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Emotions and Intellectual Property Law

Margaret Chon

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EMOTIONS AND INTELLECTUAL PROPERTY LAW

*Margaret Chon**

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ABSTRACT

Emotions constitute an integral part of the diverse approaches that we bring to bear upon our most pressing law and policy issues. This article explores the role of emotions in intellectual property, information, and technology law (IP). Like other areas of law, IP commits to, prioritizes, and even honors, reason, logic, and facts—which can result in the sidelining of the affective components of law. Yet our affective responses to legal and other phenomena influence both cognition and reason. Part I of the article provides a general overview of the field of law and emotions, pointing out how this approach to understanding law already exists, albeit still mostly

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incipiently, within IP. For example, our affective responses help to reinforce one of our main assumptions about IP: that legal incentives, such as copyrights and patents, motivate authors and inventors to create their respective works and inventions. In Part II, the article illustrates the operation of two specific emotions—nostalgia and hope—to demonstrate how an intentional analysis of emotions can impact IP law and policy. These two examples demonstrate that understanding how emotions undergird affect, attachment, attention, attraction, and repulsion for all areas of IP knowledge production is an essential first step to addressing our currently pervasive knowledge asymmetries, biases, and omissions. Put negatively, if we continue to ignore or minimize emotions in IP, we also will continue to risk an incomplete conceptual configuration of IP, at the cost of thwarting the primary policy goals of this increasingly crucial area of law.

I. INTRODUCTION

This article explores the role of emotions in intellectual property, information, and technology law (IP). Like other areas of law, IP commits to, prioritizes, and even honors, reason, logic, and facts—which can result in the sidelining of the affective components of law.¹ The field of law and emotions² can help to illuminate IP, yielding new approaches and insights.

Emotions constitute an integral part of the diverse approaches that we bring to bear upon our most pressing law and policy issues. Our affective responses to legal and other phenomena are inseparable from our other ways of comprehending them. A leading voice in the field of law and emotions, Terry Maroney, has pronounced that “[o]ver the course of the last two decades the traditional narrative casting law as a bastion of pure reason has begun to crumble. As it crumbles we are freed to explore the deep interconnectedness of emotion and cognition in the theory and practice of law.”³ And as Robin West has observed:

1. Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2021 (2010) (citing GRANT GILMORE, *THE DEATH OF CONTRACT* 109 n. 22 (1974) (quoting from Christopher Columbus Langdell) (“It was indispensable to establish at least two things; first that law is a science; . . .”).

2. See e.g., *THE PASSIONS OF LAW* (Susan Bandes, ed., 1999).

3. Terry A. Maroney, *A Field Evolves: Introduction to the Special Section on Law and Emotion*, 8 EMOTION REV. 3, 4 (2015) [hereinafter Maroney, *Field Evolves*] (“People have emotions about law itself, ranging from revulsion to reverence. Abrams and Keren set forth a helpful frame within which to understand this constellation of interactions. Law and emotion scholarship seeks to illuminate the affective features of legal problems; investigate these features through interdisciplinary analysis; and integrate resulting understandings into practical, normative proposals.” (internal citation

At least sometimes and to some degree, and sometimes for better while often for worse . . . all sorts of legal actors—legislators, judges, jurors, litigants, private contractors, city council members, drafters of constitutions, the authors of universal declarations of rights, and of course lawyers and legal scholars as well—are moved toward our legalistic decisions or our artful legal arguments by the force of our passions, rather than by the moral force of either shared or neutral principles, deductions from the natural law, inferences from past precedent, or a totting of societal costs and benefits.⁴

This is not to say that emotions can be dichotomized wholly from cognition or reason, as will be explored further below. Rather, it is to underscore that the IP community may have systematically overlooked a powerful means for understanding our policy choices, because the affective turn in law may not be as readily apparent in IP as it has been in other areas.⁵

Influenced by these insights and others described below, this article proceeds in two parts. Part I provides a general overview of the field of law and emotions, pointing out how this approach to understanding law already exists, albeit still mostly incipiently, within IP. For example, our affective responses help to reinforce one of our main assumptions about IP: that legal incentives, such as copyrights and patents, motivate authors and inventors to create their respective works and inventions.⁶ In part II, the article illustrates the operation of two specific emotions—nostalgia and hope—to demonstrate how an intentional analysis of emotions can impact IP law and policy. These two examples demonstrate that understanding how emotions undergird affect, attachment, attraction, repulsion, and attention for all areas of IP knowledge production is an essential first step to addressing our currently pervasive knowledge asymmetries, biases, and omissions.

A caveat: within the limited scope of this article, it is not possible to summarize and review the entire corpus of law and emotions scholarship. But it is possible to point out some of the cogent reasons why this field can expand our understanding of IP. At the very least, the relationship of emotions to IP is worth exploring for ways in which it can challenge our collective bias toward a primarily reason-based account of the law.

omitted). See also Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 L. HUM. BEHAV. 119 (2006).

4. Robin West, *Law's Emotions*, 19 RICH. J.L. & PUB. INT. 339, 340 (2016).

5. See Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 779–87 (2018), (describing the “affective turn” in law, particularly as applied to critical race theory).

6. See Lateef Mtima, *IP Social Justice Theory: Access, Inclusion, and Empowerment*, 55 GONZ. L. REV. 401 (2019) (summarizing and criticizing this overarching normative assumption).

Moreover, greater appreciation and integration of emotion, along with cognition and reason, may be critical to improving the quality of our knowledge, developing effective responses to our current legal and policy conundrums, and re-orienting our individual and collective imaginations of IP's potential in response to currently unimagined technologies.

II. IP AND EMOTIONS: WHAT ARE THE CONNECTIONS?

As we already know, the world outside of the law is not bound to the reason-driven parameters that guide lawyers. Indeed, emotion-driven decisions based on power, rather than considered policy, take place ever more explicitly within our constitutional democracy.⁷ This section begins exploring where emotions are located within IP despite our not paying close attention.

A. *Three-Legged Stool? Emotion, Cognition, and Reason*

Regardless of any political differences, lawyers and others trained in law likely agree upon an ideal of law that prioritizes reason over emotion.⁸ Influenced by the scientific tradition, this ideal often includes not only an emphasis on logical reasoning but also a framework of evidence-based legal decision-making within over-arching constitutional values such as due process as well as market values such as efficiency. Whether law is pronounced by courts or legislatures, or whether a legal position is espoused by a litigator or a government regulator, a consensus exists in the legal community that law and policymaking should be based primarily, if not wholly, on these reason-based attributes.⁹

7. See, e.g., Nicholas Fandos & Emily Cochrane, *After Pro-Trump Mob Storms Capitol, Congress Confirms Biden's Win*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/congress-gop-subvert-election.html> [<https://perma.cc/C6W2-G23D>].

8. See Abrams & Keren, *supra* note 1, at 2003–04. They write:

The detachment of legal rationality reflected the historic view of law as a quasi-science: a process of deducing, from a framework of legal principles, the rule to be applied to a particular case. A detached, rationalist stance also served to insulate judges from pressure by the political branches or from undue sympathy with one or more of the parties. Emotion floods careful, stagewise reasoning in a tidal wave of affect; its association with particulars sweeps decisionmakers from their impersonal, Archimedean pedestal.

Id.

9. *But see* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover Publications, Inc. 1991) (1881) Holmes wrote:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Whether in legal practice, policy, doctrine, or scholarship, emotions typically occupy a subordinate space, if they are acknowledged at all. Yet each person's encounters with law are prefigured by earlier and present emotional experiences. Our individual views about IP, for example, are based not only on our predispositions as well as family and cultural histories but also, profoundly, on our emotions. These early views are shaped by subsequent influencers such as advisors, colleagues, idols, mentors, and on the flip side, the deluded, misguided, and misinformed people we disagree with, and the rogues and scoundrels who represent the things we don't admire in the least. These various culturally and socially contingent responses provide the substrate for our basic understandings of IP.¹⁰

Emotions shape our responses to, and understanding of, law. Law in turn shapes, or even produces, emotions.¹¹ Not to be conflated entirely with cognitive responses, emotions are affective responses. Some researchers view cognition and emotion as largely separable, whereas others do not.¹² For example, Ellsworth and Dougherty endorse appraisal theory, which views emotion as one of the key drivers of cognition.¹³

While affective responses can influence cognition, and vice versa, the degree of separability is not at all clear.¹⁴ However, Abrams and Keren

Id. at 1.

10. Lisa Larrimore Ouellette, *Cultural Cognition of Patents*, 4 IP THEORY 28, 31 (2013) (describing a cultural cognition framework where “we form beliefs that cohere with the values of groups we identify with.”).

11. Maroney, *Field Evolves*, *supra* note 3, at 4 (“All approaches take as their bedrock the same notion: emotion shapes law, and law needs to get emotion right in order to function well. The dynamic also runs in the other direction: law shapes emotion.”); *see generally* West, *supra* note 4.

12. Phoebe C. Ellsworth & Adrienne Dougherty, *Appraisals and Reappraisals in the Courtroom*, 8 EMOTION REV. 20, 20–21 (2016) (outlining four main theories of emotions, including basic emotions theory, valence/arousal emotions theory, constructivist theory, and appraisal theory).

13. *Id.* at 21. (“According to appraisal theorists, emotion and cognition are mostly inseparable. Few emotional experiences occur without cognition, and few thoughts are completely free of emotion. Emotions are combinations of appraisals. A change in an appraisal is a change in emotion, and a change in emotion is a change in appraisal.”) (citation omitted).

14. Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1260–62 (2008). Bradford writes:

Emotions are part of the nervous system, arising from evolutionarily old parts of the mammalian brain that propel behavior in historically advantageous ways. Emotions generally identify goals and desires, leading individuals to pursue those desires in conscious and subconscious ways. . . . Scientists have posited the existence of “somatic markers” that lead us to classify stimuli as “good” or “bad” as we experience them. We retrieve these feelings again upon encountering or remembering a known object or situation. Without such somatic tones we might be paralyzed by inaction. The pleasant or unpleasant sensation attached to an image leads the body to react instinctively, much in the same way it reacts unconsciously to hunger, pain, fatigue, or other internal stimuli. Such reactions happen automatically and cause an instant reaction without conscious

claim that the affective components of law are undervalued resources in their own right, relative to cognitive science as well as to law and neuroscience, and that this under-emphasis is due to “certain rationalist and objectivist assumptions that traditional legal thought embraces”¹⁵ According to them, a separate consideration of emotion *per se* is important.¹⁶

In IP, as elsewhere in law, the behavioral economics revolution has resulted in the mainstream acknowledgment of cognition as a legitimate subject of inquiry.¹⁷ Cognitive science has gained a strong foothold in IP, especially through the behavioral economics strand of law and economics. Yet, cognition, emotion, and reason are mutually constitutive.¹⁸ As Laura Bradford, one of the few IP scholars to examine intentionally the role of emotion in IP doctrine, states:

Because individuals are not always aware of the degree of attraction or aversion (the “emotional valence”) they may harbor toward a specific object or event, emotion can act as an unconscious shortcut or heuristic. Individuals are drawn to one option, ignoring or dismissing the rest, for reasons they cannot consciously describe.¹⁹

This is a very different insight than those gleaned from cognitive science or neuroscience,²⁰ as related as those fields are.²¹

thought. Scientists theorize that such mechanisms enabled primitive humans to run when they encountered dangerous situations without first having to pause to plan how to react. In the same way, modern humans rely on somatic tones in weighing abstract outcomes. We are instinctively drawn in or repulsed by the affective markers our experiences have assigned to each outcome. Thus, emotion is what gives us the impetus to make decisions.

Id. (footnotes omitted).

15. Abrams & Keren, *supra* note 1, at 2018.

16. *See id.* at 2032–33.

17. *See, e.g.*, Dennis D. Crouch, *The Patent Lottery: Exploiting Behavioral Economics for the Common Good*, 16 GEO. MASON L. REV. 141 (2008). Abrams and Keren observe:

[M]uch of behavioral law and economics analysis does not analyze responses that we would describe as emotions, but focuses rather on nonaffective cognitive assumptions that depart from rationality. In that sense the domain of behavioral law and economics overlaps with, but is not coterminous with, that of law and emotions.

Abrams & Keren, *supra* note 1, at 2020.

18. Bradford, *supra* note 14, at 1260 (“[a] growing body of literature suggests that emotions do not operate in opposition to reason, but are in fact critical to any form of decision-making.”).

19. *Id.* at 1262.

20. *See* Amanda S. Bruce, Jared M. Bruce, William R. Black, Rebecca J. Lepping, Janice M. Henry, Joseph Bradley C. Cherry, Laura E. Martin, Vlad B. Papa, Ann M. Davis, William M. Brooks & Cary R. Savage, *Branding and a Child’s Brain: An fMRI Study of Neural Responses to Logos*, 9 SOC. COGNITIVE & AFFECTIVE NEUROSCI. 118 (2014) (neuroimaging study motivated by understanding the intense marketing toward youth driven by companies’ ambitions for brand recognition, preference, and loyalty).

21. *See* Abrams & Keren, *supra* note 1, at 2032–33. Abrams and Keren opine:

When emotions are acknowledged in IP, they are almost always subsumed within a cognitive science framework, cast as an improved variation of pure utilitarianism.²² This echoes efforts by non-IP scholars to treat emotional responses as measurable deviations from the choices made by a rational actor.²³ For example, some IP scholars have recently evaluated the relation of happiness and well-being to IP law and policy.²⁴ In this work, the emotion of happiness is treated as a supplement to, or substitute for, consumer preferences measured within a utilitarian scaffolding. Some IP scholars have even considered but rejected incorporating the variable of emotion in their economic analyses of preferences, apparently believing that emotion is a trivial factor.²⁵

Unsurprisingly, trademark law includes more analysis of emotion than do the other areas of IP, due to the clear linkages between trademarks and marketing.²⁶ Of course, marketing strategies rely heavily on consumer

Undoubtedly, we need the work of behavioral economics to analyze flawed heuristics, and create “choice architecture” that facilitates rational decisionmaking.

Similarly, we need neuroscience to help us understand the brain mechanisms that shape the human cognition and its limitations, and to glimpse the ways in which these patterns might be germane to legal decisionmaking. But, despite the rationalist and objectivist premises that continue to ground legal instincts, we also need a broader and more diverse set of resources from disciplines such as anthropology, sociology, psychology, cultural studies, philosophy, and literature. . . [e]motions [are] not simply . . . temporary deviations from rationality (behavioral studies) or . . . forms of neural function (brain studies), but also, at times, . . . distinct and significant supplemental means of apprehending the world.

Id. (footnotes omitted).

22. See, e.g., Bradford, *supra* note 14, at 1258.

23. See, e.g., Eric Posner, *Law and the Emotions*, 89 GEO. L.J. 1977 (2001).

24. Christopher Buccafusco & Jonathan S. Masur, *Intellectual Property Law and the Promotion of Welfare*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW (VOL. I: THEORY) 98 (Ben Depoorter & Peter Menell eds., 2019) (“The personal bond between creators and their works is recognized as particularly strong in comparison to the general level of attachment that owners may develop towards their goods.”); accord Estelle Derclaye, *Chapter 7. What can intellectual property law learn from happiness research?*, in METHODS AND PERSPECTIVES IN INTELLECTUAL PROPERTY 177, 191 (Graeme B. Dinwoodie ed., 2013) (“In sum, economic growth should no longer be a major goal. Governments should perform a different type of cost–benefit analysis (namely choose those policies that will increase happiness the most for any given cost). Some propose to even move from a cost–benefit analysis to a well-being analysis.”).

25. Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1, 43 (2010) (noting that “[w]hile there might be good reasons to credit creators’ valuations if they are the result of regret aversion or enhanced feelings of emotional attachment, we can see no valid reason for respecting pricing decisions that are driven almost exclusively by irrational biases.”); but see Ofer Tur-Sinai, *The Endowment Effect in IP Transactions: The Case Against Debiasing*, 18 MICH. TELECOMM. & TECH. L. REV. 117 (2011) (critiquing the decision by Buccafusco & Sprigman to ignore impact of emotion in their experimental research).

26. See, e.g., Bernd Schmitt, *The Consumer Psychology of Brands*, 22 J. CONSUMER PSYCHOL. 7 (2012).

psychology, including its affective components.²⁷ And as Leah Chan Grinvald has pointed out, allegations of trademark infringement involve the possibility of shaming in response to trademark enforcement.²⁸ But *all* areas of IP, and all heuristics that IP legal actors employ, involve emotion, to a greater or lesser extent.

Furthermore, emotion-driven decisions regarding IP are not merely private decisions that have no consequence outside of one's own individual preference set, but rather form collective emotional preferences that lead to what could be called a culture of IP.²⁹ Susan Bandes, another pioneer in the area of law and emotions, along with her co-author Jeremy Blumenthal, point out:

Emotions are social processes that arise, in part, through interactions or anticipated interactions with others. They both influence and are influenced by social, cultural, and institutional context. . . . Emotions such as shame, fear, trust, and the desire for approval are intimately involved in the development, communication, and enforcement of the norms animating law.³⁰

That is, law and emotions scholars emphasize the inherently *communal* quality of emotions.

If these insights have any traction, then how do emotions inform the particular assumptions, biases, and motivations of legal actors within the IP community? People specialize in IP for many reasons. IP revolves around powerful cultural memes of the author, creator, inventor, as well

27. See Bradford, *supra* note 14, at 1233–35; Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008). Bradford observes:

[T]rademark dilution law is so difficult to understand because it aims at emotion and only indirectly at information. The emotion referred to here is of the most basic kind: “affect” or the automatic negative or positive response that a mark generates when viewed by a consumer. . . . The emotion literature suggests, in contradiction to the claims of dilution regulation proponents, that much of the “selling power” of famous marks is due primarily to their familiarity and not any specific benefit, tangible or intangible, of the product.

Bradford, *supra* note 14, at 1233–35 (footnotes omitted). Furthermore:

Experiments have confirmed that repeated exposure to a stimulus alone increases positive feelings toward the stimulus. This is known as the “mere exposure” effect. The dominant explanation for the “mere exposure” effect is that the positive reaction to familiar stimuli is a function of ease of recall rather than a conscious appraisal of prior experience with the stimulus [in low involvement conditions].

Id. at 1266–67.

28. Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 687 (2011).

29. As C.P. Snow put it, speaking of physical scientists: “Without thinking about it, they respond alike. That is what culture means.” C.P. SNOW, *THE TWO CULTURES AND THE SCIENTIFIC REVOLUTION* 11 (1959).

30. Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 172 (2012) (citation omitted).

as entrepreneurship, innovation, and progress. These robust concepts have both overt and implicit positive emotional associations to most people, including those whose work revolves around IP. Most IP legal actors believe that they are doing good (or at least doing no harm), and IP's emotional penumbra is a good place to find oneself aligned with this overall goal. These individual beliefs tend to produce and reproduce positive affective or emotional responses.

Our individual and communal passions may not be dangerous in and of themselves. They serve constructive purposes, such as motivating us to action. But they also may interfere with our fuller understanding of how IP intersects with cultural, political, and social context to further the underlying purposes of IP: for example, to “promote Progress”³¹ for the overall social good.

Furthermore, unacknowledged and emotionally-laden idealizations about IP assume certain conventions as starting points, which then can be semi-impervious to challenge or reconsideration. In other words, they tend to reinforce the status quo. As critical race scholar Anjali Vats recently observed about IP:

[A]nxieties about race, nation, and citizenship developed in ways that were mutually constitutive with anxieties about knowledge production, labor, and economics. . . . Intellectual property law is bound up with narratives of race, nation, and citizenship, as well as their attendant “structures of feeling”³²

B. Locating Emotions in IP: A Brief Survey

What are the results of the collective emotional investments of IP legal actors? One example can be found in our discussions and debates over incentive theory. The positive emotional attachments (and related cognitive commitments) to the incentive explanation for IP may obscure our field's full acceptance of evidence to the contrary. Furthermore, we

31. U.S. CONST. art. I, § 8, cl. 8.

32. ANJALI VATS, *THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS* 7 (2020). Vats further states:

[S]hared feelings are what bring individuals together and “bind the imagined white subject and nation together.” Shared feelings among white men about how intellectual property law should work and who should benefit from its legal determinations were wrapped up with racial ideals of citizenship and national identity, in a manner that coalesced to produce apparently race neutral legal decisions and economic policies.

Id. at 31 (quoting Sara Ahmed).

may overlook the many ways in which emotions undergird many other areas of IP, whether law on the books or “in action.”³³

In copyright, the conventional frame idealizes or mythologizes the individual creative genius—what Peter Jaszi and others have termed Romantic Authorship³⁴—despite ample evidence of creativity without the need for, or even despite, the copyright incentive. This countervailing evidence includes, for example, Glynn Lunney’s empirical quantitative research of musical works showing that incentive theory does not adequately describe the actual output of twentieth-century musical works affected by the reward of copyright.³⁵ Paul Heald’s research suggests the same regarding the availability of books.³⁶ Relatedly, Jessica Silbey’s interviews with various scientists, engineers, musicians, artists, as well as their lawyers, demonstrates the mismatch between the dominant incentive theory and motivations for creativity and invention on the ground.³⁷

Analogously, patent law clings to its sole-inventor origin stories³⁸ despite evidence of increasing activities by non-practicing entities, the prevalence of simultaneous invention, and the treatment of patents as an asset or investment rather than an incentive.³⁹ Nonetheless incentive theory—and an arguable over-investment in its continued validation and success—continues to dominate the IP knowledge communities even as it arguably deflects attention away from other ways of framing, knowing, and shaping knowledge systems.

From perspectives outside of law and emotions, IP scholars have explained these attachments to incentive theory as deliberate cover for other ends, such as maximizing rent-seeking by powerful interest groups like copyright industries and owners.⁴⁰ Others view these affinities as

33. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 12 (1910); Bill Clune, *Law in Action and Law on the Books: A Primer*, NEW LEGAL REALISM: EMPIRICAL L. & SOC’Y (June 12, 2013), <http://newlegalrealism.org/2013/06/12/law-inaction-and-law-on-the-books-a-primer/> [<https://perma.cc/59Y6-2T5R>].

34. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455 (1991).

35. GLYNN LUNNEY, *COPYRIGHT’S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY* (2018).

36. PAUL HEALD, *COPY THIS BOOK!: WHAT DATA TELLS US ABOUT COPYRIGHT AND THE PUBLIC GOOD* (2020).

37. JESSICA SILBEY, *THE EUREKA MYTH* (2015).

38. Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 710 (2012).

39. Rochelle Cooper Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property*, 36 MICH. J. INT’L L. 557, 560 (2015).

40. Jaszi, *supra* note 34, at 500–01 (“[A]uthorship’ has remained what it was in eighteenth-century England—a stalking horse for economic interests that were (as a tactical matter) better concealed than revealed, and a convenient generative metaphor for legal structures that facilitated the emergence of new modes of production for literary and artistic works.”).

cognitively driven by prior cultural commitments,⁴¹ or even by faith-based belief, akin to religious belief.⁴² Drawing on the work of Thurman Arnold, part of the Yale legal realist group and a founding member of Arnold & Porter, Shyamkrishna Balaganesh touches upon IP and emotions when he points to the function of conceptual vessels like “author” or “inventor” as “emotionally important social symbols”⁴³ that mediate between institutional ideals and the realities on the ground—thereby resolving for insiders the contradictions, incongruities, and incommensurabilities in institutional practices.

In addition to these likely explanations, one can view this attachment to incentive theory from the perspective of emotions—including affect and attachment. Those in IP may “know” that IP provides incentives for creative and inventive activity because we want to feel (rather than know) that we’re doing the right thing with our efforts. Colloquially, we may like the “buzz” we get when we think that legal incentives make a difference, that economic progress continues to move in the right direction, that policy matters, and that we can make it turn out right in the end somehow (if not live happily ever after).

While incentive theory is one of several important IP frameworks that could benefit from considering emotions more intentionally,⁴⁴ other obvious emotional plays occur in IP. A quick (and necessarily incomplete) spin around different areas of IP illuminates many ways in which emotions are embedded within the field. Of course, copyright law’s protection of expressive content provokes positive and negative feelings on the part of both authors and consumers of those works. For example, authors may feel angry or outraged when their works of authorship are changed or used without authorization,⁴⁵ or when they cannot control the rights to their own works due to industry overreach.⁴⁶ Similar affective

41. Ouellette, *supra* note 10.

42. Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1336 (2015).

43. Shyamkrishna Balaganesh, *The Folklore and Symbolism of Authorship in American Copyright Law*, 54 HOUS. L. REV. 403, 419 (2016) (quoting THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 34 (1935)).

44. Another is the myth of IP uniformity. See, e.g., Sharon K. Sandeen, *The Myth of Uniformity in IP Laws*, 24 J. INTELL. PROP. L. 277 (2018).

45. Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., May 28, 1991, Bull. civ. I, No. 172 (Fr.); see also, Nicholas Swyrydenko, Comment, *Film Artists Bushwhacked by the Coloroids: One-Hundredth Congress to the Rescue?*, 22 AKRON L. REV. 359 (1989) (describing controversy over colorization of John Huston’s films who complained of being “bushwhacked by the coloroids”).

46. Anastasia Tsioulcas, *Look What They Made Her Do: Taylor Swift To Re-Record Her Catalog*, NPR (Aug. 22, 2019, 11:14 AM), <https://www.npr.org/2019/08/22/753393630/look-what-they-made-her-do-taylor-swift-to-re-record-her-catalog> [<https://perma.cc/FY6Q-SDL2>].

responses may occur in response to appropriation of cultural heritage that may not be protected by copyright, such as oral performances.⁴⁷ These negative emotions are often subsumed within the doctrinal categories of moral rights or attribution rights, but also undergird discussions of infringement and fair use.⁴⁸ On the positive emotional side, copyrighted content can elicit delight, joy, or even awe. Both Madhavi Sunder and Julie Cohen have explored the intrinsic emotional value of playing with copyrighted works, which then can enhance educational impacts of these works.⁴⁹ Happy engagement with inventions and trademark designs, by either the owners or putative infringers, can also further overall understanding and learning, which then furthers the goals of IP.⁵⁰ Camilla Hrdy and Daniel Brean even claim that science fiction, viewed primarily as fanciful works within the realm of copyright, can lead to the furthering of technological progress via patented inventions.⁵¹

In legal practice, emotions are key to decisions made by juries and judges.⁵² Indeed, law and emotions scholarship often focuses on the litigation space because of the palpable emotional rhetoric deployed in jury trials.⁵³ In his extensive analysis of the business and economic aspects of IP, Robert Merges documents a sea change in patent infringement litigation since 1982, when general litigators started to replace specialized patent lawyers in the courtroom. This change is presumably in part due to the formers' effective deployment of emotion to juries, compared to the patent lawyers' long custom of making technical arguments to the

47. Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 186 (2000).

48. See, e.g., Trevor G. Reed, *Fair Use As Cultural Appropriation*, 109 CAL. L. REV. (forthcoming 2021), https://papers.ssm.com/sol3/papers.cfm?abstract_id=3456164 [<https://perma.cc/K48S-LUQS>].

49. See generally Madhavi Sunder, *Intellectual Property in Experience*, 117 MICH. L. REV. 197 (2018); JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF* (2012) (discussing critical importance of play in human development).

50. See 8 Ann., c. 19 (1710) (“An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned”), <http://www.copyrighthistory.com/anne.html> [<https://perma.cc/V2JR-DJDA>]; see also U.S. CONST. art. I, § 8, cl. 8; Copyright Act of 1790, 1 Stat. 124, amended by Act of 1802, 2 Stat. 171. But see Diane Leenheer Zimmerman, *The Statute of Anne and Its Progeny: Variations Without a Theme*, 47 HOUS. L. REV. 965, 971 (2010) (tracing ambiguity in the act’s “encouragement of learning” goal).

51. Camilla Alexandra Hrdy & Daniel Harris Brean, *Enabling Science Fiction*, 27 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2021), https://papers.ssm.com/sol3/papers.cfm?abstract_id=3748840 [<https://perma.cc/5MCL-5SR4>].

52. See, e.g., Ellsworth & Dougherty, *supra* note 12.

53. See, e.g., Maroney, *Field Evolves*, *supra* note 3, at 5–6 (examining the emotional decision-making of judges and jurors).

bench.⁵⁴ Less flamboyant models of emotionally informed decision-making may involve patent office examiners or judges who engage in intuitions about patent eligibility, as pointed out by Emily Michiko Morris,⁵⁵ or judges who determine the reach of an equitable defense such as patent misuse, as Christina Laser has documented.⁵⁶ These quieter examples arguably involve reliance upon emotions by legal actors in response to indeterminate legal standards such as “technology” or “fairness.” The assessment of enhanced damages necessarily includes an analysis of the patent defendant’s subjective wantonness in committing infringement, which arguably also includes an evaluation of the emotional state of the defendant, as assessed by the decision-maker.⁵⁷

Fear looms large as an emotion in all areas of litigation. No doubt, all IP defendants experience the emotion of fear, as Mark Schultz observed in copyright infringement litigation strategies pursued by the recording industry.⁵⁸ Members of Congress may also respond to fear-based arguments as they consider proposed legislation. For example, testimony at the hearings on the Coons-Tillis proposed amendments to the eligibility provisions of the Patent Act raised the fearful specter of other nations breaching potentially unprotected technologies such as AI, quantum computing, and 5G, as well as biotech products such as biologics.⁵⁹ In trade secret law and policy, it is easy to discern more than a trace of fear-based framing of evidence and arguments.⁶⁰ And in addition to fear, feelings of betrayal and outrage often underlie trade secret litigation more generally.⁶¹

In the international IP arena, geographical indications (GIs) often trigger national pride, evidenced by the on-going debate between the old

54. ROBERT P. MERGES, *AMERICAN PATENT LAW: A BUSINESS AND ECONOMIC HISTORY* (forthcoming 2021).

55. Emily Michiko Morris, *Intuitive Patenting*, 66 S.C. L. REV. 61 (2014).

56. See Christa J. Laser, *Equitable Defenses in Patent Law*, 75 U. MIAMI L. REV. 1 (2020).

57. See Dmitry Karshedt, *Enhancing Patent Damages*, 51 U.C. DAVIS L. REV. 1427 (2018).

58. Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 655 (2006) (“The music industry has responded with lawsuits—mostly pursued by the Recording Industry Association of America (RIAA)—calculated to deter file-sharers. The recording industry hopes these lawsuits will change the behavior of file-sharers by instilling fear in potential file-sharers.”)

59. *The State of Patent Eligibility in America: Part I: Hearing Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 116th Cong. (2019); *The State of Patent Eligibility in America: Part II: Hearing Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 116th Cong. (2019).

60. See Rochelle Cooper Dreyfuss & Orly Lobel, *Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security*, 20 LEWIS & CLARK L. REV. 419 (2016).

61. ORLY LOBEL, *YOU DON’T OWN ME: HOW MATTEL V. MGA ENTERTAINMENT EXPOSED BARBIE’S DARK SIDE* (2018).

world countries that would like to protect their cultural heritage through GIs, and new world countries that would prefer to imitate or possibly even improve upon IP-protected goods with specifically identifiable cultural origins.⁶² In my recent work on certification marks, I have emphasized soft regulatory or market-based measures through what is sometimes termed “fair trade.”⁶³ By doing so, perhaps I am succumbing to my strong emotional attachment to the idea that IP can promote human flourishing through a social justice framing of IP.⁶⁴ However, this work is also a critique of conventional trademark legal doctrine, which centers around an out-moded assumption of the source of origin of a good or service: a source that used to be guilds and local manufacturers,⁶⁵ by contrast to the brand holding companies which dominate today’s global trade networks.⁶⁶ The IP community’s collective attachment to certain features of trademark doctrine resembles our attachment to incentive theory in copyright and patent law.

These passing examples show that the emotional context and content of IP is pervasive. By recognizing, and even centering, emotions in IP, a more accurate understanding of this field may emerge. The next part delves into specific emotions, in order to explore their impact more thoroughly.

III. ILLUMINATING FURTHER THE NEXUS OF IP AND EMOTIONS

A full consideration of emotions and IP would review not just such “familiar emotions as anger, compassion, mercy, vengeance, and hatred . . . [but also] happiness, guilt, forgiveness, romantic love,

62. See Irene Calboli, *Of Markets, Culture, and Terroir: The Unique Economic and Culture-Related Benefits of Geographical Indications of Origin*, in INTERNATIONAL INTELLECTUAL PROPERTY 433 (Daniel Gervais ed., 2015).

63. Margaret Chon, *Marks of Rectitude*, 77 FORDHAM L. REV. 2311 [hereinafter Chon, *Marks of Rectitude*]. See also TIM BARTLEY, SEBASTIAN KOOS, HIRAM SAMEL, GUSTAVO SETRINI & NIK SUMMERS, LOOKING BEHIND THE LABEL: GLOBAL INDUSTRIES AND THE CONSCIENTIOUS CONSUMER 29 (2015) (describing the “puzzle of rules”—by which the contradictions of neoliberal markets are incompletely addressed through market-based rule-making projects, “from standardization of accounting procedures to the rules for fairness and sustainability”).

64. Chon, *Marks of Rectitude*, *supra* note 63.

65. JEFFREY BELSON, CERTIFICATION AND COLLECTIVE MARKS 9-14 (2017) (describing the regulatory origins of certification and collective marks in guilds beginning in the eleventh century); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1850 (2007).

66. Alfonso Segura, *Luxury and Fashion Corporations*, FASHION RETAILER (Apr. 8, 2019), <https://fashionretail.blog/2019/04/08/luxury-and-fashion-corporations/> [https://perma.cc/ZE3Q-74PL].

gratitude, loyalty, envy, regret, and our own engagement with hope.”⁶⁷ This part focuses on two emotional responses in particular—nostalgia and hope—to begin to determine specific ways in which emotions can be helpful or possibly harmful in IP law and policymaking. Nostalgia is concerned with reconstructing a past and mediating between that past and inevitable life changes.⁶⁸ Hope is concerned with constructing an optimistic future. Both emotions are seemingly positive, at least on the surface. Interestingly, however, emotions researchers posit that both these emotions can be responses to adversity, hardship, and threats, whether perceived or real. And both can minimize the costs associated with either past or future experiences, respectively.

A. *Nostalgia*

A term coined in the late 1600s,⁶⁹ nostalgia is now commonly understood to mean a pleasure in remembering or reliving a past experience—smelling a food that you used to eat as a child, for example.⁷⁰ A leading researcher states that nostalgia serves multiple functions:

[N]ostalgia serves an essential psychological function [in] that it is a highly social emotion. It connects us to other people. It does that and [sic] so many beautiful ways. In the beginning, when we’re very young, it’s part of what bonds us to the most important people in our life, our parents, our siblings, our friends. As we go through life, it can broaden

67. Abrams & Keren, *supra* note 1, at 2046 (footnote omitted).

68. *Speaking of Psychology: Does Nostalgia Have a Psychological Purpose?*, AM. PSYCHOL. ASS’N (November 2019), <https://www.apa.org/research/action/speaking-of-psychology/nostalgia> [<https://perma.cc/SQ93-GHPB>] [hereinafter *Speaking of Psychology*] (interview with Krystine Batcho). Batcho says:

[N]ostalgia is an emotional experience that unifies. One example of this is it helps to unite our sense of who we are, our self, our identity over time. Because over time we change constantly we change in incredible ways. We’re not anywhere near the same as we were when we were three years old, for example. Nostalgia by motivating us to remember the past in our own life helps to unite us to that authentic self and remind us of who we have been and then compare that to who we feel we are today.

Id. See also Taylor A. Fiorito & Clay Routledge, *Is Nostalgia a Past or Future-Oriented Experience? Affective, Behavioral, Social Cognitive, and Neuroscientific Evidence*, 11 FRONTIERS PSYCHOL. 1133 (2020) (“when individuals engage in nostalgic reflection, they are not hiding in the past. They are accessing meaningful memories from the past in order to help them approach the future with purpose.”).

69. Nicole Johnson, *The Surprising Way Nostalgia Can Help Us Cope with the Pandemic*, NAT’L GEOGRAPHIC (July 21, 2020), <https://www.nationalgeographic.com/science/2020/07/surprising-role-of-nostalgia-during-coronavirus-pandemic.html> [<https://perma.cc/E3UD-H9HW>] (attributed to Swiss medical student Johannes Hofer in 1688).

70. If madeleines come to mind, you are not alone. MARCEL PROUST, REMEMBRANCE OF THINGS PAST (1913).

out and extend to a wider sphere of the people we interact with. It's a social connectedness phenomenon and nostalgia is in that sense a very healthy pro-social emotion.⁷¹

Nostalgia is one likely reason for the unusually bi-partisan ambience in the U.S. Congressional hearings on the Music Modernization Act. All participants easily agreed with each other that something needed to be done to protect individual musicians—specifically song-writers and recording artists, as well as music publishers—from being shut out of the profits made by internet streaming services (most of which had been going to the record labels).⁷² In our collective cultural imagination, the figure of the musician, whether in the guise of the composer, the song-writer, the instrumentalist, or the singer, is one that has the potential to transcend our hyper-polarized political environment.⁷³ Musicians can channel collective nostalgia for past musical works, as well as trigger other positive emotions, such as gratitude, generosity, elevation, and awe—and we can share these feelings with people who have very different political views from our own.

The hearings demonstrate the positive role that nostalgia can play with regard to artistic and expressive works, which often trigger emotional responses. Nostalgia provided a pro-social emotional platform for members of Congress to reach across the aisle in an increasingly brutal and frightening political world. Whether one is from a red or a blue state, we can all share a national nostalgia about certain musical works, which can then turn into pride over the creative boundlessness represented in our shared cultural history.

Yet there are costs to this particular emotional response. Nostalgia can minimize past harms and even glorify past injustices.⁷⁴ According to a recent summary of nostalgia research:

71. *Speaking of Psychology*, *supra* note 68.

72. 164 CONG. REC. S6259–61 (daily ed. Sept. 18, 2018).

73. Recently, I have viewed several documentary films about musicians that formed the soundtrack to my high school and college years, such as Jakob Dylan's *Echo in the Canyon* and the documentary about Linda Ronstadt, *The Sound of My Voice*. ECHO IN THE CANYON (Greenwich Entertainment 2019); LINDA RONSTADT: THE SOUND OF MY VOICE (Greenwich Entertainment 2019).

74. As Krystine Batcho, a leading researcher in the field of nostalgia, recently writes, "Historical nostalgia is often concurrent with a deep dissatisfaction with the present and a preference for the way things were long ago. Unlike personal nostalgia, someone who experiences historical nostalgia might have a more cynical perspective of the world, one colored by pain, trauma, regret or adverse childhood experiences." Krystine Batcho, *The Psychological Benefits—and Trappings—of Nostalgia*, CONVERSATION (June 5, 2017, 8:11 PM), <https://theconversation.com/the-psychological-benefits-and-trappings-of-nostalgia-77766> [<https://perma.cc/57K2-2V9H>].

[N]ostalgia is not just a wistful glow associated with pleasurable events and experiences. It is an innate response to pain or distress, and, in some sense, a coming home. What's more, cognitive scientists say, a defining trait of nostalgia is its capacity to distort the past.⁷⁵

In addition, "it's frequently triggered by low moods, loneliness, and even a sense of meaninglessness. These triggers suggest[] that nostalgia might be a kind of defense mechanism, a way to maintain resiliency during periods of anxiety, despair, and existential distress."⁷⁶ As leading nostalgia researcher Krystine Batcho states, "[i]f people are unhappy for any reason with how things are today, they're more likely then to experience this sense that things must have been better in the past. How far they have to go in terms of their longing can depend upon how much they know about history."⁷⁷

In the context of musical copyright, nostalgia may flatten and essentialize the experiences of many musicians who do not have the place in history they deserve. Some musicians in the past were deemed to carry threatening messages, such as Link Wray, an American Indian affiliated with the Shawnee tribe, whose revolutionary guitar sound in his 1958 song Rumble, was banned by US radio stations because the music (not words) apparently challenged the status quo.⁷⁸ This sensitivity to subversion of a particular national identity includes well-known musicians such as Igor Stravinsky. Invited to Cambridge, Massachusetts in 1944 to deliver the Charles Eliot Norton lectures at Harvard, he prepared a controversial arrangement of the Star Spangled Banner that provoked a police warning, based on a law that is apparently still on the books.⁷⁹

75. Mike Mariani, *How Nostalgia Made America Great Again*, NAUTILUS (Apr. 20, 2017), <https://nautil.us/issue/47/consciousness/how-nostalgia-made-america-great-again> [<https://perma.cc/4865-Q9YW>].

76. *Id.*

77. *Speaking of Psychology*, *supra* note 68.

78. Madman Films, *Rumble: The Indians Who Rocked the World—Official Trailer*, YOUTUBE (Aug. 8, 2017), <https://www.youtube.com/watch?v=8E1VVadxjRw> [<https://perma.cc/4K72-FMEZ>].

79. *Stravinsky's "Illegal" Arrangement of "The Star Spangled Banner" (1944)*, OPEN CULTURE (July 4, 2015), <http://www.openculture.com/2015/07/stravinskys-illegal-arrangement-of-the-star-spangled-banner-1944.html> [<https://perma.cc/EX92-4UCH>]. The statute states:

Whoever plays, sings or renders the "Star-Spangled Banner" in any public place, theater, motion picture hall, restaurant or cafe, or at any public entertainment, other than as a whole and separate composition or number, without embellishment or addition in the way of national or other melodies, or whoever plays, sings or renders the "Star Spangled Banner", or any part thereof, as dance music, as an exit march or as a part of a melody of any kind, shall be punished by a fine of not more than one hundred dollars.

MASS. GEN. LAWS ANN. ch. 264 § 9 (West 2020).

Olufunmilayo Arewa,⁸⁰ K.J. Greene,⁸¹ Robert Brauneis,⁸² as well as James Boyle and Jennifer Jenkins,⁸³ collaborating with the late Keith Aoki, have written specifically about past unequal distribution of the benefits of music copyright to black artists. We may not fully absorb these and other cautionary tales from the past when over-relying on nostalgia. Inequality within the music industry has present-day impacts, whether by missed royalties or reputational benefits to past or current artists. As Mary LaFrance concludes in her detailed analysis of the Music Modernization Act:

[I]f the true purpose of the CLASSICS Act is “to enable older artists and their families to benefit financially from their creativity,” the Act shows a lack of imagination. By subjecting pre-1972 recordings to the same § 114 royalty scheme as copyrighted recordings, and by not giving the recording artists any termination rights, the Act ensures that the lion’s share of the financial rewards from the newly recognized right will go to the record labels rather than the artists.⁸⁴

Nostalgia can strongly influence how we experience and respond to challenging circumstances. During the COVID-19 pandemic, for example, we might turn to the comforting and familiar cultural (and IP-protected!) products of the past.⁸⁵ Nostalgia’s immense power to comfort and bring people together, as well as its potential to create a falsely positive picture of the past, is increasingly understood.

80. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006).

81. K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL’Y & L. 365 (2008); K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008).

82. Robert Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings* (Geo. Wash. U. Legal Studies Research Paper No. 2020-56, Geo. Wash. U. L. Sch. Public Law Research Paper No. 2020-56, May 2, 2020), <https://ssrn.com/abstract=3591113> [<https://perma.cc/H5VS-RAMH>].

83. JAMES BOYLE, JENNIFER JENKINS & KEITH AOKI, *THEFT! A HISTORY OF MUSIC* (2017).

84. Mary LaFrance, *Music Modernization and the Labyrinth of Streaming*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 310, 338 (2018) (footnote omitted) (quoting H.R. REP. NO. 115-651, at 15 (2018)).

85. *Speaking of Psychology*, *supra* note 68. Batcho mentions:

TV shows that are being rebooted or were popular in the ‘90s bands from long ago have reunited and are going out on tour. There’s places like BuzzFeed often feature, top 20 lists like top 20 toys from the 1980s that sort of thing. People really flock to that and want to share their memories of certain toy.

Id.

B. *Hope*

Another positive emotion associated with IP law and policy-making is hope. Also viewed as a positive emotion, hope is often distinguished from optimism in that hope is more likely to drive actions towards goals.⁸⁶ Australian legal scholar Peter Drahos wrote about the crucial role of public hope on the part of developing countries in the context of international IP treaty-making, and specifically the TRIPS negotiations.⁸⁷ Drahos is the one of first IP scholars to address directly the role of emotion in IP policymaking, without embedding it in a behavioral economics framework.

Describing hope as “constituted of imagining and believing in the possibility that some state of affairs in the future will come to pass,”⁸⁸ Drahos wrote:

The assumption of rationality has led to the dominance of calculative approaches in international relations, with game theory providing the dominant structure of calculation that is used to study decision making. Yet the assumption that [nation-]states in certain circumstances are emotional actors is no less plausible than the rationality assumption. In fact, it may be more plausible.⁸⁹

The subject of Shepard Fairey’s “Hope” poster, former President Obama, famously invoked many emotional tropes in his 2011 State of the Union address:

We measure progress by the success of our people, by the jobs they can find, and the quality of life those jobs offer, by the prospects of a small business owner who dreams of turning a good idea into a thriving enterprise, by the opportunities for a better life that we pass on to our children.

That’s the project the American people want us to work on. Together.

. . . .

86. Marcus Roth & Philipp Hammelstein, *Hope as an Emotion of Expectancy: First Assessment Results*, GMS PSYCHO-SOC.-MED., Apr. 12, 2007; Kirsten Weir, *Mission Impossible: Being Hopeful is Good for You – and Psychologists’ Research is Pinpointing Ways to Foster the Feeling*, 44 MONITOR ON PSYCHOL. 42 (2013); *Theories of Emotion*, LUMEN: BOUNDLESS PSYCHOL., <https://courses.lumenlearning.com/boundless-psychology/chapter/theories-of-emotion/> [<https://perma.cc/X6JK-V3E5>].

87. Peter Drahos, *Trading in Public Hope*, 592 ANNALS AM. ACAD. POL. & SOC. SCI. 18 (2004).

88. *Id.* at 19.

89. *Id.* at 23.

. . . [But t]he rules have changed.

In a single generation, revolutions in technology have transformed the way we live, work, and do business. . . .

. . . .

The first step in winning the future is encouraging American innovation. None of us can predict with certainty what the next big industry will be or where the new jobs will come from. Thirty years ago, we couldn't know that something called the Internet would lead to an economic revolution.

What we can do—what America does better than anyone else—is spark the creativity and imagination of our people.⁹⁰

President Obama's speech is a robust narrative of hope, invoking innovation, entrepreneurship, and creativity, all to indicate a future in which every American can reap the benefits of technology to unify us as diverse nation. And it resonates rhetorically, even as I personally have some doubts substantively.⁹¹ Along the same lines, the Trump Administration quickly established an Office of American Innovation. While it is not clear what the office accomplished beyond a few meetings, its very name projects the same hopeful message that America is great (or will be made great again) through American innovation.⁹²

Individual hope is certainly important in keeping one foot in front of the other, in spite of the challenging circumstances that life can throw at you.⁹³ On a personal level, my family of origin has always been and still is intensely idealistic. I speculate that this focus on romanticizing life's realities must have been a partial response by my parents to traumatizing first-hand experiences, such as forcible colonization of their country of birth followed by a brutal civil war. However, the negative side of hope, especially collective hope,⁹⁴ is disappointment, or worse, from unrealistic

90. 157 CONG. REC. 640 (2011).

91. As Anjali Vats points out, Obama's invocation of the "American Dream was intertwined with positive, yet intensely competitive and oppositional, public feelings that were also deeply racialized." VATS, *supra* note 32, at 115.

92. Tajha Chappellet-Lanier, *Trump's Office of American Innovation Must Be More Transparent, Senators Say*, FEDSCOOP (May 2, 2018), <https://www.fedscoop.com/office-american-innovation-white-house-trump-senators-letter/> [<https://perma.cc/F764-875Q>].

93. Elizabeth Bernstein, *An Emotion We All Need More Of*, WALL STREET J. (Mar. 21, 2016, 4:45 PM), <https://www.wsj.com/articles/an-emotion-we-all-need-more-of-1458581680> [<https://perma.cc/FA3E-XWRN>].

94. See Drahos, *supra* note 87, at 20. Defining the concept of "collective hope," Drahos writes: Daniel Bar-Tal (2001) identifies seven conditions of collective hope including the necessity that the emotion be widely experienced in a society, that the beliefs that trigger

expectations. Corporate marketing efforts and press releases often inflate hope when discussing the fruits of technological progress. Consider Google's former slogan "Don't be evil"⁹⁵ and its current admonition "Do the right thing"⁹⁶—or Facebook's now incredibly ironic "Be connected. Be discovered. Be on Facebook."⁹⁷

With regard to hope, Drahos asserts that:

It is this mental act of creating a sense of expectation or anticipation about the future that seems to make hope an important psychological resource for dealing with a future made uncertain by a threat of some kind. . . . Individuals can possess and access the expectation, even if the event to which the expectation relates is highly uncertain. This may in fact be the only certainty in times when the threat is very great."⁹⁸

IP scholars are not exempt from this tendency to have unrealistically hopeful and perhaps even utopian expectations for the unpredictable impacts of technological change. We might remember, for example, the anticipation a quarter-century ago of the internet's potential as a liberating space for semiotic democracy.⁹⁹ Compare our enthusiasm then to the reality we find ourselves in now: surrounded by disinformation and malice fueled by social media. The early internet libertarian idea that information wants to be free,¹⁰⁰ carried by the hope of ultimate unconstrained liberty,

the emotion be widely shared, that the cultural products of the society express the emotion and the beliefs to which it is connected, and that the emotion and beliefs are part of collective memory. Public hope is hope that is articulated or held by actors acting politically in relation to societal goals.

Id.

95. Kate Conger, *Google Removes "Don't Be Evil" Clause from Its Code of Conduct*, (May 18, 2018, 5:31 PM), <https://gizmodo.com/google-removes-nearly-all-mentions-of-dont-be-evil-from-1826153393> [<https://perma.cc/5ZAA-Q9C9>].

96. *Id.*

97. *Double Talk at Facebook: Pandora's Box in Mark's Dorm*, IRISH EXAMINER, (July 18, 2018, 1:00 AM), <https://www.irishexaminer.com/opinion/ourview/arid-30855912.html> [<https://perma.cc/WG2Y-PNDW>].

98. *Id.* at 21–22.

99. This term is attributed to John Fiske, a media studies scholar, to describe a world where audiences freely and widely engage in the use of cultural symbols in response to the forces of media. A semiotic democracy enables the audience, to a varying degree, to 'resist,' 'subvert,' and 'recode' certain cultural symbols to express meanings that are different from the ones intended by their creators, thereby empowering consumers, rather than producers.

Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 489–90 (2006).

100. John Perry Barlow, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age*. (*Everything You Know About Intellectual Property is Wrong.*), WIRED (Mar. 1, 1994, 12:00 PM), <https://www.wired.com/1994/03/economy-ideas/> [<https://perma.cc/T98N-V4PL>] (famously stating that "Information [w]ants to [b]e [f]ree" and that memes "self-reproduce, they interact with their surroundings and adapt to them, they mutate, they persist. They evolve to fill the

is dangerously daft in light of the events culminating in the attack on our nation's capital on January 6, 2021.

Thus, ideas of authorship, creativity, inventorship, progress, and so on both produce and are reproduced by strong emotions such as nostalgia and hope. These emotions tend to influence law in directions that would be different if wholly rational legal actors were responsive only to evidence-based information. Positive emotions along with their associated framing of information keep us optimistic about our future as a powerful yet fallible, and even vulnerable, species. And they give us psychological incentives to propel ourselves towards a distant goal, vague in its exact details, but perhaps not wholly unattainable.

To be sure, if these policy choices do not align completely with realities on the ground, that may not be a cause for concern. But when the emotional valences of IP are deployed for policy ends that are wildly incongruent with either creative realities or social welfare outcomes, we should be concerned. Collective hope in particular, is important—possibly crucial—in motivating legal actors, as well as others, to work for positive social change. Yet hope can be, and is, misused and manipulatively marketed by what Drahos called the merchants of hope—whether by political or corporate campaigns. Emotions also can mask legitimate concerns that should be included within a rational analysis of science and knowledge—and the legal institutions tasked with regulating them. IP legal actors tend to grasp tightly to the hopeful narratives that our innovation systems will inevitably bring the fruits of technological progress to Americans. But they rarely ask the homeless persons in California how well Silicon Valley is working for them.

IV. CONCLUSION

Law and emotions scholars claim that a greater consideration of emotions “can inform both the more modest end of improving legal doctrine, and the more ambitious aspiration of using law to produce desirable emotional effects.”¹⁰¹ As Bandes and Blumenthal, put it, “Institutions are, inevitably, constructed in light of assumptions about emotional dynamics, and these assumptions should be illuminated and evaluated. Knowledge of emotional dynamics can be utilized to

empty niches of their local environments, which are, in this case the surrounding belief systems and cultures of their hosts, namely, us.”)

101. Abrams & Keren, *supra* note 1, at 2033.

restructure incentive systems and construct more effective legal institutions.”¹⁰²

Abrams and Keren have trifurcated their efforts into illumination (where a consideration of emotions can show where our existing accounts of law may be incomplete), investigation, and integration.¹⁰³ This article dwells upon the first two prongs, illumination and investigation, claiming merely that important IP questions are on the table. Any answers require careful analysis, including of emotions, regarding the underlying purposes and benefits of IP.

If this article does not purport to offer any specific suggestions for legal change at this juncture, where does this leave us? IP legal actors probably can agree on the need for on-going and effective law reform, if for no other reason than because technological change is accelerating, and IP is the field of law most closely aligned to “technology,” whatever that “weasel word,” as Judge Michel recently put it,¹⁰⁴ means. Furthermore, philosophers of science point out that scientific objectivity is almost never value-neutral, and that we all should carry around with us a huge backpack of humility regarding the limits of what we know.¹⁰⁵ They point out that much of what people accept as knowledge, science, and truth is affected by cultural and social contexts, constraints, and opportunities. The making of knowledge, like any other social endeavor, is . . . well, social.¹⁰⁶ And that social construction of knowledge includes our individual and collective emotional responses. The emotional energy represented by IP can be harnessed quite easily into directions that do not serve IP’s ultimate

102. Bandes & Blumenthal, *supra* note 30, at 173.

103. Abrams & Keren, *supra* note 1, at 2033. They elaborate:

The first dimension, “Illumination,” stands for the task of highlighting the often unacknowledged way that emotions are implicated in a particular legal setting. The second, “Investigation” reflects the interdisciplinary effort to better understand the nature and characteristics of the specific emotions at issue. The third, “Integration,” represents the challenge of incorporating the new affective insights gleaned through this effort into normative suggestions for legal change. Not every example of law and emotions scholarship encompasses each of these dimensions.

Id. at 2033–34.

104. Steve Brachmann & Eileen McDermott, *First Senate Hearing on 101 Underscores That “There’s More Work to Be Done,”* IP WATCHDOG (June 4, 2019), <https://www.ipwatchdog.com/2019/06/04/first-senate-hearing-on-101-underscores-that-theres-more-work-to-be-done/> [<https://perma.cc/CSU7-QQ5S>] (quoting Former Chief Judge of the Court of Appeals for the Federal Circuit, Paul Michel).

105. Sandra Harding, *Rethinking Standpoint Epistemology: What is “Strong” Objectivity?*, 36 CENTENNIAL REV. 437 (1992).

106. Timothy M. Lenton & Bruno Latour, *Gaia 2.0: Could Humans Add Some Level of Self-Awareness to Earth’s Self-Regulation?*, 361 SCIENCE 1066, 1067 (Sept. 14, 2018) (describing networks and politics in climate change decision-making).

goals, including dividing people of otherwise shared commitments toward enhancing the power of creativity and innovation for social good.¹⁰⁷

One of the most challenging of our current technology-related issues is how the benefits of social media seem to be hijacked by negative emotions and their consequences. In addition, any regulatory approaches must contend with the emotional impetus for, and consequences of, our communicative activities, including but not limited to the neurologically addictive impacts on the pleasure centers of the brain. By necessity, the law and emotions field is cross-disciplinary, drawing simultaneously from neuroscience and the humanities.¹⁰⁸ IP has much to contribute to and benefit from this conversation, as well as to the larger goal of promoting social welfare.

The two cultures problem¹⁰⁹ of the post-war military industrial era is completely dwarfed today by what some have described as post-industrial IP.¹¹⁰ This includes the move from IP-protected goods to IP-protected services¹¹¹ as one of one of many strategies to address post-scarcity. Rampant concentration of informational power is occurring within what I have termed cognitive capitalist business models.¹¹² Attention, undergirded by emotion, is the key transactional vector in our post-scarcity and information-saturated digital economy. For example, as consumers of IP-protected content, we are all increasingly exposed only to the side of the story that we already want to see or hear.¹¹³ This is a feature, not a bug, of our network-based media business models. Characterized by passionately partisan politics, our current historical

107. Ouellette, *supra* note 10.

108. Abrams & Keren, *supra* note 1.

109. C.P. Snow, *supra* note 29, at 3 (“the intellectual life of the whole of western society increasingly being split into two polar groups”).

110. Julie E. Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 TEX. L. REV. 1, 6 (2015).

111. Sean M. O’Connor, *The Multiple Levels of “Property” in IP and Why That Matters for the Natural Versus Regulatory IP Debates*, 5 GEO. MASON L. REV. (Forthcoming 2018), https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3252253 [<https://perma.cc/W2AQ-4K45>].

112. Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 U.C. DAVIS L. REV. 935 (2014); Margaret Chon, *Tracermarks: A Proposed Information Intervention*, 53 HOUS. L. REV. 421 (2015); Margaret Chon, *Trademark Goodwill as a Public Good: Brands and Innovations in Corporate Social Responsibility*, 21 LEWIS & CLARK L. REV. 277 (2017).

113. These emotional responses seem to be exacerbated by what I once termed the “reversion effect,” that is, the tendency to revert to familiar cultural scripts through new technological means such as digital networked technologies. See Margaret Chon, *Erasing Race? A Critical Race Feminist View of Internet Identity Shifting*, 3 J. GENDER, RACE & JUST. 439, 441 (2000). This phenomenon, which I described in the context of racial identity, is now more generally referred to by terms such as “echo chambers,” “bubbles” or the “Daily Me”—that is, the proclivity to engage with social media content that only confirms our pre-existing cognitive biases and beliefs, because they make us feel better about ourselves. See, e.g., CASS R. SUNSTEIN, *REPUBLIC.COM* (2001) (coining the “Daily Me”).

moment is evidence enough that any comprehensive understanding of law and policymaking should include a serious consideration of the roles of emotions. Emotional responses might explain much of the post-fact society that we seem to find ourselves in right now. Information may have wanted to be free at one point in internet time, but we now know all too well that it always comes with a cost.¹¹⁴

Today in IP, legal scholars can be skeptical about the basic parameters of IP systems and are willing to stand down from the siren calls of innovation and progress if these calls are leading us in the wrong direction. Some of us are even willing to state that IP in certain manifestations could be counter-productive to social welfare. By contrast, many IP makers, including lawmakers and policy-makers, are typically responding to short-term incentives—whether of the business or election cycle. Thus the IP knowledge network, to use Latourian terminology,¹¹⁵ is fraught with misaligned incentives that point in different policy directions. Emotions provide some explanation for this disconnect.

Regardless, in our current dialogues about IP, we typically do not acknowledge the individual and social contingencies in constructing our knowledge—the science, if you will—of IP law, including its emotional content. And this collective body of knowledge should include or even begin with acknowledging ourselves as emotional beings, in addition to rational actors. Put negatively, if we continue to ignore or minimize emotions in IP, we also will continue to risk an incomplete conceptual configuration of IP, at the cost of thwarting the primary policy goals of this increasingly crucial area of law.

114. Guy Pessach, *Beyond IP—The Cost of Free: Informational Capitalism in a Post IP Era*, 54 OSGOODE HALL L.J. 225 (2016).

115. Lenton & Latour, *supra* note 106.