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READING INTELLECTUAL PROPERTY REFORM THROUGH THE LENS OF CONSTITUTIONAL EQUALITY

Jessica Silbey*

BILL D. HERMAN, *THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY* (2013). Pp. 264. Hardcover \$ 32.99.

ARAM SINNREICH, *THE PIRACY CRUSADE: HOW THE MUSIC INDUSTRY'S WAR ON SHARING DESTROYS MARKETS AND ERODES CIVIL LIBERTIES* (2013). Pp. 256. Paperback \$ 26.95.

ROBERT SPOO, *WITHOUT COPYRIGHTS: PIRACY, PUBLISHING AND THE PUBLIC DOMAIN* (2013). Pp. 384. Hardcover \$ 35.00.

The three books selected for this book review tell intellectual property (IP) stories that are familiar to many students of copyright. In *The Fight Over Digital Rights*,¹ Bill Herman explores the expansion of copyright from the 1976 Copyright Act to its 1998 reform encompassing both the term extension and digital rights.² Herman's book ends with the demise of the Stop On-Line Privacy Act (SOPA) and Protect IP Act (PIPA) in 2012, suggesting that Internet activism may be a game changer in copyright law.³ Robert Spoo's *Without Copyrights: Piracy, Publishing, and the Public Domain*⁴ tells the story of the entrenched protectionist tendencies of the U.S. book publishing industry throughout the twentieth century at the expense of modernism's great authors (Joyce, Pound, Eliot, Yeats) but to the benefit of the U.S. public domain.⁵ Aram Sinnreich's *The Piracy Crusade: How*

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1. BILL D. HERMAN, *THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY* (2013).

2. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 302-04 (1998)); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§ 512, 1201-05, 1301-22 (1998)).

3. See Larry Magid, *What are SOPA and PIPA And Why All the Fuss?*, FORBES.COM (Jan. 18, 2012, 10:14 AM), <http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-the-fuss/> (discussing the controversy surrounding SOPA and PIPA).

4. ROBERT SPOO, *WITHOUT COPYRIGHTS: PIRACY, PUBLISHING AND THE PUBLIC DOMAIN* (2013).

5. Until 1989, foreign copyright owners had significant difficulty securing U.S. copyright protection because of technical formalities (such as notice and registration) and because of the "manufacturing clause,"

the Music Industry's War on Sharing Destroys Markets and Erodes Civil Liberties recounts the rise of peer-to-peer (P2P) technology and the music establishment's attempts to thwart further P2P innovation because of the harm of "piracy" but at the expense of further music creation and development.⁶

Despite telling familiar stories about the expansion of and resistance to copyright protection in the twentieth and early twenty-first centuries, this troika of books also reframes and enriches those debates in important and similar ways. First, the sustained attention to legal and cultural history within the particular fields of focus enlightens the student of political science (Herman's book), literary history (Spoo's book), and media studies (Sinnreich's book). These are no ordinary books about copyright history. Herman's book is about copyright, but it is also a book about politics and government. You do not need to understand copyright to read this book and learn new aspects of legislative promulgation and reform and how both can dramatically affect resulting substantive and procedural rights. Spoo's book brings to the reader the written, personal correspondences between James Joyce, Ezra Pound and attorney John Quinn in which they debate copyright, censorship and trade regulation. Spoo's book is full of modernist gossip and addictive particulars of early versions of great books (such as *Ulysses*), escapades of "literary swindler[s]" like Samuel Roth, and the negotiated details of publishing contracts and trade courtesies (including negligent business advice and intentionally veiled business advantages).⁷ Reading both the Herman and Spoo books feels like taking a trip through a living history museum where costumed actors and period furniture conjure vibrant and vital times and places where copyright was critical (the back halls of Congress and the Lower East Side of New York). Sinnreich's book, although about the more recent past, also leads the reader through an intricate cast of characters—music publishers, labels, broadcasters, recording artists, performers and enthusiasts—who are feathered into his dramatic retelling of the sharing technology's evolution from piano rolls, to vinyl, audio tape, CDs and digital files. Like nineteenth century realist novels, these three books are bursting with people, places, facts, and chronologies.

Second, all three of these books also share a preoccupation with piracy, but each attends differently to it as an idea or problem. In Herman's book, piracy is an evil to which legislative reform is constantly responding and which, once Internet advocacy takes hold, suffers from a public-relations problem. Herman suggests that the masses of Internet users who are the mobilized constituents of elected congresswomen and men cannot also be the pirates the law seeks to condemn. By the end of his book, he implies that diversifying the participation in democratic deliberation and lawmaking is one way to break open the epithet of piracy to discern how IP laws can be more narrowly targeted to address financially devastating copying while also fostering speech, creativity and innovation on

which required for U.S. copyright protection that the copyrighted work be published first in the United States, or published in the U.S. within several months of foreign publication. Failure to secure U.S. copyright meant that works published overseas could be copied and sold in the U.S. without violating U.S. copyright law. These works were effectively in the U.S. public domain upon publication in Europe. Publishing overseas was often desirable because it was less expensive, audiences were more receptive, and censorship of "obscene" material was less frequent. SPOO, *supra* note 4, at 69-72.

6. ARAM SINNREICH, *THE PIRACY CRUSADE: HOW THE MUSIC INDUSTRY'S WAR ON SHARING DESTROYS MARKETS AND ERODES CIVIL LIBERTIES* (2013).

7. SPOO, *supra* note 4, at 182 (internal quotation marks omitted).

and through the worldwide web.⁸ Spoo spends much of his book ambivalent about “literary pirates” such as Samuel Roth, the editor and publisher of literary magazines *The Little Review*, *Two Worlds*, and *Two Worlds Monthly*. These magazines were famous for their unauthorized but lawful publication of modernist writers who lost their copyrights because of U.S. copyright laws that did not protect those who first published their writing in Europe. Spoo regularly refers to “lawful piracy” as that which cultivated the U.S. public domain, thwarted the censors, and shaped U.S. literary taste.⁹ Indeed, Spoo suggests that the unguarded and virulent disputes between piratical publishers like Roth and the modernist writers and artists such as Joyce, Picabia, Brancusi, and Pound recast these “scandalous” and “obscene” modernists as celebrities. “It transformed Joyce from victimizer into victim and recast *Ulysses*, widely regarded as an instrument of corruption, as an object of legitimate readerly desire and the subject of international praise and sympathy.”¹⁰ Sinnreich’s book is devoted to deflating the music industry’s “piracy crusade” by explaining how, in concert with the legal reforms and policies of the late twentieth century, the “anti-piracy agenda” is profoundly wrong-headed. He says it “sacrifices constitutional rights, civil liberties, and international relations in the name of protecting . . . outmoded business models of a few multinational corporations.”¹¹ Piracy, for Sinnreich, is a strawman for protecting incumbent interests and aggregating wealth for its own sake rather than for achieving the social good of binding communities and enhancing creativity. And, Sinnreich says, when P2P file sharing is considered over the long-term, it appears to provide economic and reputational benefits for both music artists and industry organizations rather than cause irreparable harm.

These three books also reframe otherwise familiar discussions about IP in yet a third less familiar way. Over the past decade, the U.S. Supreme Court has issued a handful of copyright decisions that many IP scholars lament and critique as unwise and even wrong: *Eldred v. Ashcroft*,¹² *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*,¹³ and *Golan v. Holder*.¹⁴ Critics assert that these cases misconstrue the Copyright Act and its underlying policy. With *Grokster* in particular, the critique is that the decision destabilizes significant prior decisions, such as *Sony v. Universal Studios*, that struck the right balance in favor of technological innovation and public access.¹⁵ Considering these cases alongside the three books under review helps excavate alternative ways to understand the governing principles at work in these Supreme Court decisions that have shaped intellectual property law over the past decade. Herman’s book helps recast *Eldred*’s approval of copyright extension by twenty years from a discussion about rational legislative process and purpose to one about the importance of equal treatment: likes should be treated alike so that existing and future copyrights both share the benefit of the copyright term extension. Spoo’s book effectively reframes *Golan*’s approval of the reclamation of foreign author’s copyright from the U.S. public domain from a discussion about incentives for creation and dissemination to one

8. HERMAN, *supra* note 1, at 218-19.

9. SPOO, *supra* note 4, at 155, 169, 189.

10. *Id.* at 190.

11. SINNREICH, *supra* note 6, at 13.

12. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

13. *MGM v. Grokster*, 545 U.S. 913 (2005).

14. *Golan v. Holder*, 132 S. Ct. 873 (2012).

15. *Sony Co. of Am. v. Universal Pictures Corp.*, 464 U.S. 417 (1984).

about anti-subordination and reparative accommodations for the historical unequal treatment of foreign authors under the U.S. Copyright Act.¹⁶ And Sinnreich's book helps to reclassify the error of *Grokster*, a case that shut down the file-sharing companies Napster and StreamCast under an unexpected theory of secondary liability, as less about honing its relation to legal precedent than about the Court's misplaced anxiety toward pluralism and amplified participation by diverse communities through organs of speech, commerce and power. Pushing back against societal changes related to digital dissemination, the Court in *Grokster* appears to entrench individual liberty and autonomy (under the rubric of individual rights) at the expense of distributive justice.

What I am suggesting—and will elaborate upon further below—is that these three books about copyright law and history help exhume the connection between intellectual property law and equality. This is a less familiar story, although I am not the first to tell it.¹⁷ There are various ways to structure this story, such as around values of access and ownership, incentives and progress, or identity and community. There is much more to be done in these veins, especially as the intellectual property field is only recently—and still begrudgingly—moving beyond the utilitarian and economic model of regulatory critique.¹⁸ With this short essay, I seek to add to this growing body of literature and point out an irony and a puzzle: in Supreme Court cases holding that the copyright laws justifiably cut in favor of ownership and exclusivity (an anti-access result the IP and equality literature critiques), the Court's reasoning for stronger and longer copyright rests on long-standing frameworks substantiating the importance of constitutional equality. This may be no surprise given that Justice Ginsburg authored two of the three opinions I cite above as some of the most troubling, *Eldred* and *Golan* (Justice Souter wrote *Grokster*). Justice Ginsburg is well-known and respected for her opinions applying the equal protection doctrine (and for her advocacy prior to becoming a judge), especially in cases of gender discrimination.¹⁹ Justice Ginsburg knows her equality law. How then does she (and her colleagues in the majority) get it so wrong in the context of intellectual property? These three books assist in the critique of the Court's application of equality principles to

16. *Golan* upheld §514 of the Uruguay Round Agreements Act, inserted into the Copyright Act at §104, which grants copyright protection to preexisting works of Berne Convention member countries protected in their country of origin but lacking protection in the United States for particular reasons. The Berne Convention for the Protection of Literary and Artist Works is an international treaty that the U.S. did not join until 1989. As described by the Supreme Court in *Golan*, “Members of the Berne Union agree to treat authors from other member countries as well as they treat their own.” *Golan*, 132 S. Ct. at 878.

17. Peter DiCola, *Copyright Equality: Free Speech, Efficiency, and Regulatory Parity in Distribution*, 93 B.U. L. REV. 1837 (2013); MADHAVI SUNDER, FROM GOODS TO THE GOOD LIFE (2012); Margaret Chon, *Intellectual Property Equality*, 9 SEATTLE J. FOR SOC. JUST. 259 (2010); Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601 (2010); Lea Shaver, *Copyright and Inequality*, WASH. U. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398373. See also Jessica Silbey, *Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change*, 61 CASE W. RES. L. REV. 195, 236-50 (2010) (describing the anti-hierarchy rhetoric in some of the open-access movements).

18. Anupam Chander & Madhavi Sunder, *Copyright's Cultural Turn*, 91 TEX. L. REV. 1397, 1398-99 (2013) (reviewing Julie Cohen's book THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (2012), and praising it for shepherding the “emerging” “cultural turn in intellectual property thinking” which rejects “the stylized utilitarianism of law and economics”).

19. Some of her most famous recent decisions in this vein are *United States v. Virginia*, 518 U.S. 515 (1996) and *Lilly Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (Ginsburg, J., dissenting). When she was an attorney with the ACLU, she famously argued—and won—some of the first cases to establish the prohibition of gender discrimination under heightened scrutiny. See *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

the copyright regulations at issue and hopefully sketch new ways to advocate for IP law reform without undermining important long-standing equality principles.

I. TREATING LIKES ALIKE: OPENING UP THE FIGHT OVER DIGITAL RIGHTS

Aristotle’s foundational principle of equality—that things . . . alike should be treated alike—grounds constitutional equal protection doctrine.²⁰ We often call this “formal equality.” It is embodied in the case law as a balancing analysis that demands sufficient justification for differential treatment of people or groups of people when otherwise they appear to be similarly situated. “Equal protection” under the Fourteenth Amendment of the U.S. Constitution does not require that all people be treated the same, only that there be legitimate reason for differential treatment of otherwise similarly-situated people and the different treatment be rationally related to a legitimate purpose.²¹ Only when the law intentionally classifies on the basis of a “suspect” classification—such as race, gender, or religion—does the court engage in more searching review of the law and become involved in the details of the legislative rationales and procedures.²² In cases involving suspect classifications, federal courts worry that democratic decision-making, which is our constitutional default, has failed a historically disadvantaged group for arbitrary reasons or is otherwise perpetuating long-standing and irrational prejudice.²³ As such, judicial second-guessing of the law-making and line-drawing in the form of stricter judicial review is justified.²⁴ But when ordinary economic classifications of difference are afoot, such as regulations that distinguish between food products or business practices for example, courts will defer to legislative rationales and even presume the existence of a rational basis for the discriminating law if one is not apparent on its face.²⁵

Eldred v. Ashcroft concerned the rationality of congressional legislation that extended the copyright term twenty years, from life of the author plus fifty years (as enacted in 1976), to life of the author plus seventy years.²⁶ One of the central questions the Court considered was whether Congress had a rational basis for adding the twenty years and, relatedly, whether the enlarged term could permissibly apply to existing copyrights as it would to future copyrights.²⁷ Justice Ginsburg, writing for seven members of the Court, held that Congress did have a rational basis for the extension and for its equal application to existing and future copyrights.²⁸

The controversy around *Eldred* has centered largely on the fact that few people believe that twenty extra years of copyright protection in fact adds any incentive to create or disseminate creative works, and these are the two primary reasons for which copyrights are granted.²⁹ But rather than dig into the legislative history as to whether the evidence and

20. ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, at 1129a-1131b (David Ross trans., Lesley Brown ed., 2009) (c. 384 B.C.E.).

21. United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174-75 (1980).

22. *Id.* at 174.

23. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-11 (1976).

24. *Id.*

25. *Fritz*, 449 U.S. at 174.

26. *Eldred v. Ashcroft*, 537 U.S. 186, 193-94 (2003) (upholding the Copyright Term Extension Act (CTEA) of 1998, which amended the durational provisions of the Copyright Act at 17 U.S.C. §§ 302, 304 (1998)).

27. *Id.* at 204, 231.

28. *Id.* at 194.

29. *Feist Pub’l, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (stating that “the primary objective of

factual record supported a finding of sufficient incentives, the Court did what it usually does in cases concerning the rationality of ordinary economic legislation and deferred to Congress, saying “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”³⁰ This is a correct statement of law and history. And there was some evidence before Congress—albeit self-serving and exaggerated evidence—suggesting that the extension of copyright by twenty years would benefit authors and publishers and encourage both to invest in more creative work.³¹ But even if there was no such evidence, the Court properly exercises its power of judicial review when it presumes the existence of such facts absent evidence of irrationality or the need for heightened scrutiny (as when the law targets a suspect class or a fundamental right).³²

There were other complaints about *Eldred* aside from the absence of a rational basis for the extension, including the possibility of perpetual copyright protection under the Court’s reasoning (which would violate the Constitution’s “limited times” provision) and whether the First Amendment was being violated.³³ The Court rejected both of these arguments and throughout reminded readers that what it (and Congress) were achieving was “parity” and “evenhanded[ness],” as if to say, “as long as Congress is acting to promote equality in the copyright field, we trust their decision-making and, without more, these other issues do not concern us.” What do I mean by this? And how does Herman’s book help show how this reasoning in *Eldred* is mistaken *even on its own terms*?

One way to understand Justice Ginsburg’s decision in *Eldred* is that it is about the class of copyright holders (as opposed to the users of copyrighted works) that must all be treated the same or else the formal equality principle is violated. Indeed, long-standing copyright law from 1903 prohibits discrimination among copyright holders, holding that “high” and “low” art are similarly situated with regard to the exclusive rights copyright law provides.³⁴ *Eldred* may therefore be simply an extension of this century-old holding. Simply counting the amount of times the opinion uses words synonymous with “equality” demonstrates the Court’s focus on similar treatment. The first paragraph ends with the sentence, “Congress provided for application of the enlarged terms to existing and future copyrights *alike*.”³⁵ The third paragraph states again that “Congress placed existing and future copyrights *in parity*.”³⁶ It then concluded saying “[i]n prescribing that *alignment*, we hold, Congress acted within its authority.”³⁷ The opinion repeats the words “alike,” “parity,” and “alignment” or “aligned” nearly a dozen times. If we add to that the reference to “matches,” “equity,” “harmony,” “evenhandedly,” and “same[ness],” which also pepper the decision, we could produce a word cloud that proves the prominence of equal

copyright” is “[t]o promote the Progress of Science and useful Arts” (alteration in original) (quoting U.S. Const. art. I, § 8, cl. 8); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the [Copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . .”).

30. *Eldred*, 537 U.S. at 212.

31. *Id.* at 255-57 (Breyer, J., dissenting).

32. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980).

33. *Eldred*, 537 U.S. at 198-99.

34. *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

35. *Eldred*, 537 U.S. at 193 (emphasis added).

36. *Id.* at 194 (emphasis added).

37. *Id.* (emphasis added).

protection thinking in this copyright opinion.

Other than linguistic choices, Ginsburg focused on the authors themselves, their expectations, and their perceived wellbeing. She insisted throughout the opinion that current copyright holders are reasonable to expect they will be treated like future copyright holders should new benefits under the law arise because that is what has always happened.³⁸ She also explained that Congress' extension of copyright terms ensures the equal treatment of American authors to foreign authors under the Berne Convention.³⁹ Personalizing the equal treatment—its present expectation and its future effect globally—paints this case not about monetary incentives to create or disseminate but about the dignity of equal treatment absent a good reason to deviate from it as a social value. In other words, although the decision reads as the classic deference to congressional decision-making under their plenary powers, Ginsburg's opinion evoked her continuing mission of equal treatment for persons under the law. She, for the majority, could see no plausible reason to treat some copyright holders differently from others (be it current versus future copyright owners or American versus foreign copyright owners). This was in part because of the strength of the equality principle but also because of the history and precedent of copyright legislation. Here is where Herman's book skillfully intervenes.

Herman's book continues the important conversation Jessica Litman began with her book *Digital Copyright*.⁴⁰ In that book, Litman explained how U.S. copyright legislative reform has almost always been the work of only the strong-copyright advocates (the big six movie studios (the "MPAA"), the music recording industry (the "RIAA"), and the text publishing industry (the Author's Guild)). She further argued that captured legislative process concerning copyright results in benefits for an elite group of copyright holders and harms to the everyday audience of copyright users and creators. (In today's parlance we might call the beneficiaries of these legislative reforms "the one percent.") Litman warned that if the past legislative process is predictive of the future, digital copyright (the dominant form of expression going forward) will suffocate the constitutional mandate for "progress of science and . . . arts" that requires distribution and access.⁴¹

Herman's book is less of a battle cry. Indeed, it exhaustively describes the legislative debates and media coverage of copyright reform over the past thirty years. Through the thicket of details about hearings, witnesses, publication venues, coalitions and media debates, Herman nonetheless also tells a normative story about the value of participatory democracy and his belief in its inevitability in the digital age. This is because he believes the SFU coalition has begun to win some debates. (I question whether sinking SOPA and PIPA is a legislative "win" without the success of newly promulgated laws that instantiate the reasons those proposals were bad, but I will accept that their defeat is a step in the right direction for the SFU coalition.)

Reading *The Fight Over Digital Rights*, I imagined Herman (metaphorically) taking Jessica Litman's hand and following her back in time, retracing the legislative hearings of the late 1980s concerning the Audio Home Recording Act (AHRA), the Digital

38. *Id.* at 200, 206-07.

39. *Id.* at 205-06 ("Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.")

40. JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

41. U.S. CONST., art. 1, § 8. cl. 8.

Millennium Copyright Act (DMCA) in the late 1990s, and then doing a deep dive into the media coverage surrounding both as well as substantial online communication concerning the latter. Herman's book contains exhaustive detail—the real nitty-gritty of coalitions, debates, and compromises of copyright reforms from our past. The book contains comprehensive discourse analysis, historical case studies, and quantitative measurements of media coverage of copyright reform since 1976. Where one might characterize Litman's book as a polemic, Herman's book is primarily about the value of evidence—evidence of the legislative capture Litman describes. And the value of his evidence reads like an antidote to Litman's warning cry.

Through the thicket of details about hearings, witnesses, and back-room coalitions, Herman demonstrates that the “equality” I have described *Eldred* as glorifying explains how the CTEA was a mirage. To be sure, by extending copyright by twenty years for all current and future copyright holders, a plausible argument exists that all copyright holders are being treated the same. But that argument holds up only by ignoring the evidence in Herman's book (and Litman's book) that there were very few *people* who supported the CTEA. The testimony before Congress supporting the legislation served corporate or aggregate interests (the movie studios, broadcasting companies, or the publishing entities). They did not serve the individual authors and creators—the valued citizens and romantic origins of copyright in the first instance—nor did they even pretend to. Writing about the AHRA, Herman says:

The motivation for record companies and music publishers was clear enough; the former wanted to reduce the number of illicit digital copies competing with their official recordings, and the latter wanted another source of licensing revenues. Technology companies supported the bill – not on principle, but because they wanted to design and sell their products without being sued.⁴²

Herman later explains that “[t]he DMCA was not crafted as an effort to maximize the public's interest or the free circulation of ideas online, but as a deal between copyright holders [not individual authors but intermediaries] and service providers.”⁴³ The result, Herman explains, is laws that entrench moneyed interests.⁴⁴ Far from treating people the same, this process excludes from democratic participation those who stand to lose the most from copyright reform that appears to be choking access to work in the name of the constitutional progress mandate.

Herman's book concludes with what he believes is proof of his normative claim: that earlier reform ignored the importance of equal access to, and equal treatment through, a deliberative democracy.⁴⁵ This is because the 2012 reform efforts (concerning SOPA and PIPA) were more evenly balanced and copyright reform occurred (or did not occur, as the case turned out!) in a very different fashion than ever before. Herman chronicles how the historic insularity of copyright reform has recently given way to public and political

42. HERMAN, *supra* note 1, at 35.

43. *Id.* at 52.

44. *Id.* at 48-52.

45. *Id.* at 207.

forums about copyright on the Internet. In previous decades, groups with less capital had to take their case to the street, which often caused a lack of continuity and strength as the effort depended on a sustained dedication of time and bodies. Now “[t]he internet reshapes policy advocacy . . . [and] mitigate[s] the problem of collective action.”⁴⁶ No longer may groups with the greatest funding and political access win policy outcomes of their choice by maintaining insularity and elite access.⁴⁷ Because Internet communication is cheap, facilitates the aggregation and identification of communities of interest, and is durable and repetitious, it can even out the fight for access and rupture the insular spaces where legislative reform occurs.⁴⁸ Herman explains that when the gears of the Internet were fully harnessed in 2012 during the debate over SOPA and PIPA “underfunded, diffuse group[s] of citizens and nongovernmental organizations (NGOs) scored a victory against . . . concentrated, well-funded industry group[s], highlighting the potential for online communication to shape policy outcomes.”⁴⁹ Herman is not subtle about what he thinks the Internet means for copyright reform and political processes generally. It is “nothing less than a fundamental reordering of the copyright policy subsystem.”⁵⁰ The demise of SOPA and PIPA—proposed legislation widely considered disastrous for Internet users, individual as well as small or modest-sized content creators, distributors, and technology companies—is Herman’s evidence of a more fair and participatory democracy in our digital age, the benefits of which will redound more widely throughout society.

If Herman’s prediction holds true that the power of Internet advocacy to collate and represent interests of individual people will continue to counter and resist the heretofore dominant voices of the content industries, we may, in fact, see copyright reform reversing the trends of the past. This prospect may reveal *Eldred*’s equality justification for upholding the CTEA (that Congress was merely “treating likes alike”) to be not only inaccurate but a lesson in the risks of importing constitutional frameworks from one area of law into another. Herman’s book demonstrates how the legislative debates and congressional reasons on which past copyright reform was based did not in fact treat all authors the same. In fact, most authors were excluded from the conversation. It further demonstrates how the category of authors to whom the equality principle should apply is much broader today than the voices and interests represented in those earlier hearings from the past and about which *Eldred* was concerned. Authors are not only those who succeed at earning royalties in exchange for licensed use by established intermediaries, but are everyday creators and users (or “prosumers” to borrow Alvin Toffler’s coinage) who depend on access to expressive works in order to produce and participate in our dynamic and industrious culture.⁵¹ *Eldred* failed to consider these other copyright stakeholders, despite basing its decision on the value of inclusivity.⁵² As it turns out, there is much to criticize about equality jurisprudence that mechanically recites the mantra of “treating

46. *Id.* at 13.

47. *Id.* at 13-14.

48. *Id.*

49. *Id.* at 14.

50. *Id.* at 19.

51. ALVIN TOFFLER, *THE THIRD WAVE* 27 (1980). See also DON TAPSCOTT, *THE DIGITAL ECONOMY* 62 (1995); George Ritzer & Nathan Jurgenson, *Production, Consumption, Prosumption: The Nature of Capitalism in the Age of the Digital ‘Prosumer,’* 10 J. CONSUMER CULTURE 13, 17 (2010).

52. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

likes alike” without investigating more deeply the categories and their qualities being compared.⁵³ The just application of formal equality principles often depends on a starting line to which everyone has the same access. Justice Ginsburg knows this, as the more mainstream equality cases concerning accommodation and affirmative action reveal. I turn to this modality of equality now.

II. ACCOMMODATION AND REPARATION: UNDERSTANDING *GOLAN* AS A CASE ABOUT AFFIRMATIVE ACTION

Golan v. Holder upholds as constitutional section 104A of the Copyright Act, added in 1994 as part of Congress’ accession to the Berne Convention for the Protection of Literary and Artistic Works (Berne) and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁵⁴ Section 104A (enacted as section 512 of the Uruguay Round Agreements Act (“URAA”)) grants copyright protection to certain preexisting works of Berne member countries previously in the public domain in the U.S. They lack U.S. copyright protection and are in the public domain because either the U.S. did not protect works from that country at the time of their publication, or the authors of those works failed to comply with U.S. statutory formalities that are no longer applicable. Section 104A’s effect was to withdraw hundreds of thousands of works from the U.S. public domain and bring them under U.S. copyright protection for the remaining portion of their exclusive term as if they had not lost protection in the first place.

Many advocates considered section 104A’s effective shrinking of the public domain—on which innumerable people relied for education, entertainment, and commerce—a First Amendment violation and beyond Congress’ power under the intellectual property clause. Further, the petitioners in *Golan* argued that, “[r]emoving works from the public domain . . . violates the ‘limited [t]imes’ restriction by turning a fixed and predictable period into one that can be reset or resurrected at anytime, even after it expires.”⁵⁵ This appeared to present unorthodox challenges to free speech previously unaddressed by copyright law. Because the Supreme Court stated in *Eldred* that altering the “traditional contours of copyright protection” warrants heightened scrutiny under the First Amendment, those opposing the constitutionality of section 104A argued that it caused such an alteration.⁵⁶ In other words, unlike *Eldred*, more than a rational basis is needed to justify this kind of legislative reform. The petitioners in *Golan* learned their lesson from *Eldred*. If the Court would have deferred to Congress concerning ordinary extensions of copyright terms, Petitioners must show how 104A is no ordinary legislation. If they succeeded at that characterization of 104A, Congress would have to justify the amendment with a more rigorous record which, the petitioners thought, Congress could not do.

But they were wrong. In *Golan*, as in *Eldred*, Justice Ginsburg imports equality jurisprudence into her analysis of copyright law. She begins the decision with familiar

53. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 219 (1989) (describing how law and society subordinate women to men through defining sex difference in terms of power) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY]. See also CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 123 (1987) (same) [hereinafter MACKINNON, FEMINISM UNMODIFIED].

54. *Golan v. Holder*, 132 S. Ct. 873, 894 (2012).

55. *Golan*, 132 S. Ct. at 887 (internal quotation marks omitted).

56. *Eldred*, 537 U.S. at 219.

language about “sameness” and “reciprocity,” stating that the URAA gave to foreign works “the same full term of protection available to U.S. works”⁵⁷ because “[m]embers of the Berne Union agree to treat authors from other member countries as well as they treat their own.”⁵⁸ Ginsburg, for the majority, sees the United States’ acquiescence to Berne and its signing of the URAA as a “reciprocat[ion] with respect to . . . authors’ works.”⁵⁹ The Court considers the laudable effect of section 104A, despite its diminution of the public domain, as a “restoration plac[ing] foreign works on an equal footing with their U.S. counterparts.”⁶⁰

But the *Golan* decision goes beyond Aristotelian formal equality—treating likes alike—and justifies its reasoning with reliance on an anti-subordination principle. The anti-subordination principle is sometimes seen as competing with anti-classification equality (or formal neutrality).⁶¹ Commitment to anti-subordination reflects a belief that constitutional equal protection prohibits state action that reproduces or enforces inferior social status of historically oppressed groups.⁶² Reliance on the anti-subordination rationale, rather than an anti-classification or neutrality principle, therefore allows—and even encourages—the state to prefer or benefit some groups over others in service to remedying past conditions of subordination or deprivation. Rather than relying on concepts of “sameness” and “difference,” whereby relevant differences justify different treatment, an anti-subordination rationale recognizes the existence and perpetuation of hierarchy in past or present conditions that reinforce both privilege and stigma. Consider the case of gender inequality. Under the formal equality model, women and men are the “same” and must always be judged by the same criteria.⁶³ Conversely, they are “different” and thus need not be treated the same.⁶⁴ Neither approach considers how gender as a social category structures power relations—opportunities for and access to social, political and economic benefits on the basis of sex.⁶⁵ “Same” or “different” treatment without regard to existing gendered power relations simply reproduces inequality at the hands of power wielded by men at the expense of women. An anti-subordination approach to gender inequality identifies the power relations instantiated in the labels “male” and “female,” and asks whether the maintenance of the labels “participates in the systemic social deprivation of one sex because of sex”⁶⁶:

The only question [for equality] . . . is whether the policy or practice in

57. *Golan*, 132 S. Ct. 877.

58. *Id.* at 878.

59. *Id.* at 880.

60. *Id.* at 882.

61. Reva Siegel, *Equality Talk: Anti-subordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004).

62. *Id.* See also Reva Siegel & Jack Balkin, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2004) (“Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”).

63. MACKINNON, FEMINISM UNMODIFIED, *supra* note 53, at 33. See also MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 53, at 219.

64. MACKINNON, FEMINISM UNMODIFIED, *supra* note 53, at 33; MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 53, at 219.

65. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 53, at 34-39.

66. CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 102, 117-18 (1979).

question integrally contributes to the maintenance of an underclass or a deprived position because of gender status The social problem addressed is not the failure to ignore woman's essential sameness with man, but the recognition of womanhood to women's comparative disadvantage.⁶⁷

What does this have to do with the *Golan* decision and copyright law? As Robert Spoo artfully recounts in *Without Copyright: Piracy, Publishing and the Public Domain*, the U.S. copyright system was rigged against foreign authors from its earliest days on behalf of the American publishing industry.⁶⁸ Foreign authors were subordinated to domestic authors with regard to copyright, which failed to protect foreign authors almost entirely. This led to profound imbalances in the U.S. in the relative cost of works by foreign and domestic authors (foreign works were cheap to publish because licenses were not required). Thus, purposeful market asymmetries skewed the perceived value of, and access to, foreign and domestic works. The URAA was enacted finally to remedy those imbalances. It was enacted, according to Ginsburg's majority opinion, as an affirmative action the purpose of which is to undo or reverse the harm caused by decades of deprivation to the foreign market and foreign copyright holders.⁶⁹

Spoo makes clear that he reads the history as unfairly targeting foreign authors for poor treatment and that U.S. publishers took advantage of that inequality. However, he is delicately ambivalent about the effect of these legal and market asymmetries. He describes how Samuel Roth, the literary magazine publisher and "repackager," was accused "of having the shamelessness of a highwayman but quite without the highwayman's courage, since the law grants him a temporary immunity" from having to pay for unauthorized copying and distribution of foreign authors' works.⁷⁰ Spoo provides significant—and entertaining—detail about the rabid dislike of Roth and the U.S. publishers who were perceived to take scandalously free rides on foreign author's works thanks to U.S. copyright law.⁷¹ Spoo suggests that the U.S.-focused copyright preferences that legalized such advantages disincentivized foreign authors and limited their ability to move freely in time and space.⁷² He also argues that it enabled the mutilation and unauthorized editing of the original work.⁷³ On the other hand, Spoo points to several benefits of the legal imbalance, one of which is the informal publishing trade courtesy that developed to plug the perceived gaps in the U.S. copyright law by negotiating private agreements with the authors outside any statutory regime.⁷⁴ The reason for and effect of these private negotiations was to cultivate ongoing, unique, and lucrative business relationships with writers believed to have future celebrity status. Two other benefits included the enrichment of literary culture through widespread dissemination of the modernist writers, as well as the avoidance of official censorship to which mainstream (as opposed to "pirate")

67. *Id.* at 117.

68. SPOO, *supra* note 4, at 3.

69. *Golan v. Holder*, 132 S. Ct. 873, 877-87 (2012).

70. SPOO, *supra* note 4, at 187.

71. *Id.* at 182-92.

72. *Id.* at 117.

73. *Id.* at 118.

74. *Id.* at 64.

publishers were subject.

Despite Spoo's careful analysis of the pros and cons of the U.S. protectionist scheme for the U.S. economy and literary culture, his language and narrative emphasis suggest that he considers section 104A to be both legally and politically justified. Reading Spoo's book helps us understand that 104A is truly remedial in the equality-reinforcing way that the *Golan* decision describes. Spoo spends an entire chapter on Ezra Pound's idealized copyright reform in which Pound portrays U.S. protectionism as "an obstacle to the free circulation of thought" and believes the hoped-for equal treatment of foreign authors by the U.S. will benefit international understanding and cultural exchange.⁷⁵ In other words, Spoo writes that this kind of affirmative action for previously deprived authors will bring benefits to the literary society and international politics. Spoo helps us read *Golan* with this focus on international harmonization in terms of the twin benefits of 104A: a foreign author's revived copyright in the U.S. and better treatment of U.S. authors abroad.⁷⁶ The *Golan* majority says the "securing [of] greater protection for U.S. authors abroad" accompanies "remediation of the inequitable treatment suffered by foreign authors."⁷⁷ Like Pound's emphasis on dissemination and free-moving ideas, the majority in *Golan* repeatedly emphasizes how remediation of the lost copyright and harmonization of both foreign and domestic rights "promotes the diffusion of knowledge."⁷⁸ In a footnote, Ginsburg's opinion accuses the unreformed copyright law (and Justice Breyer's dissent) of American exceptionalism and isolationism, a critique resonating with concerns of cultural dominance (status and stigma) that animate anti-subordination equality theory.⁷⁹

Some scholars have criticized *Golan*'s unconvincing reliance on the financial benefit of exclusive dissemination as the requisite justification for foreign copyright restoration under 104A.⁸⁰ Yet, Spoo's book helps make clear that many authors care a great deal about equal treatment and control over dissemination, not only because of lost copyright royalties, but because of the dignity affront an absence of copyright causes. Spoo describes how Joyce, Pound, and T.S. Eliot, among others, lamented the unfairness of U.S. copyright law and fought the system to control the form and manner in which their work was published and disseminated in the U.S. Joyce sued Roth for commercial misappropriation of his name instead of suing Roth under copyright law because it did not protect Joyce in the U.S.⁸¹ Pound engaged in utopian law reform filled with compulsory licenses at a level of detail that would impress any contemporary legislator. Many others signed Joyce's "protest"⁸² "deploring the inadequacy of American copyright law and blaming the 'pirates' for taking advantage of it."⁸³ Ginsburg's majority decision in *Golan* similarly focuses on the dignity of authors and the anti-subordination value within the international field of copyright.

75. *Id.* at 121, 132.

76. *Golan v. Holder*, 132 S. Ct. 873, 889 (2012).

77. *Id.* at 894.

78. *Id.* at 889.

79. *Id.* at 890 n.28.

80. Wendy J. Gordon, *Dissemination Must Serve Authors: How the U.S. Supreme Court Erred*, 10 REV. OF ECON. RES. COPYRIGHT ISSUES 1 (2013).

81. SPOO, *supra* note 4, at 198, 202.

82. *Id.* at 168, 186-88.

83. *Id.* at 186.

Section 514 continued the trend toward a harmonized copyright regime by placing foreign works in the position they would have occupied if the current regime had been in effect when those works were created and first published. As *Golan* states, “[a]uthors once deprived of protection are spared the continuing effects of that initial deprivation; [section] 514 gives them nothing more than the benefit of their labors during whatever time remains before the normal copyright term expires.”⁸⁴

Restoring works to the “position they would have occupied” and “spar[ing]” authors any further “deprivation” provides foreign authors with protection over works that should have existed, explains the Court.⁸⁵ Far from making foreign authors whole (it does not add all the years that have been lost), the *Golan* majority modestly claims to raise those “deprived” foreign authors to the current status of the U.S. authors.⁸⁶ Like the affirmative action doctrine in the gender or race context, the bestowed “benefit” on the select class—here, copyright of foreign works whose protection were stripped or lost under the older regime—is something that should have previously been conferred, but was otherwise unlawfully or wrongfully withheld.

Unlike Spoo, however, who describes the significant benefits of the U.S. protectionist regime for the U.S. literary culture and public domain, the *Golan* majority is decisively against the U.S. protectionist regime despite the benefits it provided to the U.S. economy:

The question here . . . is whether would-be users must pay for their desired use of the author’s expression, or else limit their exploitation to “fair use” of that work. Prokofiev’s *Peter and the Wolf* could once be performed free of charge; after §514 the right to perform it must be obtained in the marketplace. This is the same marketplace, of course, that exists for the music of Prokofiev’s U.S. contemporaries: works of Copland and Bernstein, for example, that enjoy copyright protection, but nevertheless appear regularly in the programs of U.S. concertgoers.⁸⁷

This quote resonates with the rhetoric of “equal pay for equal work,” the slogan used for the Equal Pay Act of 1963 that continues to be marshaled in support of the Paycheck Fairness Act.⁸⁸ But contrary to equal pay laws, which have no losers except the employers for whom antidiscrimination policies may be expensive, section 104A causes real harm to those who have done nothing to deserve it. The public, who rely on the stability and existence of public domain material, are now forced to pay where they had not previously. Moreover, the *Golan* majority seems blind to the power and importance of the public domain as a resource relied upon as of right, questioning its constitutional significance⁸⁹

84. *Golan*, 132 S. Ct. at 893.

85. *Id.*

86. *Id.*

87. *Id.* But see SPOO, *supra* note 4, at 143, 303 n.148 (questioning whether American authors were held back by European competition which actually hurt the production and dissemination of U.S. literary works).

88. See *Equal Pay for Equal Work: Pass the Paycheck Fairness Act*, ACLU, <https://www.aclu.org/womens-rights/equal-pay-equal-work-pass-paycheck-fairness-act> (last visited Oct. 9, 2014).

89. *Golan*, 132 S. Ct. at 888 n.26.

and describing it as unowned (and thus less protected than property).⁹⁰ Spoo's book largely undermines this claim and persuasively demonstrates how the American public domain, which was shaped by the publishing industry's "piracy" of European works, successfully resisted government censors, cultivated the celebrity of authors like James Joyce, whose works were otherwise intellectually inaccessible or obtuse, and saturated the U.S. market and literary culture with the European and expatriate modernist writers—some of whom are considered the best of the twentieth century.

Golan's equality emphasis is evident when read against the background of Spoo's intricate and scrupulous account of the disputes, power imbalances and trade negotiations between modernist writers and the book publishing industry. And yet *Golan's* reduction of copyright issues to mere economic incentives and a question of equal pay misses the bigger picture intricately portrayed in Spoo's narrative.⁹¹ Both the authors and publishers at the center of Spoo's book care not only about equality of pay and bargaining power, but also about government censorship, professional reputation, legacy, and business relationships. *Golan* misses this bigger picture of the indispensable benefits creative work bestows on community relations, cultural development and political and social welfare. The anti-subordination rationale is only as good as the benefits that outweigh the burdens. And, if merely a sliver of benefits are considered as accruing under the legal accommodation, and the other diverse (and nonmonetary) benefits are ignored or denigrated, then the legal accommodation could end up doing more harm than good. Aram Sinnreich's book about the music industry's crusade against piracy makes just this point. In the context of cultural production to which copyright law is geared, he implicitly relies upon the value of distributive justice in order to fulfill human capabilities. Part III addresses Sinnreich's book about this third and last equality modality in the context of *Grokster*.

III. THE MUSIC INDUSTRY, *GROKSTER'S* INDIVIDUALISM, AND THE POSSIBILITY OF A PLURALISTIC APPROACH TO COPYRIGHT

Grokster is a case about the lawfulness of peer-to-peer file sharing. From the term "peer-to-peer file-sharing" alone, we get a sense of the moral ambiguities underlying the case. Justice Souter first describes the question presented as defining the scope of secondary liability in the copyright context when a product is capable of both lawful and unlawful uses by third parties.⁹² This seems straightforward enough as secondary liability (contributory or vicarious liability) is deeply rooted in the common law. But the very next paragraph sets a more nuanced factual stage, describing a digital age where technology—even infringing technology—serves the public good:

[D]efendants . . . distribute free software products that allow computer users to share electronic files through peer-to-peer networks The advantage of peer-to-peer networks . . . shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-

90. *Id.* at 892.

91. *Id.* at 890.

92. *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd.*, 545 U.S. 913, 918-19 (2005).

bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a file . . . are available on many users' computers, file requests and retrievals may be faster Given these benefits in security, cost and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries among others.⁹³

According to the Court, therefore, values of the peer-to-peer system under assessment include connectedness, sharing, improving public service, efficiency, and increased and de-hierarchized access to information and culture. How does the Court turn an innovative technology with these beneficial qualities into a civil and criminal liability? It does so delicately, and, based on the criticism of the case, ineffectively. With blunt reasoning, the *Grokster* court essentially takes a valuable technological innovation and makes it illegal only when its use is *purposefully* illegal.⁹⁴ The Court acknowledged the tension involved in the legal scenario and recognizes that there is much to lose should it draw that fine line in the wrong place. It recognizes the need to weigh:

[the] respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff The tension between the two values is the subject of this case⁹⁵

Instead of assessing this balance with all its delicacy, the Court turns to a more familiar and time-honored doctrine of inducement. Citing *Black's Law Dictionary* and referring to elemental doctrines of "fault-based liability derived from the common law,"⁹⁶ some dating as early as 1876,⁹⁷ the Court punts on the balance struck in 1984 by *Sony Corp. v. Universal City Studios*⁹⁸ (which states that infringement is avoided if the device is capable of substantial non-infringing uses) and instead relies on theories of moral culpability. Indeed, the Court cites to the famous *Prosser and Keeton on the Law of Torts* for the authoritative normative foundation on which its holding relies: "There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong."⁹⁹ The Court confidently holds:

[O]ne who distributes a device with the object of promoting its use to

93. *Id.* at 919-20.

94. *Id.* at 918-19.

95. *Id.* at 928.

96. *Id.* at 935.

97. *Id.*

98. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

99. *Grokster*, 545 U.S. at 936 (citing PROSSER AND KEETON ON THE LAW OF TORTS 37 (W. Page Keeton et al., eds., 5th ed. 1984)).

infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting act of infringement by third parties The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation¹⁰⁰

The music industry would say, “we wish!” to the Court’s promise that *Grokster*’s holding will not compromise “legitimate commerce.”¹⁰¹ Scholars and industry actors have watched and studied how *Grokster* (and the earlier major appellate rulings, such as *Napster* and *Aimster*) utterly failed to halt peer-to-peer file sharing of copyrighted works.¹⁰² And whether it has also discouraged innovation is contested.¹⁰³ Some explanations for *Grokster*’s ineffectiveness are easy to provide. *Grokster* sets a very high bar for infringement by inducement. Proving “purposeful, culpable expression and conduct” is difficult.¹⁰⁴ Only obviously bad actors who help steal revenue from its rightful recipients are liable under the *Grokster* rule. In other words, *Grokster* requires identification of Justice Holmes’ tortious “bad man.”¹⁰⁵ Given this high standard, and the myriad benefits the Court admitted peer-to-peer file sharing systems create, it is unsurprising that there have been very few findings of liability under the *Grokster* standard.

Another explanation for *Grokster*’s weak legacy is its misunderstanding of the vital terrain to which its rule applies. To this end, Aram Sinnreich’s book *The Piracy Crusade: How the Music Industry’s War on Sharing Destroys Markets and Erodes Civil Liberties*, reframes *Grokster*’s factual baseline. In doing so, Sinnreich explains both the failure of law to halt illegal peer-to-peer file sharing and the ineffectiveness of *Grokster*’s “bad man” rule. Sinnreich is explicit about his reframing:

My aim in the first part of this book is to reframe the debate surrounding music, technology, copyright, and “piracy” by examining the historical circumstances that gave rise to our current understanding of their meanings and relationships. This is a necessary precondition if we are to have a more nuanced understanding of the complex changes currently taking place within our musical cultures and industries . . . as digital networked technologies continue to grow in power and scope.¹⁰⁶

The nuanced understanding that Sinnreich foreshadows is rooted in a capabilities approach to legal regulation whereby a just legal system assures human dignity by providing in relatively equal terms the building blocks of social, political and economic

100. *Id.* at 936-37.

101. *Id.* at 915-16.

102. Rebecca Giblin, *Physical World Assumptions and Software World Realities (and Why There are More P2P Software Providers than Ever Before)*, 35 COLUM. J.L. & ARTS 57 (2012); Annemarie Bridy, *Why Pirates (Still) Won’t Behave Regulating P2P In the Decade after Napster*, 40 RUTGERS L.J. 565 (2009).

103. Peter S. Menell, *Indirect Copyright Liability and Technological Innovation*, 32 COLUM. J.L. & ARTS 375 (2009).

104. *Grokster*, 545 U.S. at 915.

105. Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 459 (1897).

106. SINNREICH, *supra* note 6, at 15.

welfare. *Grokster* may have acknowledged the social and political benefits to digital sharing in its introductory factual background for the case, and it may have asserted that its holding sufficiently accounts for the fragile balance between protecting commercial interests and promoting disruptive innovation inherent in the concession of factual complexity. Thus, *Grokster* accepts as part of its calculation of whether and how secondary liability should attach the importance of distributive justice, e.g., the “sharing” of benefits and burdens wrought by the revolutionary nature of the digital age. Despite this, *Grokster*’s nod to distributive justice is fruitless absent a more accurate and grounded understanding of the benefits and burdens distributed—the very substance of that which enables human flourishing. As with Ginsburg’s invocation of Aristotelian equality in *Eldred* and of anti-subordination equality theory in *Golan*, Souter’s justification of the Court’s holding defining secondary liability against a backdrop of distributive justice is incongruous without attending to the diversity and breadth of uses, values and contours of existing and evolving digital systems that rely on file sharing.

For Sinnreich, the music industry’s “war on sharing” failed despite the collection of legal rules that prohibit infringement because music (and human expression more generally) is:

[An] aspect[] of human consciousness . . . [that is] central to human evolution [and] remains vital to our cognitive and social processes In short, music isn’t just something we manufacture, like cars and shoes; it’s something that shaped us as a species, and continues to shape each of us as individuals throughout our lives.¹⁰⁷

If this is true (and Sinnreich cites to enough music theorists and biologists to be sufficiently convincing), then *Grokster* and the piracy crusades failed to crush unlawful digital file sharing because you cannot be a “bad man” if sharing music is a form of expression and social glue essential to humanity’s wellbeing. In this context, Sinnreich asks this provocative question:

If a pirate in Cicero’s day was the “enemy of all,” a malevolent agent exploiting the vulnerabilities of the weak and the outer boundaries of sovereignty in the interest of personal profit, consider who best fits that description today. Is it one of the tens of thousands of Americans who have been prosecuted for sharing songs with one another via LimeWire or BitTorrent? Is it one of the billions of people around the world who share music, videos, text and images via YouTube, Twitter, and Facebook? Or is it one of a tiny handful of commercial enterprises that jealously protect their financial interests in our shared culture by maligning, surveilling, bankrupting and imprisoning those who are too obstinate to acquiesce, too poor to fight back, or too weak to resist?¹⁰⁸

This question inverts the focus of the file-sharing debate but uses the same

107. *Id.* at 19.

108. *Id.* at 36.

jurisprudential baseline of distributive justice and capabilities to do so. Instead of focusing on aggregators and distributors as the critical beneficiaries of the production and spread of music, Sinnreich explains that music fans (who are essentially everyone) are heroes by necessity, stealing the bread from the industrial class in order to foment a more democratic revolution in which, in the end, everyone is better off. If this sounds hyperbolic, it is in keeping with Sinnreich's book, which is stylized as much as a manifesto as an academic monograph.

Sinnreich analyzes the “music industry’s war on sharing” from three captivating perspectives all to prove the same point: we should not fight over sharing music because music is a human good. But if we have to, we will, and we will win. First, he explains how the music industry’s response to digital file sharing resembles the five stages of grief: denying the existence of a problem; facing the problem with disproportionate anger; bargaining with opposition in the face of inevitable loss; depression and expressions of catastrophic defeat; and finally, acceptance.¹⁰⁹ Sinnreich also analyzes the issue as a murder mystery with a turn-around ending that reveals the protagonist as the killer¹¹⁰:

This narrative . . . positions the steep drop in music retail sales revenue as a kind of industrial murder, and fingers nearly everyone for the blame . . . [With] P2P file sharing . . . play[ing] the role of the butler[] as the inevitable primary suspect. In truth (spoiler alert), it is the music industry itself that deserves the bulk of the blame for its own misfortunes, a fact it has tried its best to obscure by carefully curating the narrative to emphasize some details while obscuring others.¹¹¹

Finally, consistent with the theme of war and violence, in the last third of his book, Sinnreich describes the piracy crusade’s “collateral damage” and “hidden costs.”¹¹² These come in the form of squandered or crushed opportunities for innovative music production, distribution and enjoyment, as well as the “human toll, measured in terms of wasted hours and diminished dreams.”¹¹³

In each of these sections, Sinnreich employs evocative prose and sufficient detail that should convince even skeptical readers that the traditional music industry (or “legacy cartels” as he calls them) must fundamentally change or die.¹¹⁴ Two points here with regard to the equality framework that I submit are relevant to the analysis of IP law reform. It seems clear after rereading *Grokster* alongside Sinnreich’s book that when invoking the value of distributive justice in the IP context, especially when the goal is “progress” keyed to human welfare, courts or legislators need to be explicit about the units of welfare being distributed. Vague or broad-brush gestures to “public good,” “access,” “sharing” or “efficiency” are inadequate to guide future decisions and behaviors toward the good assumed. In the context of interpreting copyright laws, Sinnreich attends to distributive

109. *Id.* at 56-68.

110. *Id.* at 71-93.

111. *Id.* at 69-70.

112. *Id.* at 135.

113. *Id.* at 140.

114. *Id.* at 139.

justice and human flourishing as does the Court in *Grokster*. And yet many critique *Grokster*'s ruling and analysis as unproductive and vacuous, at least as it aims to be either a technical directive or a moral compass.

In comparison, Sinnreich's description of the experiences of vast and diverse numbers of individuals and communities of digital file sharing and of the bargains struck as history unfolds into the future appears lucid and predictive. To be sure, Sinnreich has the benefit of ten years since *Grokster*, as well as the disciplinary flexibility to write a book rather than a court opinion. But the Supreme Court, being the highest court in the land, has some leeway too. And, it has a 225 year history analyzing constitutional provisions in terms of its central prerogatives such as "justice," "liberty," "general welfare," and "prosperity." In 1868, the Court received a new mandate ("equal protection of the laws") and for 150 years has been working through the meaning of equality as well. It seems a reasonable entreaty to ask the Court, in all of this experience, to express in a more discriminating fashion the qualities and values to be distributed on a substantively equal basis when evoking distributive justice as a rationale. And if not the Court, Congress can do it. And if neither the Court nor Congress acts, then the people—through their states or individually—will act, as Sinnreich chronicles, anarchically, defensively, and (he thinks) guiltlessly in defiance of the law.

The second point is a smaller one, but in a book review that anticipates a larger research inquiry into intellectual property and equality, I would be remiss not to mention it. In Sinnreich's last two chapters, he argues that the "piracy crusade" has harmful effects on human rights, both domestically and abroad (free speech, privacy, security, and representative government). He is in good company when making this claim, and he is not the first to assert it.¹¹⁵ No doubt the "war on piracy" has led to stronger and broader copyright laws nationally and globally. He provides ample examples of suppressed speech and asserts that local economies (and therefore cultural autonomy) are threatened by U.S. hegemony over IP regulation. Add to this Bill Herman's book, which helps us understand more thoroughly the positive role internet advocacy plays in fomenting democratic participation toward more representative government and broader, more sufficiently distributed welfare rights for those previously left out of the conversation. Sinnreich concludes in these last chapters that the "copyright" is about more than just copying: it is about the formation of new religions (Kopimism)¹¹⁶ and new parties (The Pirate Party).¹¹⁷ He reframes the resistance to the "war on piracy" in its participation in cutting edge democratic reform, as an example of the best of U.S. culture and values.¹¹⁸ I am with him on this, but I also (appear to) share his political perspective and his academic disciplinary training. I therefore wonder—indeed, it seems one of the most important things to consider if the harms accruing are as dire as he implies—whether this book will also convince those with divergent experiences and political predilections.

115. See, e.g., MADHAVI SUNDER, FROM GOODS TO THE GOOD LIFE (2012); LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE (2011); Margaret Chon, *Intellectual Property Equality*, 9 SEATTLE J. FOR SOC. JUST. 259 (2010); Margaret Chon, *Substantive Equality in International Intellectual Property Norm-Setting*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT (Daniel Gervais ed., 2007); Margaret Chon, *Radical Plural Democracy and the Internet*, 33 CAL. W. L. REV. 143 (1997).

116. SINNREICH, *supra* note 6, at 180.

117. *Id.* at 181.

118. *Id.* at 194.

CONCLUSION

Given the speed and efficacy of the Internet, Bill Herman's book suggests that we are on the verge of a true revolution in the regulation of information goods, creativity, and innovation. Trajectories are about to change. Sinnreich's book asserts this outcome is a matter of grave importance to human flourishing. And Spoo's book demonstrates that a robust public domain establishes rich cultural landscapes despite complaints about piracy and pilfering. My reading of the Supreme Court cases, as they interpret Congress' enactments and the common law of intellectual property, suggests we may have a battle on many more fronts than the economics of intellectual property. The Court's opinions importing equality jurisprudence into intellectual property law (where otherwise we are used to hearing cost-benefit and market-based analyses) have led to gaps and missed opportunities to "promote progress," perhaps precisely because of the Court's confidence in the righteousness of constitutional equality doctrine and advocates' failure to recognize its purchase in the context of IP. Constitutional equality doctrine has successfully (although not thoroughly) improved the lives of disadvantaged classes and people who have suffered under state-sanctioned dominance and disadvantage for hundreds of years. Given this, we may need to engage with this line of reasoning on its own terms in the courts and also in Congress, exposing it as a potentially mismatched application of doctrine to practice, or reinventing it for use in intellectual property law and in the communities it is intended to serve. In addition to being well-researched, richly detailed and passionately argued, these three books also help situate the new frontier of IP reform squarely in the (perhaps unexpected) terrain of equality law. They are welcome and helpful companions into this new frontier of innovation policy.