarship, the narrow understanding of intellectual property as incentives is not, in fact driving the most important legal decisions in the field.").

there is a single narrative against which everything needs to exist in oppositional or even dialectical response.

In most respects, I confess a natural—or professionally naturalized—inclination to adopt much of what Sunder suggests in both her descriptive and prescriptive assessments of IP law. Indeed, I admitted as much when I blogged about this book previously.[39] Ultimately though, however much in sympathy I find myself to Sunder's work in general and this book in particular, I am not fully convinced that all of the many issues and doctrinal subject areas are equally well served by her human capabilities approach. Nor am I clear on how the book's considerable insights can be brought to bear on IP so as to make an effective legal impact. On the one hand, the book could thus be said to understate the magnitude of the (important, and in my view welcome) reorientation Sunder proposes. On the other hand, the book could be said to have stimulated demand for a sequel in which Sunder tells us more about a topic urgently in need of further work: how to make IP a tool for global justice, rather than a weapon of global imperialism and inequity. I echo a phrase here that Sunder uses to great effect in the book: "Every tool is a weapon if you hold it right."[40] Sunder's framing reminds us of the consequentialist distinction between IP laws as tools and IP laws as weapons, and it contains hints of how powerful they can be when used, or deployed.

III. FRISCHMANN: INFRASTRUCTURES IN CULTURAL WORKS AND RESOURCES

Frischmann's book, *Infrastructure: The Social Value of Shared Resources*, offers a demand-side theory of infrastructure and commons management, looking at the underexamined microeconomic dimensions of these resources. Drawing on two complex scholarly concepts, the infrastructure and the commons, that have not traditionally been in dialogue, Frischmann illustrates the value of pivoting carefully from one way of looking at a set of problems to another. The modalities inform each other helpfully, and in my view, persuasively. Extraordinarily learned, the book displays masterful command of multiple fields of knowledge and areas of law, and consistent agility in navigating those fields and areas.

In a chapter dedicated to intellectual infrastructure, Frischmann shows how infrastructure theories can teach us important commonalities across a group of otherwise unrelated things, such as "road systems, telephone networks, ecosystems, and ideas."[41] He also suggests the urgency of attending to doctrinal limitations in IP—such as the idea/expression doctrine in copyright law, which Frischmann

39. Said, *supra* note 32:

> I am entirely in sympathy with Sunder's assessment of the need to incorporate, together with the economic metanarrative of IP, competing metanarratives whose broader and different implications ought to allow us to prioritize values other than those outlined by the law-and-economics agenda. I share Sunder's vision of the importance of facilitating cultural participation and equalizing gross trade imbalances, such as those that defined an illustrative and, in many ways, very disturbing dispute between Starbucks and Ethiopian coffee farmers (pp. 40-43). Finally, I celebrate Sunder's interdisciplinary approach . . . .

40. SUNDER, *supra* note 12, at 144 (citing Jennifer Allen, *Superflex: Rooseum—Reviews: Amsterdam*, Bjornstjerne Reuter Christiansen, Jackob Fenger & Rasmus Nielsen, ART FORUM (Feb. 2003), http://www.findarticles.com/p/articles/mi-mo268/is_6_41/ai_98123170.)

41. FRISCHMANN, *supra* note 13, at xiii.

would import to patent. Because ideas form such a crucial part of the intellectual infrastructure Frischmann conceptualizes, it becomes clearer why limiting doctrines matter, and why sharpening, even rigidifying, them will curb IP's expansionist tendencies.

Frischmann's vision overlaps with Sunder's to the extent that both stress the importance of the cultural environment (or participatory culture) for shaping creative output.[42] What is more, both scholars emphasize the relational nature of the cultural environment, thus downplaying historically contingent notions of individual or Romantic authorship isolated from context and community.[43] Participatory culture lies at the heart of both authors' normative visions of creativity, and this marks a strong divide between the books of Frischmann and Sunder, versus that of Cass and Hylton. Because this participatory view of IP does not depend for its justification on the incentives theory, it tends to downplay or displace it. A charming instantiation of that displacement comes in Frischmann's relegation to a very long footnote a meticulous clarification (and delimitation) of the scope of the incentive theory.[44]

Many important insights follow from the emphasis on IP as participatory. To highlight one, Frischmann shows that "[i]ntellectual resources often have a dual nature—creation, invention, and innovation may be [both] resources and activities."[45] Thus, rather than insisting on the property-like characteristics inherent in some IP, which orient us toward questions of ownership and consumption, the participatory framing orients us toward notions of sharing, access, infrastructural support, and so on. It starts, as the best revisionisms do, from a small place, and expands to exert a potentially very powerful impact. Frischmann's book situates itself carefully and dynamically in contemporary scholarship, and addresses itself to pressing current concerns.

At the book's conclusion, Frischmann offers a list of ongoing debates for further consideration, one of which is the case of Google Books. He writes that "Google Books is a mixed infrastructure with substantial spillover potential associated with dramatically improved public access to millions of books and the ideas, knowledge, stories, and so on contained in them."[46] To frame Google Books as an infrastructure is already a novel contribution. But Frischmann goes further when he puts into play the series of questions that would flow from nondiscriminatory access of the kind to which Google aspired. For example, both Google, and, to some extent, Frischmann, downplay the objections of copyright owners who did not wish to be included.[47] A question with which I was left is the extent to which the value of the infrastructure should, normatively, outweigh not just individual author rights, but the rights of whole classes of authors (which were at issue in the Google Books Settle-

42. *Id.* at 257.
43. *Id.* at 258.
44. *Id.* at 267 n.44.
45. *Id.* at 270.
46. *Id.* at 360.
47. But note that Frischmann mentions that Google did not secure permission from owners and, in fact, "[f]lipp[ed] the default" in terms of seeking permission from copyright owners, who would otherwise have had to opt into Google's infrastructure, thus raising the costs of establishing it. *Id.* at 359.

ment, when it was first rejected; recently, Judge Chin found that Google's copying was not infringing because it constituted fair use).[48]

Frischmann has done an immense service by laying out in a dispassionate manner a set of tools for thinking about non-rivalrous, though at times congestible, resources, including intellectual property. Though his conclusions point in a normative direction—towards non-discrimination—his methods cannot be faulted for their lack of rigor, or for their partiality.[49] Yet how far we ought to go in using those tools, and to what extent the costs associated with their use can be justified, in the service of an ideal of non-discrimination, are not questions the book decides to answer. Frischmann warns us that "[s]ocial goods involve inescapable demand-manifestation problems" that require difficult determinations about both "what types of infrastructure are essential for [the] production"[50] of these social goods, and who will foot the bill for creating and maintaining their infrastructure, given what he—cautiously—terms "infrastructure effects."[51] Frischmann intentionally leaves these questions unanswered. Hence, this is less a critique of the chosen scope of his project than a strong expression of interest in the balancing that the use of Frischmann's conceptual tools inevitably invites.

IV. CONCLUSION

This trio of books gives cause for celebration because of the diversity of possible perspectives and methodological tools on display. That complementary—and often contradictory—approaches may not simply appear, but thrive, suggests the richness that characterizes IP scholarship today. The books will naturally appeal to different readers for different reasons, yet it could be said that even seasoned scholars will learn something from each of the works.

48. Authors Guild, Inc. v. Google, Inc., 05 Civ. 8136 DC, 2013 WL 6017130 (S.D.N.Y. Nov. 14, 2013).

49. Infrastructure resources should be shared "in an open, nondiscriminatory manner when it is feasible to do so," Frischmann notes, both for fairness and efficiency purposes. FRISCHMANN, *supra* note 13, at xiii. "The social value attributable to a mixed Internet infrastructure is immense even if immeasurable." *Id.* at 357.

50. *Id.* at 71.

51. *Id.* at 89.